

William P. Kenoi  
Mayor



BJ Leithead Todd  
Director

Margaret K. Masunaga  
Deputy

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

October 27, 2011

Mr. John Clifford Rhoads  
P. O. Box 868  
Pahoa, HI 96778

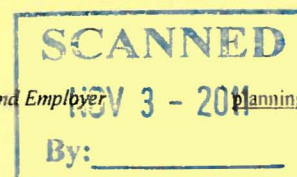
**SUBJECT: Application: VARIANCE-VAR 11-032**  
**Applicant: JOHN CLIFFORD RHOADS**  
**Owner: JOHN CLIFFORD RHOADS**  
**Request: Variance from Chapter 23, Subdivisions,**  
**Article 6, Division 2, Improvements Required**  
**Tax Map Key: 1-3-002:019; (SUB 03-000047)**

Dear Mr. Rhoads,

After reviewing your variance application, the Planning Director certifies the approval of Variance, VAR 11-032, subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 03-000047) to be created without providing access and roadway improvements required by Tentative Approval letter dated February 4, 2004. The variance is from Hawai'i County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required. The Planning Director has concluded that a variance application from the roadway requirements for the proposed subdivision be **approved** based on the following findings:

**BACKGROUND**

1. **Location.** The subject property, comprising approximately 25.92 acres, is identified as Lot 20, Grant 5529 and situated at Kama'ili, Puna, Hawai'i.
2. **Zoning.** The property is zoned Agriculture -10 acres (A-10a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicant submitted a subdivision application (SUB 03-000047) proposing to subdivide the subject property into two (2) lots and a revised preliminary plat map (PPM), dated June 2, 2003. Lot 20A is



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proposed to measure approximately 10 acres while Lot 20B is proposed to measure approximately 15 acres. Approval of VAR 1395 (File No. VAR 03-053), for relief from water requirements for one of the proposed lots, was issued on November 21, 2003. During the same time frame VAR 1425 (File No. VAR 04-013), regarding relief from road requirements, was reviewed and denied.

4. **Variance Application.** The variance application and request for variance from roadway standards, to permit the proposed subdivision and privately maintain the roadways in the vicinity "as is", was acknowledged by Planning Department letter dated September 12, 2011. This variance application includes background history, circumstances and information regarding the pending subdivision application.
5. **Agency Comments and Requirements:**
  - a. The State of Hawai'i Department of Health (DOH) memorandum dated September 15, 2011 (Refer to DOH memorandum in variance file).
  - b. Hawai'i County Fire Department (HFD) memorandum dated September 20, 2011 (Refer to HFD memorandum in variance file).
  - c. No comments concerning the variance were received from the Department of Public Works (DPW) - Engineering Division as of this date. However, following a recent request for a time extension on the associated subdivision, a memo from DPW dated June 23, 2011 was provided. One of the comments identified "if improvements are required, submit construction plans and drainage report for review and comment" (Refer to DPW memorandum in subdivision file).
6. **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, notices were mailed on July 1, 2011 and September 20, 2011. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 18, 2011. The applicant submitted an affidavit, dated September 26, 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**

### **Lot Access/Roadways:**

The subdivider has been requested to construct access and roadways pursuant to an earlier DPW memorandum dated July 2, 2003, or roadway requirements pursuant to Chapter 23, Subdivisions. The subject property currently has access to a public roadway (Kalapana-Kapoho Beach Road) via Homestead Road. Comments provided during 2003 referenced that, in order for the County to assume the maintenance of the road, various improvements would be required including, but not limited to, a minimum 20-foot wide dedicable pavement and 3-foot minimum paved shoulders.

In lieu of improving or constructing roadways required by the DPW 2003 memorandum, the owner contends that the existing gravel roadway(s) is sufficient access to the proposed lots. The one additional lot to be created by the proposed subdivision will create minimal additional impact. The owner is requesting a variance not to construct roadway improvements as initially required by the DPW memorandum, but rather privately retain maintenance of the roads to a lesser standard, as it currently is done by the area's property owners.

As identified in the "Agency Comments and Requirements" section of this analysis, a more recent memo has been released from the DPW since their 2003 memo. The prior DPW request specified minimum road improvements while the 2011 memo left it up to the discretion of the Planning Department.

