

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

May 5, 2011

Bernard & Glory Garner
13-6308 Kapoho-Kalapana Road
Pahoa, HI 96778

Dear Mr. & Mrs. Garner:

SUBJECT: VARIANCE-VAR 11-014

Applicant: BERNARD & GLORY GARNER
Owner: BERNARD & GLORY GARNER
**Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)**
Tax Map Key: 1-3-003:37, (SUB 07-000606)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance-VAR 11-014 subject to variance conditions. The variance permits proposed 4-lot subdivision (SUB 07-000606) to be created without providing a water system meeting the minimum requirements of the Department of Water Supply (DWS). The variance is from Hawai'i County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2).

The Planning Director has concluded that a variance application from the minimum water system requirements for proposed subdivision be **approved** based on the following findings:

BACKGROUND

1. **Location.** The subject property, containing approximately 44.5 acres, is situated at Opihikau, Puna, Hawai'i.
2. **Zoning.** The subject property is zoned Agricultural – 10 Acres (A-10a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicant or subdivider submitted a subdivision

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application (SUB 07-000606) and revised preliminary plat map (PPM), dated June 17, 2010, proposing to subdivide subject property into four (4) lots.

4. **Variance Application.** The variance application and request for variance from water supply requirements to permit the proposed subdivision was acknowledged by Planning Department letter dated April 4, 2011. This variance application includes background history, circumstances, and information regarding the pending subdivision application.
5. **Agency Comments and Requirements.**
 - a. The Department of Water Supply memorandum dated August 17, 2010. Refer to DWS memorandum in subdivision file.
 - b. The State of Hawai'i Department of Health (DOH) memorandum dated April 5, 2011. Refer to DOH memorandum in variance file.
 - c. No comments have been received from the Hawai'i County Fire Department as of this date.
6. **Public Notice.** The applicant filed a transmittal letter dated April 8, 2011 and attached mailing receipt and copy of notice sent to surrounding property owner(s) within 300 feet of the subject property. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on April 8, 2011. The applicant submitted an affidavit, dated April 13, 2011, regarding sign posted on the subject property, and photograph of the posted sign.
7. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

The first alternative requires the applicant or owners to construct extensive improvements and additions, including source, storage, transmission, booster pumps, and distribution facilities in accordance with DWS standards. The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

The above referenced water system improvements would be putting excessive demands upon the applicant or owners when a more reasonable alternative (e.g. private individual rainwater catchment

system for potable and emergency requirements) can be permitted pursuant to Rule 22, Water Variance.

INTENT AND PURPOSE-WATER VARIANCE

Water Variance. The intent and purpose of requiring a water system for and within the proposed subdivision is to assure that adequate water is available for human consumption and fire protection.

Section 23-84 of the Subdivision Code requires that all new subdivisions have a water system meeting with the minimum requirements of the Department of Water Supply. The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof or rain catchment water systems for potable or emergency uses.

An alternative to a water system meeting DWS standards would be to allow and utilize privately-owned individual rainwater catchment systems, which can meet the intent and purpose of the Subdivision Code and is allowed pursuant to Planning Department Rule 22-Water Variance, effective February 25, 2006. Generally, Rule 22 is both a rule and statement of criteria to be used so that consistent decisions can be made on water variance requests. Section 23-84 of the Subdivision Code requires a water system, and Rule 22 limits subdivisions requesting a variance from water supply to six (6) lots and requires a minimum 60 inches of annual rainfall for each lot served by catchment. Rule 22, states, in part:

“22-4 Minimum rainfall.

Except as provided in Rule 22-6, all lots to be served by catchment shall have an average annual rainfall of not less than 60”. The annual rainfall can be proven by rainfall records at comparable rain gauges, or by the USGS rainfall map.”

The analysis of existing rainfall within the subject TMK property, provided by the applicant, indicates that there is adequate rainfall to support individual, or separate, private rainwater catchment systems for potable and emergency uses for the proposed subdivision. The analysis of the applicant’s submittals and GIS rainfall data maintained by Planning Department indicates the proposed subdivision will receive approximately 80 inches to 120 inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

Given the circumstances cited by the applicant, the request for variance from water supply, at this time, 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, it is felt that this variance 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.

