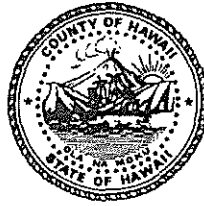


William P. Kenoi  
Mayor



BJ Leithead Todd  
Director

Margaret K. Masunaga  
Deputy

## County of Hawai'i

### PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

January 15, 2010

Paul H. Murray, LPLS  
Paul H. Murray & Associates, LLC  
PO Box 1189  
Hilo, Hawai'i 96721-1189

Dear Mr. Murray:

**SUBJECT: VARIANCE– VAR-09-034**  
**Applicant: PAUL H. MURRAY, LPLS**  
**Owners: BONNY L. SOMERS**  
**Request: Variance from Chapter 25, zoning, Article 5, Division 7, Section 25-5-76, Minimum Yards, (a), Section 25-5-77 Other regulations, and Article 4, Division 4 Section 25-4-44, Permitted projections into yards and open space requirements**  
**TMK: 1-3-019:029 (Lot 36)**

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After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 09-034 (VAR 09-034) subject to variance conditions. The variance permits portions of the Single Family Dwelling and detached "Water Tank" to remain upon Lot 36 with a minimum 18.00 feet to a minimum 18.5 feet side yard and dwelling's detached water tank to remain upon the subject property with a minimum 2.00 feet side yard and attendant minimum 2.00 feet side yard open space in lieu of minimum 20.0 feet side yard(s) and attendant minimum 14.0 feet side yard open space required. The variance is from the subject property's minimum side yard and minimum side yard open space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), Section 25-5-77 Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

## BACKGROUND AND FINDINGS

1. Location. The subject property, consists of one acre of land area and is situated within the Leilani Estates, Subdivision, Puna, Hawai'i. The subject property's street address is 13-3610 Kupono Street. The subject property is zoned Agricultural – 1 Acres (A-1a) by the County and designated Agricultural or "A" by the State Land Use Commission (LUC).
2. Variance Application-Site Plan. The applicant on behalf of the owners submitted the variance application, attachments, and filing fee on July 29, 2009 and other submittals related to the variance request and variance application. The variance application's site plan map is drawn to scale and prepared by Paul H. Murray, LPLS. The variance site plan map, dated May 26, 2009, denotes the position of the single family dwelling and detached "Water Tank" upon the subject property and that portion of the single family dwelling and detached Water Tank constructed into minimum 20-foot wide side yard setback and minimum 14-foot wide side yard open space.
3. County Building Records:

Hawaii County Real Property Tax Office records indicate that a building permit (B2005-1633H) was issued to the subject property for the construction of a single family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen and dining area, attached carport/storage and galvanized steel water tank.
4. Variance Application (VAR 09-034)-Agency Comments and Requirements:
  - a. The State Department of health (DOH) memorandum dated November 12, 2009 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. The Department of Public Works (DPW) had no comments, memo dated November 18, 2009.
5. Notice to Surrounding Property Owners. A copy of first notice and second notice sent by the applicant via USPS to surrounding property owners and mailing certificates were submitted to the Planning Department. According to these

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submittals the first and second notices were mailed via the USPS on July 28, 2009 and November 27, 2009, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 20, 2009.

6. Comments from Surrounding Property Owners or Public.

- a. An Objection letter dated on July 31, 2009 was received on August 5, 2009, and signed by Ron Hart. The parcel number stated in the objection letter is incorrect, it should be Parcel 32 and not 31. The property is located one lot south of the subject property.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner, submitted the variance application to address and/or resolve the open carport/storage and detached water tank encroachments within the property's minimum 20 feet minimum side yard setback. The variance application's site plan denotes the location of the Single Family Dwelling and Water Tank upon "Lot 36". Pursuant to the applicant's background information, "Both side yard building setback violations are visually not perceptible from neighboring lots or from public view. It appears from the site inspection and discussions with the contractor by the undersigned that the contractor committed an honest staking mistake. No malice and intent could be substantiated during the inspection. Neither the owners nor the contractor would have benefited as a result of the violation. The relative contours and steep terrain of the subject parcel may have contributed to the infrastructure placement errors." No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the single family dwelling and detached Water Tank into the property's minimum 20 feet side yard setback and attendant minimum 14 feet side yard open space required by the Zoning Code.

ALTERNATIVES

Alternatives available to the current owners to correct and/or address the building encroachments constructed into the affected front and rear yard and open space of the subject property include the following actions:

Remove the building encroachments and/or redesigning or relocating the as-built Single Family Dwelling and Water Tank constructed upon the subject property to fit within the

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correct building envelope denoted on the recent survey map as prescribed by the Zoning Code. Any structural or design correction would be expensive and cost prohibitive. Because of the uneven terrain of the property it is difficult to relocate the water tank To a more level area.

Consolidate the subject property with adjoining property and resubdivide the property to modify property lines and adjust minimum yard setbacks. Given the location of the encroachments (front and rear yard), consolidation/resubdivison with the adjoining property would not be practical.

#### INTENT AND PURPOSE

The intent and purpose of requiring building setbacks within a subdivision are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/uses and boundary/property lines.

It appears that the portion of the Single Family Dwelling and detached water tank was improperly situated on the subject property, which went undisclosed until a modern survey was completed. The survey map prepared for the landowner shows the extent of the encroachment within the minimum side yard and its open space requirement. It appears that the Single Family Dwelling and detached water tank, in its current location, is not physically and/or visually obtrusive from other properties situated within the immediate area.

Based on the foregoing findings and unusual circumstances, the representative's request for variance request would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code and the County General Plan. Furthermore, the variance request will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

The applicant's variance application was acknowledged by letter dated July 29, 2009 and additional time to review the application was required. The applicant granted the Planning Department and Planning Director an extension of time to decide on the variance application to January 15, 2010.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance application is approved subject to the following variance conditions:

1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property damage, personal injury, or death arising out of any act or omission of the applicants/owners, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.
3. No permit shall be granted to allow an ohana or second single family or farm dwelling upon the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
4. The as-built single family dwelling and water tank to be built upon the subject property ("LOT 36") will not meet the minimum side yards pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map. The approval of this variance permits portions of the as-built open carport/ storage and water tank to remain upon subject property or "LOT 36" according to the site plan map submitted with the variance application.
5. Should the single family dwelling and water tank (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement or the new single family dwelling and water tank shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.
6. Future or new building improvements and permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

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Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance - 09-034 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

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xc: Mr. Gilbert Bailado, GIS Analyst II  
Real Property Tax Office (Hilo)