

Harry Kim  
Mayor



Michael Yee  
Director

Daryn Arai  
Deputy Director

West Hawai'i Office  
74-5044 Ane Keohokalole Hwy  
Kailua-Kona, Hawai'i 96740  
Phone (808) 323-4770  
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**County of Hawai'i**  
**PLANNING DEPARTMENT**

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

February 24, 2017

Klaus Conventz  
Baumeister Consulting  
P. O. Box 2308  
Kailua-Kona, HI 96745

Dear Mr. Conventz:

**SUBJECT: Application: Variance - VAR 17-000402**  
**Applicant: KLAUS D. CONVENTZ/BAUMEISTER CONSULTING**  
**Owner: ETHAN MOST AND ALIAH MOST**  
**Request: Variance from Chapter 25, Zoning, Article 5 Division 7,**  
**Section 25-5-76 Minimum Yards (Encroachment into North**  
**Front Yard Setback, South Side Yard Setback**  
**Tax Map Key: 7-5-001:002**

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The Planning Director certifies the **approval** of Variance No. 17-000402, subject to variance conditions. The variance will allow portion of the single-family dwelling to remain with a minimum 27.70-foot front (north) yard setback, in lieu of the required 30-foot front yard setback and minimum side (south) yard setback ranging from 16.10 feet to 17.30 feet and associated roof eave projection resulting with a minimum 13.10-foot front (south) yard open space in lieu of the minimum 20-foot side yard setback and 14-foot side open space requirement. These exceptions are in lieu of the required 30-foot front yard setback, 20-foot side yard setback and the 14-foot side yard open space requirement as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-76, Minimum yards and Section 25-4-44 (a), Permitted projections into yards and open space requirements.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property, consisting of approximately 1.011 acres (44,039 sq. ft.) of land, situated at Keopu 3rd, North Kona, Hawai'i. The subject property's street address is 75-5385 Mamalahoa Highway.
2. **Zoning.** Agricultural – I acre (A-1a)
3. **State Land Use.** Agricultural.

4. **Required Setback.** 30-foot front; 20-feet for sides; Section 25-4-42, Corner building sites:  
(a) on any corner building site, the interior lines shall be side lot lines and all rear yard regulations shall be inapplicable.
5. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on January 3, 2017, and other submittals related to the variance request and variance application. The variance application's site plan, drawn to scale and prepared by Chrystal Thomas Associates, LPLS, (Wes Thomas Associates), denotes the portions of the single-family dwelling built into the front (north) yard setback and side (south) yard setback. (See attached survey map – Exhibit A)

The survey map shows that the portion of the single-family dwelling encroaches 2.30 feet into the 30-foot front (north) yard setback and the minimum side yard encroachment ranging from 2.70 feet to 3.90 feet into the 20-foot side yard setback; also, the associated roof eave encroaches 0.90 feet (10.8 inches) into the 14-foot side yard open space requirement.

The encroachment leaves portion of the single-family dwelling to remain with a minimum 27.70-foot front (north) yard setback, in lieu of the required 30-foot front yard setback and minimum side (south) yard setback ranging from 16.10 feet to 17.30 feet and associated roof eave projection resulting with a minimum 13.10-foot side (south) yard open space in lieu of the minimum 20-foot side yard setback and 14-foot side open space requirement.

6. **County Building Records.** Hawai'i County Real Property Tax Division records indicate that a building permit (BK20016-00759) was issued on May 25, 1916 for the construction of a 3-bedroom, and 2½ bath, single-family dwelling.
7. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) memorandum dated January 18, 2017: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. The Hawaii County Public Works Department - Building Division memorandum dated January 30, 2017: "Others: No issues known of on Property".
8. **Notice to Surrounding Property Owners.** The applicant submitted a copy of notices mailed to surrounding property owners (including affidavits) by USPS. According to these submittals, the first and second notices were mailed on January 3, 2017 and January 18, 2017, respectively. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on February 2, 2017.

9. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or general public were received by the Planning Department.

#### ANALYSIS OF GROUNDS FOR VARIANCE

**No variance will be granted unless it is found that:**

- (a) There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or applicant of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the property.*

**The variance application meets criteria (a) for the following reasons:**

The survey map shows that the portion of the single-family dwelling encroaches 2.30 feet into the 30-foot front (north) yard setback and the minimum side (south) yard encroachment ranging from 2.70 feet to 3.90 feet into the 20-foot side yard setback; also, the associated roof eave encroaches 0.90 feet (10.8 inches) into the 14-foot side yard open space requirement.