VARIANCE DECISION-CONDITIONS

The variance request to allow the proposed 4-lot subdivision of the subject property, without providing a water system meeting Department of Water Supply standards required, is **approved** pursuant to Rule 22, Water Variance and subject to following variance conditions:

1. The applicant, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. **WATER VARIANCE.** The owner assigns, or successors shall file a written agreement or approved written document with the Planning Department within one (1) year from the issuance of tentative subdivision approval and prior to receipt of final subdivision approval of SUB 07-000606. This written agreement, which shall contain the following deed language, being covenants, conditions, and restrictions affecting the proposed 4-lot subdivision, shall be duly recorded with the Bureau of Conveyances of the State of Hawai'i by the Planning Department at the cost and expense of the owners:
 - a. The applicant or subdivider agrees and accepts the fact that a County decidable public water system is not now able to service the proposed subdivision SUB 07-000606. Should the Council adopt a Unified Impact Fees Ordinance setting forth criteria for the imposition of exactions or the assessment of impact fees, conditions included herein shall be credited towards the requirements of the Unified Impact Fees Ordinance.
 - b. No further subdivision of lots created by SUB 07-000606 will be permitted unless county water system requirements, and other requirements of Chapter 23, Subdivisions, are met.
 - c. No condominium property regime (CPR) shall be permitted on any lots created by SUB 07-000606.
 - d. Any dwelling constructed on a lot not serviced by a County water system shall be provided with and maintain a private potable rain catchment system that includes a minimum 6000-gallon water storage capacity for domestic consumption or potable uses. This private water catchment system shall adhere to the Department of Public Works Building Division's "Guidelines for Owners of Rain Catchment Water Systems" as well as the State Department of Health requirements related to water testing and water purifying devices.

- e. Each permitted dwelling shall be provided with and maintain a private water supply system that includes an additional minimum 3,000-gallon water storage capacity for firefighting and emergency purposes. The location and capacity of the emergency water supply system, including the necessary compatible connector system, shall meet with the approval of the Hawai'i County Fire Department and be located in an area accessible to fire apparatus.
 - f. The Hawai'i County Fire Department also advises, as a precautionary measure for other uninhabited agricultural structures, that consideration be given to the provision of a similar water storage system for firefighting and emergency purposes.
 - g. In the event that there are any amendments or changes to the subdivision after the agreement is signed, the applicant shall be responsible for informing the County Planning Department of such amendments or changes so that the agreement can be amended concomitantly. Further, the written or recorded agreement shall be binding upon the owner(s), their successors, or assigns, and shall be incorporated as an exhibit and made part of each agreement of sale, deed, lease, or similar documents affecting the title or ownership of the existing property or approved subdivided lots.
 - h. In the event that the County notifies the owner(s) of any lot created by SUB 07-000606 that the County Water System has been upgraded, or an improvement district initiated to enable service to those lots, they shall participate in such improvement district or shall pay their pro-rata share of the upgrade and installation of laterals, as determined by the Department of Water Supply.
 - i. The subdivider and all grantees, successors, and assigns acknowledge that the parcel was created by a variance from the normal subdivision requirements of Hawai'i County, and that there are no special or unusual circumstances applying to the property, which deprive the owner of substantial property rights, or to a degree which obviously interferes with the best use or manner of development of the property, and hence, no grounds exist, or will exist, for a variance from the subdivision code to permit further subdivision of the property, and that changes in the owner's personal or financial situation after acquiring the property also will not constitute grounds for a variance from the subdivision code to permit further subdivision of the property.
3. The subdivision application's final plat map for proposed 4-lot subdivision shall meet all the requirements of the Hawai'i County Zoning Code and the Subdivision Code

Bernard & Glory Garner
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not covered by this variance.

4. The subdivider, owner(s), their assigns or successors shall pay any outstanding real property taxes and comply with all other applicable State statutes and County ordinances pertaining to building improvements and land use.

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 11-014 null and void.

Sincerely,

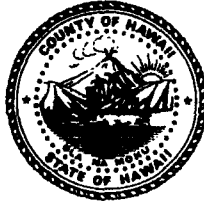


BJ LEITHEAD TODD
Planning Director

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xc: Manager-DWS
DPW—Engineering Division
SUB 07-000606

William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy Director

County of Hawai'i

PLANNING DEPARTMENT

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August 17, 2011

State of Hawai'i
Department of Land and Natural Resources
BUREAU OF CONVEYANCES
PO Box 2867
Honolulu, HI 96803

To Whom It May Concern:

SUBJECT: DECLARATION FOR VARIANCE VAR-11-000014
Declarant(s): BERNARD GARNER and GLORY GARNER,
TRUSTEES
TMK: (3)1-3-003:037 (SUB-07-000606)

Enclosed please find an Original and one (1) copy of the above described document required for pending subdivision of the above referenced subject TMK parcel(s), declarant's check # in the amount of \$30.00 USD payable to the Bureau of Conveyances, and required self-addressed stamped envelopes (SASE).

