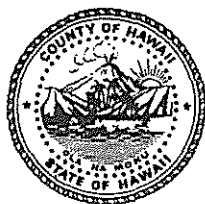


William P. Kenoi
Mayor



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

March 31, 2010

Reid E. Choate
15-2796 Aweoweo Street
Pahoa, Hawai'i 96778

Dear Mr. Choate:

SUBJECT: VARIANCE- VAR 09-050

Applicant: REID E. CHOATE, ET AL

Owners: REID E. CHOATE, ET AL

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: 1-5-102:044 (Lot 249)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 09-050 (VAR 09-050), subject to the following conditions. The variance will permit the carport or portions of the carport built circa 1993 to remain as modified, subject to condition two set forth by the Department of Public Works, Building Division, which states "*cut the building back so the supports are a minimum three (3) feet of the property line and have two (2) foot overhang that is one hour fire resistive.*" This would allow the carport to remain with a 1.5 feet side yard open space in lieu of the property's 5 feet side yard open space requirement. The dwelling's attached garage may remain upon the subject property with a minimum 8.26 to a minimum 11.73 feet rear yard setback in lieu of the property's minimum 20 feet rear yard and attendant minimum 14.00 feet rear yard open space requirements. The variance is from the subject property's minimum 20 feet rear yard and attendant minimum 14.00 feet rear yard open space requirements and required 10 feet side yard and required minimum 5 feet 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 16,627 square feet of land area and is situated within the Hawaiian Shores Subdivision, Wiakahiula, Puna, Hawai'i. The subject property's street address is 15-2796 Aweoweo Street. The subject property is zoned Agricultural – 1 Acres (A-1a) by the County and designated Urban or "U" by the State Land Use Commission (LUC).
2. Variance Application-Site Plan. The applicant/owners submitted the variance application, attachments, and filing fee on October 2, 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 Roy G. Hollowell, LPLS. The variance site plan map, dated September 5, 2009, denotes the position of the open carport along with the attached garage upon the subject property that portions of the carport and attached garage constructed into minimum 20-foot wide rear yard and 10 feet side yard setback and minimum 14-foot wide rear yard and 5 feet side yard open space.
3. County Building Records:

Hawaii County Real Property Tax Office records indicate that a building permit (901368) was issued to the subject property for the construction of a single family dwelling consisting of 2 bedrooms, 1 1/2 baths, living room, kitchen and dining area. Three additional building permits were issued: Permit No. 902307 for the construction of a 1 car garage and a 1 car carport with storage; Permit No. 912932 for enclosing ground floor with exterior walls and install partitions to create two storage rooms; and Permit No. 931252 for construction of a new two car carport attached to existing garage.
4. Variance Application (VAR09-050)-Agency Comments and Requirements:
 - a. The State Department of Health (DOH) memorandum dated December 4, 2009 states:

"Show location of cesspool on site plan. Based on Health Department records, the cesspool is under concrete pad."

- b. The Department of Public Works (DPW) memorandum dated December 15, 2009 states:

"We have reviewed the subject application forwarded by your memo dated November 12, 2009 and require approval of the application be conditioned as noted below.

A building permit will be required to address the Building Code issues regarding the carport's proximity to the property line – build a one hour fire resistive wall, cut the building back so that neither the supports or overhang is within three (3) feet of the property line and have two (2) foot overhang that is one hour fire resistive."

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 submittals the first and second notices were mailed via the USPS on October 6, 2009 and November 20, 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. No further written agency comments were received. No written comments or objections from surrounding property owners of the general public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner submitted the variance application to address and/or resolve the attached garage and open carport encroachments within the property's minimum 20 feet minimum rear yard and 10 feet side yard setbacks. The variance application's site plan denotes the location of the open carport and attached garage upon "Lot 249". Pursuant to the applicant's background information, the owners were unaware of any encroachment when they purchased the property and would not have discovered any problems affecting the open carport and attached garage until a modern survey was conducted on September 5, 2010 by Roy G. Holloway, LPLS, revealing the setback violations. 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. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the open carport and attached garage into the property's minimum 20 feet rear yard 10 feet side yard setback and attendant minimum 14 feet rear yard 5 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 side and rear yard and open space of the subject property include the following actions:

Remove the building encroachments and/or redesigning or relocating the open carport and attached garage constructed upon the subject property to fit within the 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.

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 (rear and side yard), consolidation/resubdivision 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 open carport and attached garage 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 rear and side yard and its open space requirements. It appears that the open carport modified to meet Department of Public Works, Building Division conditions and along with the attached garage in its current location, will not be 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 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 March 5, 2010 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 March 31, 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 carport and attached garage built upon the subject property ("LOT 249") will not meet the minimum side and rear 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 as modified to remain upon subject property in accordance with the condition that the owner secure a building permit to address the Building Code issues regarding the carport's proximity to the property line as stated in the Department of Public Works (DPW) memorandum dated December 15, 2009.
5. The owners shall secure a building permit within six months of this variance to address the conditions set forth by the Department of Public Works, Building Division.
6. Should the open carport and attached garage (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement or the new carport and attached garage shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.
7. 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.

Reid E. Choate
Page 6
March 31, 2010

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance- 09-050 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

LHN:kwr
O:\Variances\ZoneI\Var09-050TMK1-5-102-044Choate.doc

xc: Real Property Tax Office (Hilo)