The encroachment leaves portion of the single-family dwelling to remain with a minimum 27.70-foot front (north) yard setback, in lieu of the required 30-foot front yard setback and minimum side (south) yard setback ranging from 16.10 feet to 17.30 feet and associated roof eave projection resulting with a minimum 13.10-foot side (south) yard open space in lieu of the minimum 20-foot side yard setback and 14-foot side open space requirement.

No evidence has been found to allow indifference or premeditation by the owners or builders to deliberately create or intentionally allow the single-family dwelling encroachments problem to occur.

It appears the encroachment issue occurred during the plan review process; according to the applicant's background report, the owners were issued Building Permit BK2016-00759 on May 25, 2016. Their plot plan showed approval stamps first for 30.00 foot front yard setback and 20.00 foot side yard setbacks which is appropriate for a 1.011 acre lot. **(See Exhibit B copy of the approved plot plan)** However, the Planning Department changed the front yard setback to 25.00 feet and the side yard setbacks to 15.00 feet, which was probably based on Hawai'i County Real Property Tax records which revealed a 36,155 square foot parcel, which is also appropriate for this parcel size.

Based on the new less restrictive setbacks, the owner had their architect redraw their plans to incorporate a small enlargement to their single-family dwelling. In the process of resubmitting

their amended building plans for approval, the owner was informed that the setbacks had been changed to 30 foot front yard setback and 20 foot side yard setback.

In the interim the concrete slab and plumbing pipes had been completed under related Plumbing Permit No. MK2016-00608 issued on September 20, 2016.

The as-built survey map (see **Exhibit A**) and Warranty Deed (See **Exhibit C**) confirm the parcel size of 1.011 acres.

The above special and unusual circumstances determine the owner was not at fault in creating the encroachment violation, and requiring them to fix the encroachments would interfere with the best use and development of the property.

*(b) There are no other reasonable alternatives that would resolve the difficulty.*

**The variance application meets criteria (b) for the following reasons:**

Alternatives available to the current owners to correct and/or address the single-family dwelling encroachment constructed into the affected front yard setback and side yard setback and side yard open space of the subject property include the following actions:

Remove the building encroachments and/or redesign the proposed single-family dwelling upon the subject property to fit within the correct building envelope denoted on the recent survey map as prescribed by the Zoning Code. This alternative would be deemed unreasonable, especially when the current owners were under the impression that the single-family dwelling was in compliance with all County requirements.

Because the encroachments are within the front and side yard setback one alternative would be to consolidate the front yard of the subject property with the roadway and consolidate the subject property with the adjoining side property which is owned by someone else, and resubdivide the property to modify property lines and adjust minimum front and side yard setbacks. Both of these alternatives are not practical. Therefore, there are no reasonable alternatives to resolve the difficulty.

*(c) The variance is consistent with the general purpose of the district, the intent and purpose of this chapter, and the general plan, and will not be materially detrimental to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties.*

**The variance application meets criteria (c) for the following reasons:**

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. The encroachment of the single-family dwelling still allows for adequate air circulation, as the affected area is within the front and side yard setback.

No evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow the building encroachment problems to occur.

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 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.

#### **PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS**

Based on the variance application's survey map, the single-family dwelling and garage built upon the subject property (TMK: 7-5-001:002) will not meet the minimum front and side yard setback requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

This variance request 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 Hawai'i 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. Should the single-family dwelling built on the subject property be destroyed by fire or other natural causes, the replacement structure shall comply with the Hawai'i County Code, Chapter 25, (Zoning) and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.
4. An Ohana or Farm Dwelling permit shall not be granted upon the subject property, subject to provisions of the Hawai'i County Code, Chapter 25 (Zoning) or State Law, which may change from time to time.
5. Future or new building improvements and permitted uses shall be subject to State Law and County Ordinances and Regulations pertaining to building construction and occupancy.

Klaus D. Conventz  
dba Baumeister Consulting  
Page 6  
February 24, 2017

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance VAR-17-000402 null and void.