Sincerely,


BJ LEITHEAD TODD
Planning Director

SHG/shg

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Encs.: Original & Copy of Declaration for Variance VAR-11-000014
Check #519 (\$30.00)
2 SASE

xc: Mr. Paul H. Murray, LPLS, Paul H. Murray & Associates, LLC
SUB-07-000606

REGULAR SYSTEM: _____

LAND COURT SYSTEM: _____

AFTER RECORDATION, RETURN BY MAIL TO:

County of Hawai'i Planning Department
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720

TITLE OF DOCUMENT:

**DECLARATION OF VARIANCE and RESTRICTIONS
VAR-11-000014**

PARTIES TO DOCUMENT:

**AGENCY: PLANNING DIRECTOR
PLANNING DEPARTMENT,
COUNTY OF HAWAI'I**

**DECLARANTS: BERNARD GARNER and
GLORY GARNER, TRUSTEES
13-6368 Kapoho-Kalapana Road
Pāhoa, HI 96778**

PROPERTY DESCRIPTION:

Parcel "C", 'Opihikao Homesteads, Being Also a
Portion of Grant 5,014, consisting of approximately
44.537 acres, Kaueleau, 'Opihikao, Puna, Hawai'i

TMK No. (3) 1-3-003:037

DECLARATION OF VARIANCE- VAR-11-000014 and RESTRICTIONS

This Declaration is made this 18th day of August, 2011,

Whereas, **BERNARD GARNER and GLORY GARNER**, trustees, whose primary mailing address is 13-6368 Kapoho-Kalapana Road, Pāhoa, Hawai'i 96778, are the owners of real property bearing Tax Map Key (3) 1-3-003:037, more particularly described herein; and

Whereas, the owners desire to subdivide the above-described property or tax map keys (3) 1-3-003:037 parcel of land into four (4) lots; and

Whereas, the Planning Director for the County of Hawai'i has, by letter dated May 5, 2011, agreed to grant variance from the water system improvement requirements applicable to a proposed four (4) lot subdivision (SUB-07-000606) of the above-referenced property; and

Whereas, the grant of Variance – VAR-11-000014 by the Planning Director is subject to the following Variance conditions:

1. WATER VARIANCE:

- a. The applicant or subdivider agrees and accepts the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB-07-000606. Should the Council adopt a Unified Impact Fees Ordinance setting forth criteria for the imposition of exactions or the assessment of impact fees, conditions included herein shall be credited towards the requirements of the Unified Impact Fees Ordinance.
- b. No further subdivision of lots created by SUB-07-000606 will be permitted unless county water system requirements, and other requirements of Chapter 23, Subdivisions, are met.
- c. No condominium property regime (CPR) shall be permitted on any lots created by SUB-07-000606.
- d. Any dwelling constructed on a lot not serviced by a County water system shall be provided with and maintain a private potable rain catchment system that

includes a minimum 6000-gallon water storage capacity for domestic consumption or potable uses. This private water catchment system shall adhere to the Department of Public Works Building Division's "Guidelines for Owners of Rain Catchment Water Systems" as well as the State Department of Health requirements related to water testing and water purifying devices.

- e. Each permitted dwelling shall be provided with and maintain a private water supply system that includes an additional minimum 3,000-gallon water storage capacity for fire fighting and emergency purposes. The location and capacity of the emergency water supply system, including the necessary compatible connector system, shall meet with the approval of the Hawai'i County Fire Department and be located in an area accessible to fire apparatus.
- f. The Hawai'i County Fire Department also advises, as a precautionary measure for other uninhabited agricultural structures, that consideration be given to the provision of a similar water storage system for fire fighting and emergency purposes.
- g. In the event that there are any amendments or changes to the subdivision after the agreement is signed, the applicant shall be responsible for informing the County Planning Department of such amendments or changes so that the agreement can be amended concomitantly. Further, the written or recorded agreement shall be binding upon the owner(s), their successors or assigns and shall be incorporated as an exhibit and made part of each agreement of sale, deed, lease, or similar documents affecting the title or ownership of the existing property or approved subdivided lots.
- h. In the event that the County notifies the owner(s) of any lot created by SUB-07-000606 that the County Water System has been upgraded, or an improvement district initiated to enable service to those lots, they shall participate in such improvement district or shall pay their pro-rata share of the upgrade and

installation of laterals, as determined by the Department of Water Supply.