The owner has obtained a cost estimate from Yamada and Sons, Inc., stating that the total cost of paving approximately one mile of road would be approximately \$730,000. The applicant further identifies an additional \$500,000 for excavating and widening the road. Considering the foregoing issues, there are circumstances applying to the subject property which exist either to a degree which deprives the applicant substantial property rights that would be available, or to a degree which obviously interferes with the highest and best use or manner of development of the property.

## **INTENT AND PURPOSE-ROADWAY VARIANCE**

The intent and purpose of access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots that is clearly defined and accessible from a public road by domestic and farm vehicles, police, fire, and other service vehicles under various weather conditions without constant maintenance.

Therefore, given the circumstances cited by the applicant and evaluation of the request to improve the existing roadway(s) as identified by the DPW 2003 memorandum, the Planning Director has concluded that the current roadway is sufficient access to the subject property. The



request for variance from roadway standards, 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 application to allow alternative roadway improvements to be constructed in lieu of 20-foot wide dedicable pavement with a minimum 3-foot paved shoulders, to permit proposed 2-lot subdivision (SUB 03-000047), is hereby **approved** subject to the following variance conditions:

#### **General Conditions:**

1. The applicant, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant or 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. No condominium property regime (CPR) shall be permitted on any lots created by SUB 03-000047.
4. No Planning Department or Building Division permit will be issued to allow construction of an ohana dwelling on the subject property or upon lots created by proposed subdivision, subject to provisions of the Zoning Code or State Law, which may change from time to time.
5. The subdivision application's (SUB 03-000047) final plat map shall meet with all the conditions of this variance and/or the Hawai'i County Zoning Code and Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 03-000047.



6. 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.

**Road Variance Conditions:**

1. The subdivider, owners, their assigns, or successors understand that the two (2) lots arising out of SUB 03-000047 will use and maintain the privately-owned road, and/or any other necessary easement(s), on their own, without any expectation of governmental assistance to maintain the existing privately-owned access or roadway improvements within the subdivisions preliminary plat map, or any other necessary access and utility easement(s) within or upon proposed lots or proposed subdivision.

The applicant, owners, their assigns, or successors shall file a written agreement or approved written document with the Planning Department prior to receipt of final subdivision approval of SUB 03-000047. The proposed lots shall form an Homeowner or Road Association or include appropriate deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed lots arising from the approval of the pending subdivision application and be duly recorded at the Bureau of Conveyances of the State of Hawai'i by the Planning Department at the cost and expense of the applicant:

- a. The applicant and/or owner(s) shall indemnify and defend the State of Hawai'i or County of Hawai'i from any and all liability arising out of vehicular access to and from the subject property utilizing this existing private utility and access easement.
- b. Upon written demand of the County of Hawai'i, the applicant and /or owners, their assigns, or successors shall agree to participate and pay their fair share percentage of any improvement district adopted for the purpose of roadway improvements serving the proposed lot(s) arising out of SUB 03-000047. Should the improvement district require acquisition of any privately-owned rights-of-way fronting the lots arising out of SUB 03-000047, such rights-of-way shall be dedicated to the County without cost and the value of the dedication credited to the fair share contribution of the respective lot owner(s). 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.
- c. The future lot owner(s) agree to participate in any road maintenance



Mr. John Clifford Rhoads  
Page 6  
October 27, 2011


agreement or/and pay their fair share to maintain the roadway. 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.

2. The subdivision application's final plat map for proposed 2-lot subdivision shall meet all the requirements of the Hawai'i County Zoning Code and the Subdivision Code not covered by this variance.
3. 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 11-032, null and void.

The applicant is further reminded of any outstanding conditions of approval from VAR 03-053, concerning relief from minimum water requirements for one of the proposed lots. Said conditions include, but are not limited to, the need to file a restrictive deed document prior to receipt of final subdivision approval.