Sincerely,

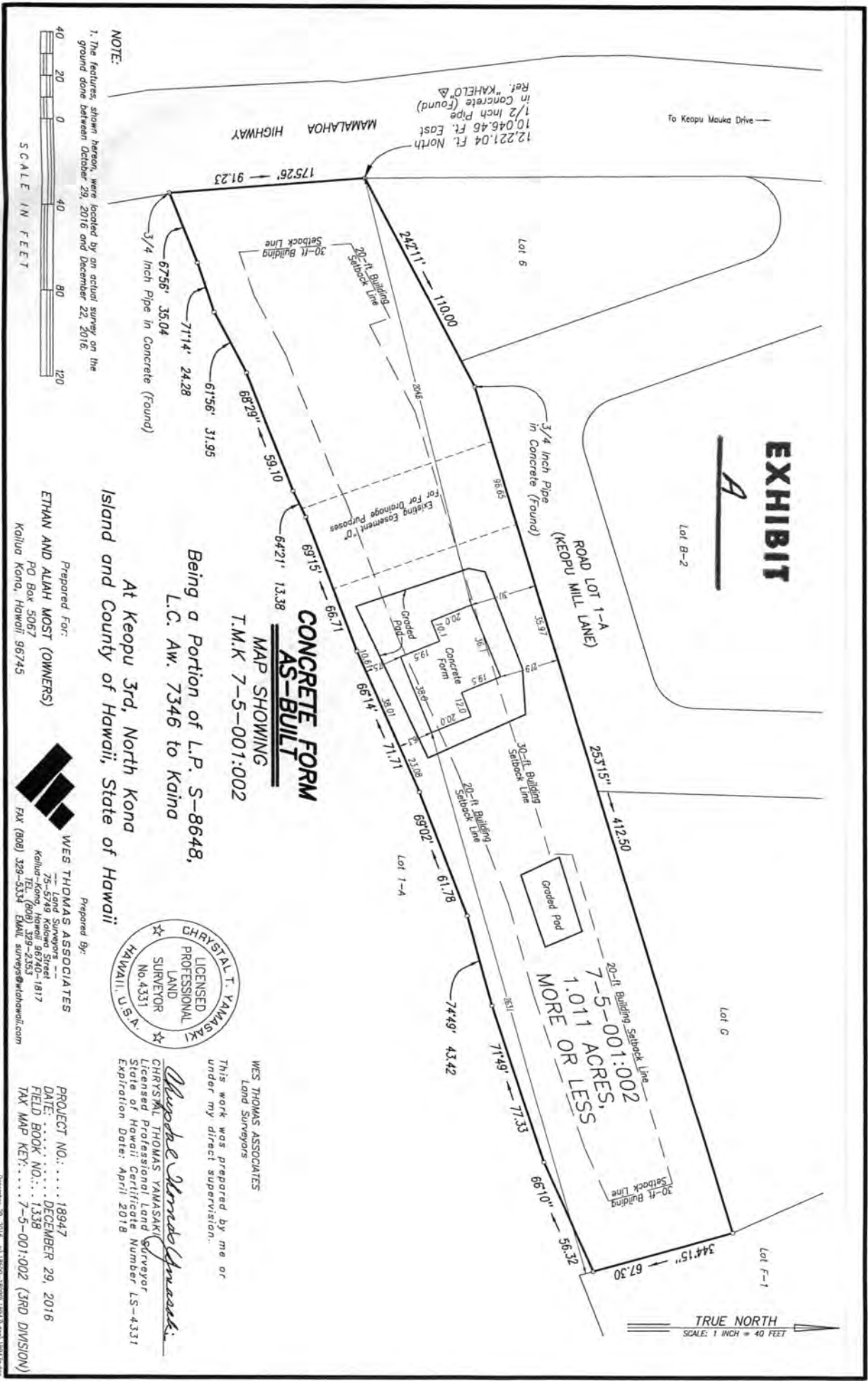
A handwritten signature in black ink, appearing to read "Michael Yee", with a stylized flourish at the end.

MICHAEL YEE  
Planning Director

LHN:nci  
P:\Admin Permits Division\Variances From CoH02\Zone7\VAR17-000402TMK7-5-001-002Most.doc

xc: Planning Department-Kona  
Real Property Tax Division-Kona  
Gilbert Bailado, GIS (via email)

# EXHIBIT A



NOTE:  
1. The features shown herein were located by an actual survey on the ground done between October 29, 2016 and December 22, 2016.



