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Mayor



BJ Leithead Todd
Director

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County of Hawai'i
PLANNING DEPARTMENT

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November 7, 2011

Ms. Sandra Pechter Song, Attorney-at-Law
10 Kamehameha Avenue
Hilo, HI 96720

Dear Ms. Song:

SUBJECT: VARIANCE VAR-11-048
Applicant: SANDRA PECHTER SONG, ATTORNEY-AT-LAW
Owners: ALICE COMFORT ADEE
Request: Variance from Chapter 25, Zoning, Article 5, Division 7, Section 25-5-7, Minimum Yards, and Article 4, Division 4 Section 25-4-44, Permitted projections into yards and open space requirements
TMK: 2-4-074:046 (Lot 300)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 11-048 (VAR 11-048), subject to variance conditions. The variance permits portion of the detached "Open Deck/Eaves" to remain on Lot 300 with a 20.5 feet rear yard and attendant minimum 16'8" rear yard open space in lieu of the 30 feet rear yard setback and 24 feet rear yard open space requirement; and a minimum 12'7" side yard open space in lieu of the 14 feet side yard open space requirement, as identified on the plot plan submitted to our office on September 15, 2011. The variance is from the subject property's minimum rear and side yard and minimum rear and side open space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, 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 contains approximately 1.00 acre and is identified as Lot 300 situated within the Sunrise Estates Subdivision, Kukuau 1st, South Hilo, Hawai'i. The subject property's street address is 478 Ho'okina Place.

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2. **Zoning.** The subject property is zoned Agriculture – 1 acre (A-1a) by the County and designated Agriculture or "A" by the State Land Use Commission (LUC).
3. **Variance Application.** The owner submitted the variance application, attachments, and filing fee on September 15, 2011 and other submittals related to the request. The variance application's plot plan, drawn to scale and prepared by Leslie Taylor Cockerham, denotes the open deck/eaves built into the property's minimum rear/side yard and open space requirement.
4. **County Building Records.** Hawaii County Real Property Tax Office records indicate that a building permit (950014) was issued on January 4, 1995 for the construction of a 3-bedrooms and 2-bath Single Family Dwelling; including a two car garage with storage.
5. **Agency Comments and Requirements.**
 - a. The State Department of Health (DOH) memorandum, dated October 6, 2011, identifies no environmental health concerns with regulatory implications. (Refer to DOH memorandum in variance file).
 - b. No comments have been received from the Department of Public Works – Building Division as of this date.
6. **Public Notice.** The applicant submitted a copy the first and second notices sent to surrounding property owners including an associated affidavit. Pursuant to these submittals, it appears that the applicant's notices were mailed to the surrounding property owners by USPO on September 14, 2011 and October 10, 2011, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on October 9, 2011.
7. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received by the Planning Department.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The owner/applicant is requesting a variance from the minimum rear and side yard setback requirements pursuant to Section 25-5-76 and 25-4-44 of the Zoning Code.

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Pursuant to the applicant's background information, which states in part "*At the time that this deck was constructed, the Applicant understood this deck to be in compliance with rear and side yard requirements of the Zoning Code since this deck was an accessory structure and was at least ten feet away from the side and rear yard boundary lines of the Property.*"

The encroachment was created because of an unintentional misunderstanding of the requirements of the Zoning Code and was only discovered nearly five years after this structure was completed when the Applicant attempted to secure an after-the-fact building permit for the above-grade pool installed on the Property. Relocation of the deck in light of the location of the pool may not be possible, and to lose this feature on the Applicant's Property would diminish the value of the Property. These facts comprise "special or unusual circumstances or conditions" which support granting of this variance request."

No evidence has been found to show indifference or premeditation by the builder to intentionally construct the residential improvements into the property's minimum setbacks required by the Zoning Code.

ALTERNATIVES

Alternatives available to the current owner to correct and/or address the proposed encroachment into the affected rear and side yard of the subject property include the following actions:

- Relocate the improvements upon the subject property to fit within the correct building envelope denoted on the recent plot map as prescribed by the Zoning Code.
- Another alternative is to consolidate the subject property with the adjoining property and resubdivide the property to modify property lines and adjust minimum yard setbacks.

The above referenced alternatives are not reasonable or practical due to the anticipated expense and difficulty.

INTENT AND PURPOSE

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

Based on the foregoing findings and unusual circumstances, the applicant's request for variance would be consistent with the general purpose of the zoning district and the intent 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. Also, no comments or objections were received from the surrounding property owners or general public in response to the Notification of Surrounding Properties Owners.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance application is approved subject to the following 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. The improvements constructed upon the subject property ("LOT 300") will not meet the minimum rear and side yard pursuant to Chapter 25, the Zoning Code. The approval of this variance permits the existing open deck/eaves to remain upon the subject property in accordance to the plot plan submitted on September 15, 2011.
4. No permit shall be granted to allow an ohana or second single family or farm dwelling upon the subject property, subject to provisions of the Zoning Code or State Law, which may change from time to time.
5. Any further building permit and/or other construction permits issued to enlarge or change or modify the structures built upon the subject property shall be limited to the setbacks required by the underlying zoning, as modified by this variance and denoted on the plot plan submitted on September 15, 2011.
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 VAR 11-048 null and void.

Sincerely,

A handwritten signature in black ink that reads "BJ Leithead Todd". The signature is written in a cursive, flowing style.

BJ LEITHEAD TODD
Planning Director

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xc: Real Property Tax Office (Hilo)