Sincerely,

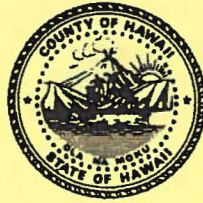


BJ LEITHEAD TODD  
Planning Director

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xc: DPW—Engineering Division  
SUB 03-000047

William P. Kenoi  
Mayor



BJ Leithead Todd  
Director

Margaret K. Masunaga  
Deputy

West Hawai'i Office  
74-5044 Ane Keohokalole Hwy  
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Fax (808) 961-8742

April 4, 2012

Mr. John Clifford Rhoads  
P.O. Box 868  
Pahoa, HI 96778

Dear Mr. Rhoads:

**SUBJECT: DECLARATION FOR VARIANCE for VAR 11-000032**  
**Document No(s). A-44400715**  
**TMK: (3) 1-3-002:019 (SUB 03-000047)**

Enclosed is Document No. A-44400715 (Original) for your files. A copy of this document will be maintained in our files at the Hilo office.

If you should have any questions, please contact this office at (808) 961-8288.

Sincerely,

BJ LEITHEAD-TODD  
Planning Director

SHG/shg

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Enclosure: Agreement (Original)

xc: SUB 03-000047 (Ltr. only)



30/12/10

THE ORIGINAL OF THE DOCUMENT  
RECORDED AS FOLLOWS:  
STATE OF HAWAII  
BUREAU OF CONVEYANCE  
DOCUMENT NO. \_\_\_\_\_  
DATE - TM Doc A-44400715  
February 27, 2012 1:00 PM

REGULAR SYSTEM: \_\_\_\_\_

LAND COURT SYSTEM: \_\_\_\_\_

AFTER RECORDATION, RETURN BY MAIL TO:

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

TITLE OF DOCUMENT:

DECLARATION FOR VARIANCE  
VAR -11-032 (03-053)

PARTIES TO DOCUMENT:

AGENCY: PLANNING DIRECTOR  
PLANNING DEPARTMENT  
COUNTY OF HAWAII

DECLARANTS: JOHN CLIFFORD RHOADS  
PO BOX 868  
PAHOA, HI 96778

PROPERTY DESCRIPTION:

Lot 20 (Sub 03-0047)  
Consisting of 25.92 acres

TMK No. 3-1-3-002:019



**DECLARATION FOR VARIANCE – VAR 11-032 (03-053)**

This Declaration is made this 23 day of Jan., 2012.

Whereas, John Clifford Rhoads whose primary mailing address is PO Box 868, Pahoa, HI 96778 is the owner of real property bearing Tax Map Key No. 3-1-3-002-019 more particularly described herein; and

Whereas, the owner desires to subdivide the above-described property or tax map key 3-1-3-002-019 parcel of land into (2) lots; and

Whereas, the Planning Director for the County of Hawai'i has, by letter dated November 21, 2003 agreed to grant variance from the water system improvement requirements and has by letter dated October 27, 2011 agreed to grant variance from Roadway improvement requirements applicable to a proposed two (2) lot subdivision (SUB 03-000047) of the above referenced property; and

Whereas, the grant of Variance – VAR 11-032 (03-053) by the Planning Director is subject to the following Variance conditions:

WATER VARIANCE

- a. The owners agree and accept the fact that a County dedicable public water system is not now able to service the proposed lot without public water created by SUB 03-0047. 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. Any lots created by SUB 03-0047 may not be made subject to a condominium property regime.
- c. The owners agree and accept the fact that the County will not, at this time, bear the responsibility of supplying public water to the proposed or affected lot created by SUB 03-0047 not serviced by a County water system.
- d. Any farm dwelling constructed on a proposed lot not serviced by a County water system shall be provided with and maintain a private potable rain catchment system which 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 farm dwelling shall be provided with and maintain a private water supply system which includes and 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 Hawaii County Fire Department. The Hawaii County Fire Department also advises as a precautionary measure for the other uninhabited agricultural structures that consideration be given to the provision of a similar water storage system for fire fighting and emergency purposes.

f. 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.

g. In the event that the County notifies the owner(s) of the lot(s) created by SUB 03-0047 that the Hawaii County Water System has been upgraded or an improvement district initiated to enable service to any lot created by SUB 03-0047 without County water, the owner(s) of the affected lot created by SUB 03-0047 without County water shall participate in such improvement district or shall pay their pro-rata share of the upgrade and installation of laterals, as determined by the Hawaii County Department of Water Supply.

h. The subject property was created by subdivision of a larger parcel pursuant to a variance from the water supply requirement in Section 23-84 of the Hawaii County Code. The subdivider or grantee, the assigns or successors acknowledges that there are no special or unusual circumstances existing on the property, and therefore, there are no grounds for the subdivider or grantee, the assigns or successors to request a further variance from the water supply requirements to permit further subdivision of the subject property.