**CONCRETE FORM AS-BUILT**  
**MAP SHOWING**  
**T.M.K. 7-5-001:002**

Being a Portion of L.P. S-8648,  
 L.C. Aw. 7346 to Kaina  
 At Keopu 3rd, North Kona  
 Island and County of Hawaii, State of Hawaii

Prepared For:  
**ETHAN AND ALMAH MOST (OWNERS)**  
 PO Box 5067  
 Kailua Kona, Hawaii 96745

Prepared By:  
**WES THOMAS ASSOCIATES**  
 Land Surveyors  
 75-5749 Kailua Street  
 Kailua, HI 96741  
 TEL: (808) 329-2155  
 FAX: (808) 329-5334  
 Email: surveys@wethawaii.com



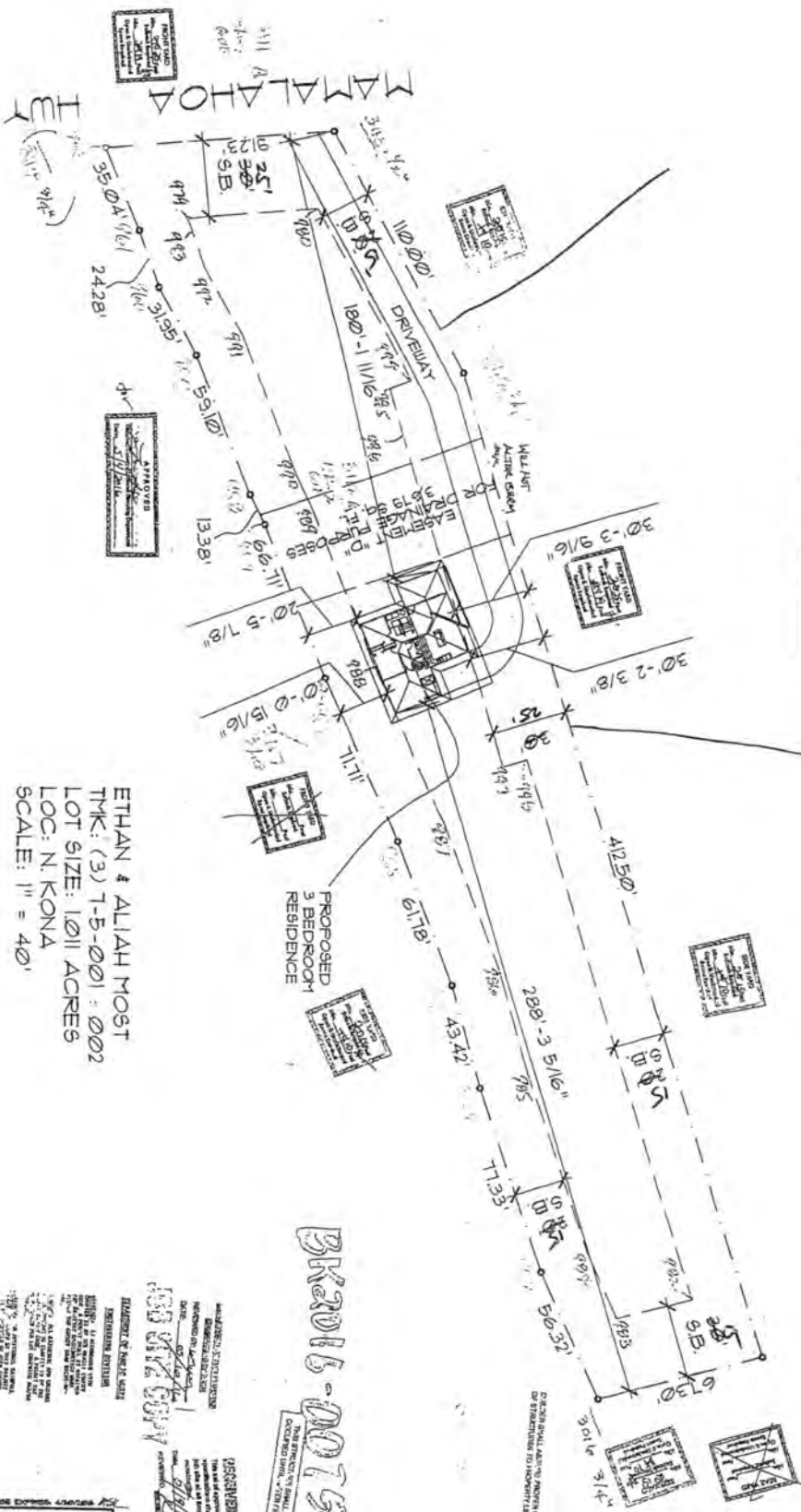
WES THOMAS ASSOCIATES  
 Land Surveyors  
 This work was prepared by me or  
 under my direct supervision.

