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**County of Hawai'i**  
**PLANNING DEPARTMENT**

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

April 28, 2017

Jacob Milberg  
P. O. Box 384494  
Waikoloa, HI 96738

Dear Milberg:

**SUBJECT: Application: Variance - VAR 17-000406**  
**Applicant: JACOB MILBERG**  
**Owner: JACOB MILBERG & JUNKO MILBERG**  
**Request: Variance from Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum Yards, and Section 25-4-44, Permitted Projections into Yards and Open Space Requirements (Encroachment into Southwest Side Yard Setback and Southwest Side Yard Open Space)**

**Tax Map Key: 6-8-035:004: Lot 4-A**

The Planning Director certifies the **approval** of Variance 17-000406, subject to conditions. The variance will allow portion of the single-family dwelling to remain on Lot 4-A, with a minimum 8.84-foot side (southwest) yard setback in lieu of the minimum required 10-foot side yard setback and associated roof eave projection resulting with a minimum 4.84-foot side (southwest) yard open space in lieu of the minimum 5-foot side yard open space requirement. These exceptions are in lieu of the required 10-foot side yard setback and 5-foot side yard open space as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards and Section 25-4-44 Permitted Projections into Yards and Open Space Requirements.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property consists of approximately 12,058 square feet of land, is located within the Kilohana Kai at Waikoloa Subdivision, situated at Waikoloa, South Kohala, Hawai'i. The subject property's street address is 68-3620 Haena Street.
2. **County Zoning.** Single-Family Residential – 10,000 sq. ft. (RS-10).
3. **State Land Use.** Urban.
4. **Setback Requirements.** 20-foot front and rear; 10 foot sides.

5. **Variance Application-Site Plan.** The applicant, Jacob Milberg, submitted the variance application, attachments, filing fee, and associated materials on January 13, 2017. The variance application's site plan map is drawn to scale and was prepared by Thomas G. Pattison, L.P.L.S. (Pattison Land Surveying, Inc.), and denotes the single-family dwelling encroaching into the southwest side yard setback and east side yard open space. The site plan also shows concrete rock masonry retaining walls ranging from 4 feet to 7 feet in height along the perimeter of the property and the interior free standing concrete rock masonry walls are approximately 4-5 feet in height. (See Exhibit A)

The site plan prepared by Thomas G. Pattison, L.P.L.S., shows that portion of the single-family dwelling encroaches 1.16 feet into the 10-foot southwest side yard setback and the associated roof eave projection encroaches 0.16 feet (1.92 inches) into the 5-foot southwest side yard open space.

The encroachment leaves the single-family dwelling with a minimum 8.84-foot southwest side yard setback, in lieu of the minimum required 10-foot side yard setback and a 4.84-foot southwest side yard open space, in lieu of the required 5-foot side open space.

6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (B2011-00919K) was issued on October 31, 2011, for the construction of a single-family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen and dining area. A subsequent building permit was issued on November 16, 2013 (BK2013-01841) for the enclosure of the lower level for the addition of a living/game room, private use hobby and meeting room/office, storage, 2 bedrooms, and a craft counter with bar sink.
7. **Agency Comments and Requirements.**
  - a. The State Department of Health (DOH) memorandum dated February 6, 2017: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. The Department of Public Works Department – Building Division memorandum dated February 1, 2017: "No issues known of the property."
8. **Notice to Surrounding Property Owners.** The applicant submitted a copy of notice mailed to surrounding property owners (including affidavits) by U.S.P.S. According to these submittals, the first notices were mailed on January 14, 2017, and the second notices were mailed on February 4, 2017. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 2, 2017.
9. **Time Extension.** The applicant's variance application was acknowledged by letter dated January 27, 2017 and additional time to review the application was required. The applicant granted the Planning Director an extension of time for decision on the Variance Application to April 30, 2017.



10. **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.

**GROUNDS FOR APPROVING VARIANCE**

**Special and Unusual Circumstances**

- (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 owner/applicant submitted the variance application to address or resolve the encroachment of the single-family dwelling into the 10-foot southwest side yard setback and associated roof eave projection into the 5-foot southwest side yard open space.

The site plan prepared by Thomas G. Pattison, L.P.L.S., shows that portion of the single-family dwelling encroaches 1.16 feet into the 10-foot southwest side yard setback and the associated roof eave encroaches 0.16 feet (1.92 inches) into the 5-foot southwest side yard open space.

The encroachment leaves the single-family dwelling with a minimum 8.84-foot southwest side yard setback, in lieu of the minimum required 10-foot side yard setback and a 4.84-foot southwest side yard open space, in lieu of the required 5-foot southwest side open space.

