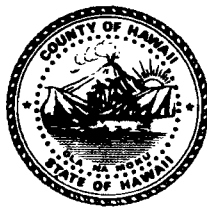


Harry Kim  
Mayor



Michael Yee  
Director

Daryn Arai  
Deputy Director

West Hawai'i Office  
74-5044 Ane Keohokalole Hwy  
Kailua-Kona, Hawai'i 96740  
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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  
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June 26, 2017

Don Kaipolei Kimi  
Tamera Hollinger Kimi  
P. O. Box 4277  
Hilo, Hawaii 96720

Dear Mr. & Mrs. Kimi:

**SUBJECT: Application: Variance - VAR 17-000421**  
**Applicant: DON KAIPOLEI KIMI AND TAMERA HOLLINGER KIMI**  
**Owner: DON KAIPOLEI KIMI AND TAMERA HOLLINGER KIMI**  
**Request: Variance from Chapter 25, Zoning, Article 5 Division 7, Section 25-5-76 Minimum Yards, Article 4, Division 4, Section 25-4-44(a) Permitted Projections into Yards and Open Space Requirements (Encroachment into Northwest Rear Yard Setback)**  
**Tax Map Key: 1-6-012:001 (Lot 80)**

The Planning Director certifies the **approval** of Variance No. 17-000421, subject to variance conditions. The variance will allow portion of the single-family dwelling to remain with a minimum 24.97-foot northwest rear yard setback with roof eave projection a minimum of 20.90-foot northwest rear yard open space, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space allowance. The variance will also allow a water tank to remain with a minimum 13.83-foot northwest rear yard setback and northwest rear yard open space, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space allowance. These exceptions are in lieu of the required 30-foot rear yard setback as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property contains approximately 3.130 acres and is located in Orchidland Estates, Keaau, Puna, Hawai'i. The subject property's street address is 16-570 Orchidland Drive, Keaau, Hawaii.

2. **County Zoning.** Agricultural – 3 acres (A-3a).
3. **State Land Use Designation.** Agricultural.
4. **Setback Requirements.** 30-foot front and rear; 20-feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on March 30, 2017. The variance application's survey map dated November 21, 2016 was prepared by Niels Christensen (The Independent Hawaii, LLC) and denotes a portion of the single-family dwelling and water tank built into the rear yard setback. **(See Exhibit A-Site Plan)**

The survey map dated November 21, 2016, prepared by Niels Christensen L.P.L.S. (The Independent Hawaii Surveyors, LLC), shows a section of the single-family dwelling encroaches 5.03-feet into the 30-foot northwest rear yard setback and the associated roof eave projection of 3.10-foot into the northwest rear yard open space, in lieu of the required 30-foot northwest rear yard setback and 24-foot northwest rear yard open space requirement. It also shows that the water tank encroaches 16.17 feet into the 30-foot northwest rear yard setback and 10.17 into the northwest rear yard open space.

The owners purchased the property on November 25, 2016 and was unaware of any encroachment of the single-family dwelling and water tank until a modern survey was conducted by Niels Christensen L.P.L.S (The Independent Hawaii, LLC), revealing the setback violations.

The encroachment leaves a minimum 24.97-foot rear yard setback with roof eave projection a minimum of 20.90-foot rear yard open space, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space allowance. The water tank depicts a minimum 13.83-foot rear yard setback, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space requirement.

6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit #BH2015-02473 was issued on December 22, 2015, for a single-family dwelling consisting of 4 Bedrooms, 3-1/2 Bathrooms, 7'2" Galvanized Water Tank, Open Covered Entry, Foyer With Closet, Kitchen.
7. **Agency Comments and Requirements.**
  - a. No comments received from State Department of Health (DOH) memorandum dated March 16, 2017: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. Department of Public Works Building Division memorandum dated May 5, 2017: "Reviewed with no comment".

8. **Public Notice.** The applicant filed a transmittal letter with copy of the notices sent to surrounding property owners via USPS. According to USPS certificate of mailing receipts and affixed postal receipts, the first and second notices were mailed on May 1, 2017 and May 8, 2017, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 18, 2017.
9. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners or the general public were received.

### **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 criterion (a) for the following reasons:**

The owner/applicant submitted the variance application to address or resolve portion of the single-family dwelling to remain with a minimum 24.97-foot northwest rear yard setback with roof eave projection a minimum of 20.90-foot northwest rear yard open space, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space requirement. The variance will also allow a water tank to remain with a minimum 13.83-foot northwest rear yard setback and northwest rear yard open space, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space requirements.

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The encroachment leaves a minimum 24.97-foot northwest rear yard setback with roof eave projection a minimum of 20.90-foot northwest rear yard open space, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space allowance. The water tank depicts a minimum 13.83-foot northwest rear yard setback, in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space requirement.

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. It

appears that the original dwelling improvements authorized under building permit #BH2015-02473 which was issued on December 22, 2015 and given final inspection approval October 11, 2016, prior to the Kimi's purchase. It also appears that building permit inspections of the premises, by the affected agencies during construction of the dwelling improvements, did not disclose any building encroachment issues or building setback irregularities at that time. The applicants purchased the property by Deed, dated November 25, 2016 after the building inspections were finalized. Subsequently, they received the surveyor's final report informing them of the encroachments into the setback

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 best use and development of the subject property.