*Chrystal T. Yamasaki*  
 CHRYSAL THOMAS YAMASAKI  
 Licensed Professional Land Surveyor  
 State of Hawaii Certificate Number LS-4331  
 Expiration Date: April 2018

PROJECT NO.: 18947  
 DATE: DECEMBER 29, 2016  
 FIELD BOOK NO.: 1338  
 TAX MAP KEY: 7-5-001:002 (3RD DIVISION)

# EXHIBIT

B



ETHAN & ALIYAH MOST  
 TRK: (3) 7-5-001 : 002  
 LOT SIZE: 1011 ACRES  
 LOC: N. KONA  
 SCALE: 1" = 40'

**BR2016-00759**

ARCHITECT'S STATEMENT  
 I, the undersigned, being a duly licensed Architect in the State of Hawaii, do hereby certify that I am the author of the design and content of the drawings herein, and that I am a duly licensed Architect in the State of Hawaii.  
 DATE: 08/12/2016  
 ARCHITECT: [Signature]

ARCHITECT'S LICENSE EXPIRES 06/30/17

**5-1**

PROFESSIONAL ARCHITECT  
 ETHAN & ALIYAH MOST  
 1000 KAWAIAWA DRIVE  
 KONA, HAWAII 96701  
 PHONE: (808) 855-1234  
 FAX: (808) 855-1234  
 E-MAIL: ethan@ethanaliyah.com



310



STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED

February 10, 2016 8:01 AM

Doc No(s) A-58840416

**EXHIBIT**

C



/s/ NICKI ANN THOMPSON  
REGISTRAR

1 2/3 OFC  
B-32760135

Conveyance Tax: \$210.00

REGULAR SYSTEM

LAND COURT

AFTER RECORDATION, RETURN BY MAIL (  ) PICKUP ( ) TO:

ETHAN MOST and ALIAH MOST  
P.O. BOX 698  
CAPTAIN COOK, HI 96704

76-201561700-A R5(2)

Tax Map Key No.: (3) 7-5-001-002

Total Pages 8

**WARRANTY DEED**

MARGARET MERCADO WAHINEKAPU, Trustee of the Margaret Mercado Wahinekapu Revocable Living Trust dated August 6, 2009 with full powers to sell, mortgage, lease or otherwise deal with the land as Fee Owner, whose address is P.O. Box 383, Kailua Kona, Hawaii 96740 (hereinafter called the "Grantor"), in consideration of the sum of TEN DOLLARS (\$10.00) paid by ETHAN MOST and ALIAH MOST, husband and wife, <sup>as tenants by the entirety</sup> whose address is P.O. Box 698, Captain Cook, Hawaii 96704 (hereinafter "Grantees"), the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the Grantees:

*[Handwritten signature]*

All of that certain real property more particularly described in Exhibit A attached hereto and made a part hereof, subject to the encumbrances noted therein.

And the reversions, remainders, rents, issues and profits thereof and all of the estate, right, title and interest of the Grantor, both at law and in equity, therein and thereto:

TO HAVE AND TO HOLD the same, together with all buildings, improvements, rights, easements, privileges and appurtenances thereunto belonging or appertaining or held and enjoyed in connection therewith unto the **Grantees** as aforesaid, in FEE SIMPLE FOREVER, subject to any mortgage, lease, deed, grant or other instrument of conveyance or transfer of the property by the **Grantees** shall be deemed conclusively to be pursuant to proper authorization, shall be binding upon **Grantees** and shall constitute the act and deed of the **Grantees**, and no person dealing with the **Grantees** need inquire

into the power or authority of the **Grantor** to execute and deliver any such mortgage, lease, deed, grant or other instrument of conveyance.