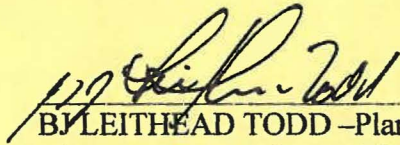
## ROADWAY VARIANCE

- a. The applicant and/or owner(s) shall indemnify and defend the State of Hawai'i or County of Hawai'i from any and all liability arising out of vehicular access to and from the subject property utilizing this existing private utility and access easement.
- b. Upon written demand of the County of Hawai'i, the applicant and/or owner(s), their assigns, or successors shall agree to participate and pay their fair share percentage of any improvement district adopted for the purpose of roadway improvements serving the proposed lot(s) arising out of SUB 03-000047. Should the improvement district require acquisition of any privately-owned rights-of-way fronting the lots arising out of SUB 03-000047, such rights-of-way shall be dedicated to the County without cost and the value of the dedication credited to the fair share contribution of the respective lot owner(s). Should the Council adopt a Unified Impact Fees Ordinance setting forth criteria for the imposition of exactions or the assessment of impact fees, conditions include herein shall be credited towards the requirements of the Unified Impact Fees Ordinance.
- c. The future lot owner(s) agree to participate in any road maintenance agreement or/and pay their fair share to maintain the roadway. 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.

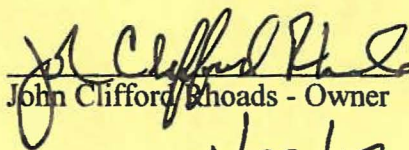
IN CONSIDERATION OF THE AFORESAID, the Department  
Hereby approves this Declaration for Variance as being in conformity  
with County Code, Chapter 23, Subdivisions.

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

FIRST PARTY (AGENCY):

  
BY LEITHEAD TODD - Planning  
Director County of Hawai'i Planning  
Department

SECOND PARTY (DECLARANTS):

  
John Clifford Rhoads - Owner  
1/23/12



STATE OF HAWAII )  
 ) .SS  
COUNTY OF HAWAII )

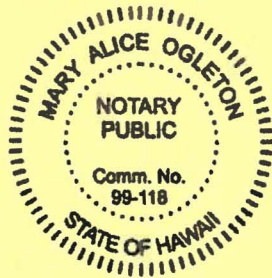
On this 23rd day of Jan., 2012 before me personally appeared JOHN CLIFFORD RHOADS to me know to be the person (s) described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.



Name Mary Alice Ogleton

Notary Public, State of Hawaii

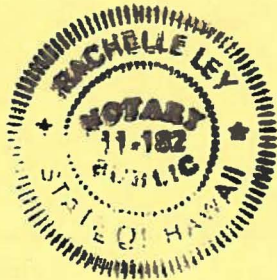
My Commission expires: MAR 16 2015



Dec. Description: Declaration  
for balance  
Dec. Date: 1/23/2012 No. Pages: 7  
MARY ALICE OGLETON 3rd  
Notary Public Name Not. Circuit

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

On this 6<sup>th</sup> day of February, 2012, 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*  
\_\_\_\_\_  
Rachelle Ley

Notary Public, State of Hawai'i  
Third Judicial Circuit

My Commission Expires: June 12, 2015

Document Date:	<u>January 23, 2012</u>	No. of Pages:	<u>7</u>
Notary Name:	<u>Rachelle Ley</u>	Third Judicial Circuit	
Doc. Description:	<u>Declaration for Variance VAR-11-000032</u>		
	<u>Tax Map Key (3) 1-3-002:019</u>		
<i>Rachelle Ley</i> Notary Signature	FEB 6 2012 Date		