### **Alternatives**

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

**The Variance application meets criterion (b) for the following reasons:**

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

Remove the building encroachments and/or redesign the single-family dwelling and water tank denoted on the survey map to fit within the correct building envelope as prescribed by the Zoning Code. This alternative would be deemed unreasonable, especially when the owners complied with the building permit process and were under the impression that the single-family dwelling was in compliance with all County requirements. Any structural or design correction of the single-family dwelling to meet setback requirement would leave unattractive reconstruction scars.

Because the encroachment is within the rear yard setback, to consolidate the subject property with the adjacent rear yard property, which is owned by someone else, and to re-subdivide the property to modify property lines and adjust minimum side yard setbacks are not viable options. Both of these alternatives are not practical. There are no reasonable alternatives to resolve the encroachment issue.

Therefore, there are no reasonable alternatives to resolve the encroachment issue.

### **Intent and Purpose**

***(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 criterion (c) for the following reasons:**

The intent and purpose of requiring building setbacks for a lot 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 and water tank 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.

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 single-family dwelling and water tank built on the subject property ("LOT 80") will not meet the minimum rear yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

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 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 and water tank 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 Additional Farm Dwelling permit 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.

Don Kaipolei Kimi and Tamera Hollinger Kimi

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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 initiate proceedings to null and void Variance-17-000421.

Sincerely,

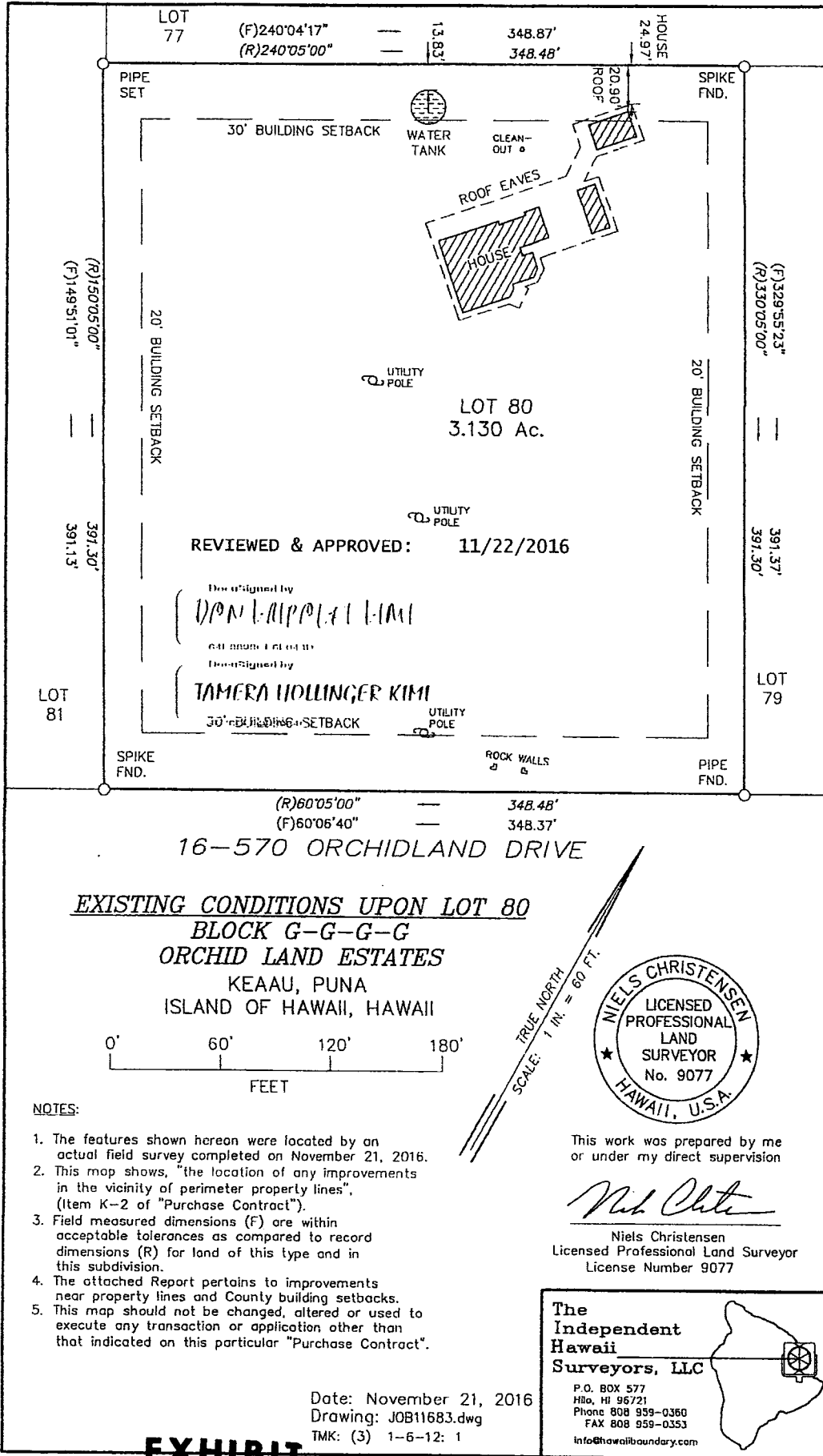
A handwritten signature in black ink, appearing to read 'Michael Yee', with a long horizontal stroke extending to the right.

MICHAEL YEE  
Planning Director

LHN:nci

P:\public\Admin Permits Division\Variances From CoH02\Zone1\VAR-17-000421TMK 1-6-012-001 Kimi.rtf5

cc: Real Property Tax Office (Hilo)  
Gilbert Bailado, GIS



**EXHIBIT**  
**A**