

**CARLSMITH BALL LLP** PLANNING DEPARTMENT  
COUNTY OF HAWAII

A LIMITED LIABILITY LAW PARTNERSHIP

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OUR REFERENCE NO.:

November 12, 2010

**HAND DELIVERY**

BJ Leithead Todd  
Director  
Planning Department  
101 Pauahi Street, Room 3  
Hilo, Hawaii 96720  
Attn: Larry Nakayama

Re: **Withdrawal of PUD Application No. 10-000019 and Variance Application No. 10-032**

Applicant: Richard Lewis and James Petty

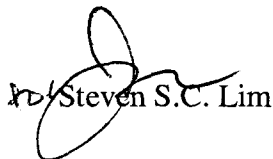
Tax Map Key: (3) 8-7-008:002, 033 and 034 (the "Property")

Dear Ms. Todd:

On behalf of our clients, Richard Lewis and James Petty, we hereby withdraw Planned Unit Development Application No. 10-000019 and Variance Application No. 10-032.

Please contact my paralegal Jason Knable to coordinate pick-up the Applications. Should you have any questions concerning this request, please feel free to contact me. Thank you for your assistance.

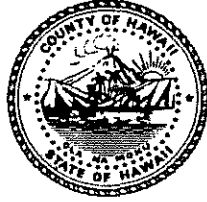
Very truly yours,

  
s/s/ Steven S.C. Lim

SSL/JKK

067752

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

March 8, 2011

Steven L. C. Lim  
Carlsmith Ball, LLP  
121 Waianuenue Avenue  
Hilo, Hawai'i 96720

Dear Mr. Lim:

**SUBJECT: VARIANCE: VAR 10-032**  
**AGENT: STEVEN S.C. LIM/CARLSMITH BALL, LLP**  
**APPLICANT: RICHARD LEWIS AND JAMES PETTY**  
**OWNER; LOREN L. SAXTON & MARY M.**  
**SAXTON OF THE SAXTON TRUST AND**  
**MALAMA INVESTMENT, LLC**  
**Request: Variance from Chapter 23, Subdivisions,**  
**Article 6, Division 2, Improvements Required,**  
**Section 23-84, Water Supply, (1)(2)**  
**Tax Map Key: 8-7-008:002, 033 and 034 (PUD-10-000019)**

After reviewing your variance application, the Planning Director certifies the **approval** of VAR 10-032 subject to variance conditions. The variance permits proposed 14-lot agricultural Planned Unit Development (PUD 10-000019) 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 from the minimum water system requirements for proposed subdivision be **approved** based on the following findings:

### **BACKGROUND**

1. **Location.** The subject properties, measure approximately 72.178 acres in size and are located at Kaohe 1-5 and Waikāku'u, within the District of South Kona,

Hawai'i Island and County of Hawai'i, and are identified as being Tax Key designations (3)-8-7-008:002 (Lot A-1), 033 (Lot A-2) and 034 (Lot A-3).

2. **Zoning.** The subject property is zoned Agricultural – 5 acres (A-5a) by the County and designated Agriculture ( “A” ) by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicants/owners submitted a Planned Unit Development application (PUD 10-000019) dated August 8, 2010, proposing to subdivide subject property into fourteen (14) lots.
4. **Variance Application.** The applicant submitted the variance application on September 23, 2010.
5. **Agency Comments and Requirements:**
  - a. The State Department of Health (DOH) memorandum dated November 3, 2010 (refer to memorandum in variance file).
  - b. Department of Water Supply Memos dated December 2 and 6, 2010 (refer to letters in variance file).
  - c. The Hawai'i County Fire Department memorandum dated November 8, 2010 (refer to memorandum in variance file).
6. **Notice to Surrounding Owners.** The applicant submitted a copy of notices sent to surrounding property owners, including an affidavit stating notices were sent or mailed to surrounding property owners by USP. According to the affidavit, the notices were mailed by the applicant to the surrounding property owners on November 8, 2010. In accordance with Ordinance No. 05-135, the applicants submitted a notarized affidavit, dated November 24, 2010, and photographs to confirm posting of required sign. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 5, 2010.

**Comments from Surrounding Property Owners or Public.**

- a. An objection letter from Robert W.S. Chang was received on November 30, 2010.