- i. The subdivider and all grantees, successors, and assigns acknowledge that the parcel was created by a variance from the normal subdivision requirements of Hawai'i County, and that there are no special or unusual circumstances applying to the property, which deprive the owner of substantial property rights, or to a degree which obviously interferes with the best use or manner of development of the property, and hence, no grounds exist, or will exist, for a variance from the subdivision code to permit further subdivision of the property, and that changes in the owner's personal or financial situation after acquiring the property also will not constitute grounds for a variance from the subdivision code to permit further subdivision of the property.

2. ROAD MAINTENANCE:

- a) The applicant or subdivider shall create a Road Maintenance Agreement or Association covering the common access easement over the "poles" of the flag lots to be shared proportionally by all four (4) lots.

IN CONSIDERATION OF THE AFORESAID, the Department hereby approves this Declaration of Restrictions as being in conformity with County Code, Chapter 23, Subdivisions.

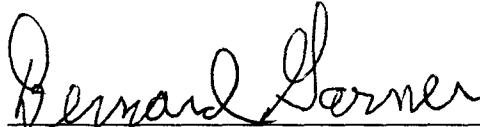
IN WITNESS WHEREOF, the parties have executed this agreement and agree to such provision which shall run with the land.

FIRST PARTY (AGENCY):

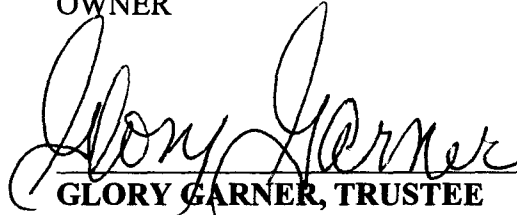


BJ LEITHEAD TODD – Planning Director
County of Hawai‘i Planning Department

SECOND PARTY (DECLARANTS):



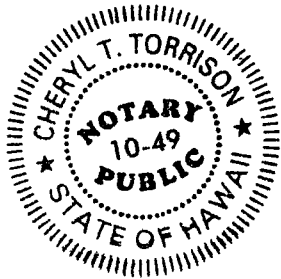
BERNARD GARNER, TRUSTEE
OWNER



GLORY GARNER, TRUSTEE
OWNER

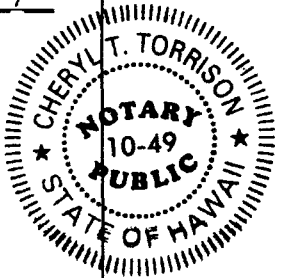
STATE OF HAWAII)
) SS.
COUNTY OF HAWAII)

On June 7, 2011 before me personally appeared Bernard Garner and Glory Garner to me known to be the person described in and who executed the foregoing instrument, and acknowledged that Bernard and Glory Garner executed the same as his/her free act and deed.



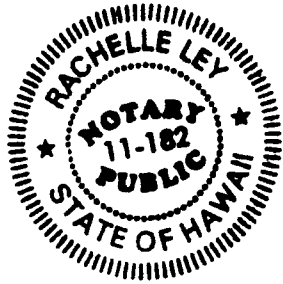
Cheryl Torrison
CHERYL T. TORRISON
Notary Public, Third Circuit, State of Hawai'i
My Commission expires: 03/07/2014

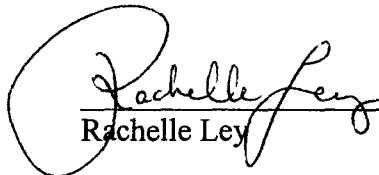
Doc. Date: <u>Not dated at time of notarization</u>	No. of Pages: <u>7</u>
Notary Name: Cheryl T. Torrison	Third Circuit
Doc. Description: <u>x DECLARATION OF VARIANCE AND RESTRICTIONS</u>	
<u>VAR-11-000014</u>	
<u>Cheryl Torrison</u> Notary Signature	<u>0607-2011</u> Date



STATE OF HAWAI'I)
) SS.
COUNTY OF HAWAI'I)


On August 18, 2011, before me personally appeared BJ Leithead Todd, to me personally known, who, being by me duly sworn, did say that BJ Leithead Todd is the Planning Director of the County of Hawai'i, and that the Planning Department of the County of Hawai'i has no corporate seal; and that the instrument was signed on behalf of the Planning Department of the County of Hawai'i, a government agency, and said BJ Leithead Todd acknowledged the instrument to be the free act and deed of said Planning Department, County of Hawai'i.




Rachelle Ley

Notary Public, Third Circuit, State of Hawai'i

My Commission Expires: June 12, 2015

Doc. Date: August 18, 2011	# Pages: 7
Notary Name: Rachelle Ley	Third Circuit
Doc. Description: Declaration of Variance and Restrictions VAR-11-000014 Tax Map Key No. (3) 1-3-003:037	
 Notary Signature	August 18, 2011 Date