No evidence has been found to show indifference or premeditation by the past owners or builders to deliberately create or intentionally allow the building encroachment problems to occur. The single-family dwelling was built under Building Permit BK2011-00919, issued on October 31, 2011, with final inspection issued and approved on December 24, 2012. It also appears that past building permits inspections of the premises by the agencies, during construction of the dwelling improvements, did not disclose any building encroachment issues or building setback irregularities at that time.

Based on the above-mentioned information, special and unusual circumstances do exist to an extent that they deprive the owner of substantial property rights that would otherwise be available, or which unreasonably interfere with the best use or manner of development of the subject 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 dwelling

encroachments constructed into the affected rear yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign the single-family dwelling denoted on the survey map to fit within the correct building envelope as prescribed by the zoning code. This alternative would be deemed unreasonable due to the existing retaining walls and the need to rebuild the dwelling. Any structural or design correction of the single-family dwelling to meet setback requirement would leave unattractive reconstruction scars.

Another alternative is to 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 yard setbacks. Therefore, to consolidate and re-subdivide the property to modify property lines and adjust minimum side yard setbacks are not viable options. There are no reasonable alternatives to resolve the encroachment issue.

*(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 structural setbacks within a building site are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/ uses and boundary/property lines.

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.

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 single-family dwelling was constructed under valid building permits and other construction permits issued by the County of Hawai'i. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the surrounding properties.

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.

Therefore, the variance would be consistent with the general purpose of the zoning district and not be materially detrimental to the public's welfare or cause substantial adverse impact to the area's character or to adjoining properties.



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

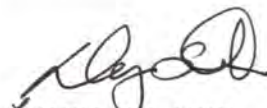
Based on the variance application's survey map, the existing dwelling on the subject property ("LOT 4-A") does not meet the minimum side (southwest) yard setback requirement pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

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. An Ohana or farm dwelling shall not be approved for the subject property, subject to the provisions of the Hawai'i County Code, Chapter 25, (Zoning) or state law, which may change from time to time.
4. 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.
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 building occupancy.

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 17-000406 null and void.

Sincerely,



MICHAEL YEE  
Planning Director

LHN:nci

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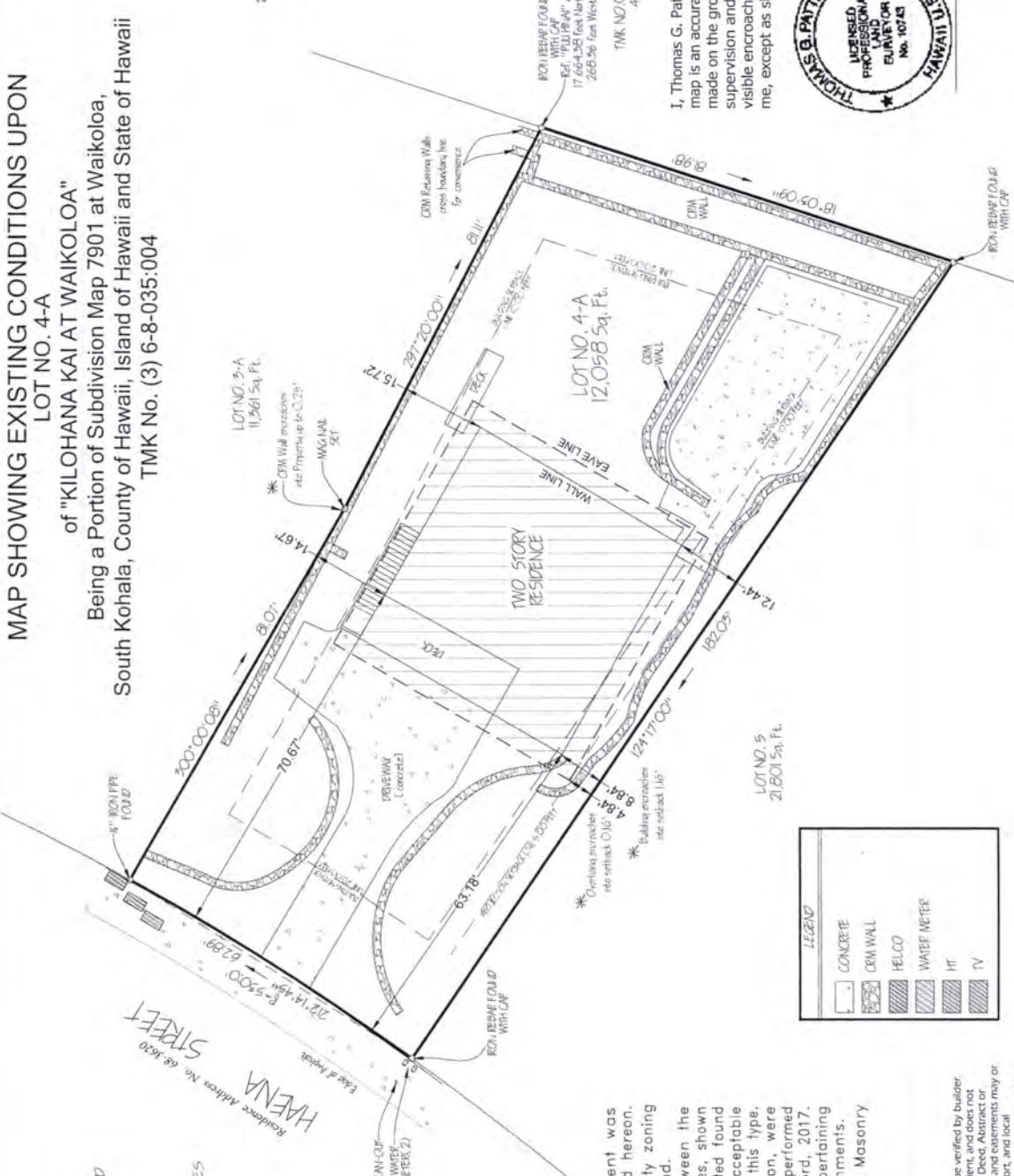
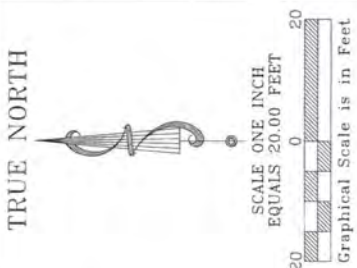
Enclosure: Exhibit A