**SPECIAL AND UNUSUAL CIRCUMSTANCES**

After considering the variance application and background information, including rainfall information provided by the applicant, and agency comments, the Planning Director has

determined that there are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the applicant or owners of property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of development of the subject property.

### ALTERNATIVES

There are no other reasonable alternatives in resolving the difficulty of the applicant. The first alternative would require the applicant to connect to the existing Department of Water Supply water line 5.1 miles from the subject property at the Ho'okena Junction. The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards. Both alternatives would be cost prohibitive and not feasible for a fourteen (14) lot subdivision.

As such, the imposition of improving the existing public water system or providing an approved alternative water system for the proposed subdivision would be putting excessive demands upon the applicant when a more reasonable alternative is available.

### INTENT AND PURPOSE

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.

The alternative to a water system would be an approval of a variance from "standards for water," to allow and utilize privately-owned individual rain water catchment systems for proposed 14-lot subdivision, which can meet the intent and purpose of the Subdivision Code and can be 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 that a proposed subdivision requesting a variance to allow individual rainwater catchment systems for potable and emergency needs must receive 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 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 indicated the proposed subdivision will receive at least 60+ inches of rainfall annually.

With reference to Planning Department Rule 22-5 “Maximum Number of Lots” the applicant in its application for variance cites the following:

**‘B. The County can approve a Planned Unit Development Subdivision by way of rain catchment variance in excess of six (6) lots.**

Planning Department Rule 22-5 states; “Maximum Number of Lots. Except as provided in Rule 22-6, no more than six lots shall be allowed in a catchment subdivision.”

Although Planning Department Rule 22-5 specifically limits the amount of lots that can be created in a rainwater catchment subdivision to six (6) lots, in theory, the Applicant could process a Parcel Consolidation Resubdivision Action to revert the Property back to the original configuration under “Exhibit E” to create the three (3) rectangle lots, submit three (3) separate PUD Applications for these lots, along with three (3) separate Water Variance Applications, and create identical density as proposed under the Applicant’s Master Plan (see “Exhibit D”). As such, the proposed project satisfies the intent of Rule 22-5.

The processing of multiple applications would require the applicant to unnecessarily phase the development, utilize a more intricate and costly system of internal roadways to access these lots, which would create multiple irregular lot lines to achieve this similar density, and triple the amount of engineering and surveying required, when a much simpler and more viable option is available. As such further impetus to approve this request under a Subdivision Application, the Kona Community Development Plan ( “KCDP” ), promotes the implementation of “Clustered Rural Subdivision Guidelines”. According to the KCDP, “The intent of the guidelines is to minimize grading, preserve the natural appearance of the land to the extent possible, ensure agricultural use in the State Land Use Agricultural District, and create a rural setting for residences.” The Applicant

has determined that the fourteen (14) lot Master Plan, as designed, will better preserve and maintain the rural environment of the existing agricultural land, by limiting the amount of grading required for a more intricate internal roadway system by processing a sing subdivision application.”

**Therefore, based on the foregoing facts and findings, this variance request 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 requested 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 a proposed 14-lot Planned Unit Development (PUD) of the subject property without providing a water system meeting DWS standards is **approved** subject to the 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 owners, their 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 PUD 10-000019. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the 14 lots not serviced by a County water system of pending subdivision application and shall 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 owners:
  - a. The owners agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision PUD 10-000019. 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. 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 additional lots created by PUD 10-000019 not serviced by a County water system. No further subdivision of the lots created by PUD 10-000019 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.

- c. Any lots created by PUD 10-000019 may not be made subject to a condominium property regime (CPR).
- d. Any 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 dwelling shall be provided with and maintain a private water supply system which 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. 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.
- 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 PUD 10-000019 that the County Water System has been upgraded or an improvement district initiated to enable service to these lots, the owner(s) of the lot(s) 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.
- h. 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 shall meet all the requirements of the Hawai'i County Zoning Code and the Subdivision Code not covered by this variance. No other variance from Chapter 23, Subdivisions, shall be granted to permit subdivision application PUD 10-00019.
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 the subject Variance Permit (VAR-10-032) null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

LHN: nci

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xc: Manager-DWS  
DPW - Engineering Division  
PUD 10-00019