AND the Grantor, in consideration of the premises, does hereby covenant and agree to and with the Grantees as follows: That the Grantor is seized of the property herein described in fee simple; that it is free and clear of and from all encumbrances other than those hereinabove or hereinafter mentioned, except for the lien of real property taxes not yet required by law to be paid; that the Grantor has good right to sell and convey the same as foresaid; and that the Grantor will WARRANT AND DEFEND title to the same unto the Grantees against the lawful claims and demands of all persons except as mentioned hereinabove or hereinafter.

AND the Grantees hereby accept said real property described in Exhibit A.

IT IS MUTUALLY AGREED that the terms "Grantor" and "Grantee" as and when used hereinabove or hereinbelow shall mean and include the masculine or feminine, the singular or plural number, individuals, associations, trustees or corporations, and their and each of their respective successors in interest, heirs, personal representatives and permitted assigns, according to the context thereof, and that if these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall be and for all purposes deemed to be joint and several.

IN WITNESS WHEREOF, the Grantor and Grantees have executed these presents on this 4<sup>th</sup> day of February, 2016.

Margaret M. Wahinekupu  
MARGARET MERCADO WAHINEKAPU, Trustee  
Grantor

Ethan Most  
ETHAN MOST  
Grantee

Aliah Most  
ALIAH MOST  
Grantee

STATE OF HAWAII )  
 ) SS.  
COUNTY OF HAWAII )

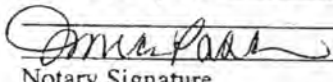
On this 4<sup>th</sup> day of February, 2016, before me personally appeared MARGARET MERCADO WAHINEKAPU, Trustee, to me known to be the person described in and who executed the foregoing instrument and acknowledge that she executed the same as her free act and deed in both her individual capacity and as Trustee.



Print Name: Jessica Pascua  
Notary Public, State of Hawaii  
My commission expires: Expiration Date: December 14, 2016



CERTIFICATION:  
Date of Document 2/4/16 # Pages 8  
Name: Jessica Pascua, Third Circuit  
Doc. Description: Warranty Deed

  
Notary Signature 2/4/16  
Date



STATE OF HAWAII )  
 ) SS.  
COUNTY OF HAWAII )

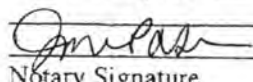
On this 5<sup>th</sup> day of February, 2016, before me personally appeared ETHAN MOST, Trustee, to me known to be the person described in and who executed the foregoing instrument and acknowledge that he executed the same as his free act and deed.



Print Name: Jessica Pascua  
Notary Public, State of Hawaii  
My commission expires: Expiration Date: December 14, 2016



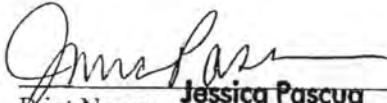
CERTIFICATION:  
Date of Document 2/4/16 # Pages 8  
Name: Jessica Pascua, Third Circuit  
Doc. Description: Warranty Deed

  
Notary Signature 2/4/16  
Date



STATE OF HAWAII )  
 ) SS.  
COUNTY OF HAWAII )

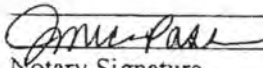
On this 5th day of February, 2016, before me personally appeared ALIAH MOST, Trustee, to me known to be the person described in and who executed the foregoing instrument and acknowledge that she executed the same as her free act and deed.



Print Name: **Jessica Pascua**  
Notary Public, State of Hawaii  
My commission expires: **Expiration Date: December 14, 2016**



CERTIFICATION:  
Date of Document 2/4/16 # Pages 8  
Name: Jessica Pascua, Third Circuit  
Doc. Description: WARRANTY Deed

 2/4/16  
Notary Signature Date



# EXHIBIT A

All of that certain parcel of land (being portion of the land(s) described in and covered by Land Patent Number S-8648, Land Commission Award Number 7346 to Kaina) situate, lying and being at Keopu 3rd, District of North Kona, Island and County of Hawaii, State of Hawaii, and thus bounded and described:

Beginning at the northwest corner of this parcel of land, on the southeast side of Mamalahoa Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station "KAHELO" being 12,221.04 feet north and 10,046.46 feet east and running by azimuths measured clockwise from true South:

- |    |          |        |                                                                |
|----|----------|--------|----------------------------------------------------------------|
| 1. | 242° 11' | 110.00 | feet along R. P. 6019, L. C. Aw. 7368, Apana 1 to Kamakahue;   |
| 2. | 253° 15' | 412.50 | feet along same;                                               |
| 3. | 344° 15' | 67.30  | feet along R. P. 4475, L. C. Aw. 7713, Apana 5 to V. Kamamalu; |

Thence partly along stonewall along Grant 3100 to J. W. Kuakamauna for the next eleven (11) courses, the azimuths and distances between points being:

- |     |         |       |       |
|-----|---------|-------|-------|
| 4.  | 66° 10' | 56.32 | feet; |
| 5.  | 71° 49' | 77.33 | feet; |
| 6.  | 74° 49' | 43.42 | feet; |
| 7.  | 69° 02' | 61.78 | feet; |
| 8.  | 66° 14' | 71.71 | feet; |
| 9.  | 69° 15' | 66.71 | feet; |
| 10. | 64° 21' | 13.38 | feet; |
| 11. | 68° 29' | 59.10 | feet; |
| 12. | 61° 56' | 31.95 | feet; |
| 13. | 71° 14' | 24.28 | feet; |

14. 67° 56' 35.04 feet;  
15. 175° 26' 91.23 feet along Mamalahoa Highway to the point of beginning and containing an area of 1.011 acres, more or less.

BEING THE PREMISES ACQUIRED BY QUITCLAIM DEED

GRANTOR : MARGARET MERCADO WAHINEKAPU, widow  
GRANTEE : MARGARET MERCADO WAHINEKAPU, as Trustee of the Margaret Mercado Wahinekapu Revocable Living Trust dated August 6, 2009  
DATED : August 17, 2009  
RECORDED : Document No. 2009-130513

SUBJECT, HOWEVER, TO:

1. Mineral and water rights of any nature.
2. The terms and provisions contained in the following:  
INSTRUMENT : LAND PATENT NUMBER S-8648  
DATED : December 9, 1992
3. Unrecorded GRANT OF EASEMENT by ANNA L. S. NAKAHARA to HILO ELECTRIC LIGHT COMPANY, LIMITED, now known as HAWAII ELECTRIC LIGHT COMPANY, INC., dated June 25, 1958, as mentioned in instrument recorded in Liber 9167 at Page 2.
4. GRANT  
TO : COUNTY OF HAWAII, a municipal corporation duly existing under, pursuant to and by virtue of the laws of the State of Hawaii  
DATED : February 9, 1976  
RECORDED : Liber 12087 Page 424  
GRANTING : easement of way over, along and across that certain parcel of land described therein for drainage purposes including access thereto for construction and maintenance thereof. Said easement more particularly described as follows:

EASEMENT "D"  
For Drainage Purposes

Being portion of L. C. Aw. 7346 to Kaina  
Situated at Keopu 3rd, North Kona, Hawaii

Beginning at the northwest corner of this parcel of land,  
on the southeast side of a road reserve of Coffee Farm

Lots Subdivision, the coordinates of said point of beginning referred to Government Survey Triangulation Station "KAHELO" being 12,280.02 feet north and 10,169.17 feet east and running by azimuths measured clockwise from true South:

- |    |      |     |       |                                                                                                                                                        |
|----|------|-----|-------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | 253° | 15' | 40.05 | feet along a road reserve of Coffee Farm Lots Subdivision;                                                                                             |
| 2. | 340° | 25' | 90.55 | feet along the remainder of L. C. Aw. 7346 ti Kaina to the northwest side of Grant 3100 to J. W. Kuakamauna;                                           |
| 3. | 69°  | 15' | 35.76 | feet along Grant 3100 to J. W. Kuakamauna;                                                                                                             |
| 4. | 64°  | 21' | 4.27  | feet along Grant 3100 to J. W. Kuakamauna;                                                                                                             |
| 5. | 160° | 25' | 93.71 | feet along the remainder of L. C. Aw. 7346 to Kaina to the point of beginning and containing an area of 3,679 square feet or 0.084 acre, more or less. |

5. Encroachment(s) as shown on the survey map prepared by Thomas G. Pattison, Land Surveyor, with Pattison Land Surveying, Inc. dated December 8, 2015.

CRM wall at the Northeast corner of the subject lot belonging to Lot F-1, extends across the East boundary line of the subject lot up to 2.0 feet.

**END OF EXHIBIT A**