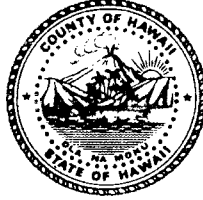


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PRIVILEGED AND CONFIDENTIAL COMMUNICATION ATTORNEY-CLIENT
COMMUNICATION NOT A PUBLIC RECORD

MEMORANDUM

TO: Chris Yuen
Director of Planning

FROM: Amy G. Self *AGS*
Deputy Corporation Counsel

DATE: October 24, 2005

SUBJECT: Morton Bassan's Request to Change Tentative Subdivision
Approval Condition based on Whitlow v. Jennings and Kaneshiro;
Corporation Counsel WRK 05-10863

Pursuant to your request regarding the above subject matter, I am providing the following legal opinion.

I. Issue Presented

Whether Section 23-76, Hawai'i County Code, which prohibits the conveyance of land prior to final subdivision approval, is in derogation of an owner's common law right to sell land, and therefore an invalid condition, in light of the Hawaii Supreme Court case, *Whitlow v. Jennings and Kaneshiro*?

II. Brief Answer

No. Based on the specific facts presented in this case, Section 23-76, Hawai'i County Code, is a valid condition and must be enforced by the Planning Department, unless Mr. Bassan's sales agreement and instructions to escrow contain the necessary language to protect the public and the buyers.

Contrary to Mr. Bassan's belief, the Court's decision in *Whitlow* did not invalidate County ordinances like Section 23-76, it merely held that such ordinances are in derogation of the common-law right to sell and buy land and must, therefore, be strictly construed in their prohibitive applications, while giving due regard to the purpose of the ordinance. The purpose of County ordinances such as Section 23-76 is to protect the public and the unwary purchaser from substandard subdivisions. Therefore, the Court held that an agreement to sell that is placed in escrow with the condition that the agreement is of no force and effect until final subdivision approval is granted by the Planning Department does not violate the County ordinance because the public and the buyers are fully protected since the contract is of no force and effect until the subdivision has been approved by the Planning Department.

In the case at hand, the escrow agreement provided to me by Mr. Bassan contains no language which protects the purchaser. In other words, unlike the escrow agreement in *Whitlow*, there is no condition in Mr. Bassan's escrow agreement that requires the seller to obtain final subdivision approval from the Planning Department before the agreement will be in full force and effect. If, under these circumstances, the Planning Department agrees not to enforce Section 23-76, there is no incentive for Mr. Bassan to complete the improvements required for obtaining final subdivision approval, which goes against the whole purpose of Section 23-76. In addition, it could potentially expose the planning department to liability for failing to enforce Section 23-76 for the protection of the buyers.

If, however, the sales agreements for each lot contain such a condition and are placed into escrow with instructions to the escrow agent that the agreement to sell is to be ineffectual and not delivered to the buyer until after final subdivision approval is obtained, Section 23-76 would be in derogation of Mr. Bassan's right to sell land, pursuant to *Whitlow*, and therefore should not be enforced against Mr. Bassan under such circumstances. Therefore, the Planning Department should require Mr. Bassan to submit a copy of the agreement to sell and instructions to escrow before determining whether to require Mr. Bassan to comply with Section 23-76.

III. Discussion

Section 23-76, Hawai'i County Code, provides:

Land shall not be offered for sale, lease or rent in any subdivision, nor shall options or agreements for the purchase, sale, leasing or rental of the land be made until approval for recordation of the final plat is granted by the director.

The selling and buying of land by an owner and a purchaser are common-law rights; therefore, statutes and ordinances in derogation of a common-law right must be strictly construed in their prohibitive applications, giving due regard to the purposes of the statutes and ordinances and the evils which the legislature intended to prohibit, and will not be extended beyond the course of the evils sought to be prevented. See *Whitlow v. Jennings and Kaneshiro*, 40 Haw. 523 (1954). "Restrictions upon the sale of unapproved subdivisions are twofold: (1) for the protection of the public, and (2) for the protection of purchasers of subdivisions." *Id.* at 528. The purpose of the Hawai'i statutes and County ordinances relating to subdivisions is "to prevent the subdividing of large areas into smaller areas for the purpose of sale, lease or rent, without providing for adequate light, air, fire protection, traffic safety and to insure the proper sanitation and drainage of lands. The provision against the owner selling such land without approval is to protect an unwary purchaser who may find he has bought a parcel of land upon which he cannot build, cannot install public utilities, etc., because the lot does not comply with the building ordinances or other health or police measures." *Id.* at 528.

The seller in *Whitlow* agreed to subdivide and enter into and execute an agreement to sell, and the buyer to purchase a lot, upon the condition that the seller would, in conformity with the statutory requirements, obtain approval of the proposed subdivision by the planning commission of the City and County of Honolulu. It was further agreed that the agreement to sell would be placed in escrow and the agreement to sell would be wholly ineffectual and would not be delivered until final approval by the city planning commission of the proposed subdivision, at which time – and not before – the escrow agreement would be delivered by the escrow holder to the buyer and thereupon take effect. Based on the foregoing facts, the Court held that the escrow agreement did not fall within the purpose of the statute because "(1) the public was fully protected as the contract was of no force and effect until the subdivision was approved by the planning commission; (2) the purchaser was protected for the same reason; and (3) the seller would be protected in that the placing of the agreement in escrow was an assurance that the contract to subdivide, when performed, would not be in vain and the various expenses . . . would not be lost to the vendor." *Id.* at 532-533.

The whole purpose of Section 23-76 and other similar ordinances and statutes is to protect the public and the unwary purchaser from substandard subdivisions. Unlike the escrow agreement in *Whitlow*, Mr. Bassan's escrow agreement with First American Title Company does not contain a condition requiring the seller to obtain final subdivision approval from the Planning Department before the agreement to sell will be effectual and delivered to the buyer. In other words, the escrow agreement provided to me by Mr. Bassan contains no language which would prevent the conveyance of lots to buyers prior to Mr. Bassan obtaining final subdivision approval from the Planning Department. If, under these circumstances, the Planning Department agrees not to enforce Section 23-76, there is no incentive for Mr. Bassan to complete the improvements required for obtaining final subdivision approval, which goes against the

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whole purpose of Section 23-76. This could potentially expose the Planning Department to lawsuits filed by the buyers of the lots. Therefore, the Planning Department should not agree to waive Section 23-76, unless Mr. Bassan provides a copy of the sales agreement and instructions to escrow containing appropriate language to protect the buyers.

IV. Conclusion

The Court in *Whitlow* makes it clear that a statute or ordinance that is in derogation of the common law right to sell and buy land, such as Section 23-76, Hawai'i County Code, must be construed strictly in its prohibitive application, giving due regard to the purpose of the statute or ordinance and the evils which the legislature intended to prohibit. The purpose of Section 23-76 and other similar ordinances and statutes is to protect the public and unwary buyers from substandard subdivisions. The placing of an agreement to sell for lots in a proposed subdivision upon the express condition that the agreement to sell will be ineffectual and not delivered to the buyer until final approval by the Planning Department is granted does not violate Section 23-76 because the public and buyers are fully protected since the agreement to sell is of no force and effect until the subdivision is approved by the Planning Department. Therefore, the Planning Department should require Mr. Bassan to provide a copy of the agreement to sell and the instructions to escrow to determine whether they contain the necessary language to protect the public and the buyers. If no such language exists, the Planning Department must require Mr. Bassan to comply with Section 23-76.

AGS:cm

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