cc: Kona Office  
Real Property Tax Office (Kona)  
Planning GIS, Gilbert Bailado (via email)

# EXHIBIT

A

## MAP SHOWING EXISTING CONDITIONS UPON LOT NO. 4-A of "KILOHANA KAI AT WAIKOLOA" Being a Portion of Subdivision Map 7901 at Waikoloa, South Kohala, County of Hawaii, Island of Hawaii and State of Hawaii TMK No. (3) 6-8-035:004



NOTE: BASIS OF AZIMUTH DERIVED  
USING SONAR GPS RTK SYSTEM  
NOTE: ALL CORNERS ARE FOUND  
8" IRON PIPES IN CONCRETE  
UNLESS OTHERWISE NOTED  
NOTE: ALL AZIMUTHS & DISTANCES  
ARE SHOWN & MAPPED HEREON  
IN A CLOCKWISE DIRECTION

- NOTES:
- \*1) A boundary encroachment was found as shown & mapped hereon.
  - \*2) Two violations of the County zoning setback codes were found.
  - 3) The distances shown between the property lines & the features, shown hereon, are based on selected found boundary monuments & acceptable tolerances for properties of this type.
  - 4) The features, shown hereon, were located by an actual survey performed on the ground on January 3rd, 2017.
  - 5) See accompanying report pertaining to setbacks and encroachments.
  - 6) CRM = Concrete, Rock & Masonry Wall.

LEGEND	
[Symbol]	CONCRETE
[Symbol]	CRM WALL
[Symbol]	HELCO
[Symbol]	WATER METER
[Symbol]	HT
[Symbol]	TV

I, Thomas G. Pattison, do hereby certify that this map is an accurate representation of a survey as made on the ground, by me, or under my direct supervision and that there are no apparent or visible encroachments or easements, known to me, except as shown and mapped hereon.



THOMAS G. PATTISON  
Hawaii License No. 10743  
January 6th, 2017--Job 17012

PATTISON LAND SURVEYING, INC.

P.O. Box 1016, Kaunaloa, Hawaii 96734  
tpattison@yahoo.com Phone 327-9439

Setback Lines are shown from current data, but should be verified by builder. The description on this plat was provided to us by the client, and does not guarantee dimensions, and should be compared to your Deed, Abstract or other documents. Dimensions shown on this plat are based on current data, and may not be shown, check your Deed, Abstract, Title Report, and local ordinances, no responsibility is assumed by Surveyor. Compare all points before building by same and report any discrepancy at once. Dimensions are shown in feet and decimal parts thereof, no dimension is to be assumed by scaling.