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PLANNING DIRECTOR OF THE COUNTY OF HAWAI'I

BEFORE THE BOARD OF APPEALS

COUNTY OF HAWAI'I

In re the Appeal of

PUU LANI RANCH CORP.,

Appellant,

From the March 20, 2006 decision of the
Planning Director, County of Hawai'i,
purporting to impose remediation
requirements on Appellant and to restrict the
availability of building permits for Lot 1 of
File Plan 2241, Puu Lani Ranch Subdivision,
Puanahulu, Island of Hawai'i, State of
Hawai'i,
TMK (3) 7-1-006-054

BOA NO. 06-000024

COUNTY OF HAWAI'I PLANNING
DIRECTOR'S HEARING MEMORANDUM

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COUNTY OF HAWAI'I PLANNING DIRECTOR'S HEARING MEMORANDUM

County of Hawai'i Planning Director, Christopher J. Yuen, ("Planning Director"),

by and through his attorneys, submits this Hearing Memorandum in support of his March
20, 2006 decision.

I. INTRODUCTION

Puu Lani Ranch Corp. ("PLRC") is appealing from the March 20, 2006 final decision of the Planning Director, County of Hawai'i, in which the Planning Director set out the remedial action that will be required because of PLRC's destruction of the Henry Hao homestead site in violation of the conditions of final subdivision approval. A prehearing conference relating to the appeal was set by the Chair of the Board of Appeals ("Board"), Valta A. Cook, for Thursday, July 6, 2006 at 2:00 p.m. A statement of the facts leading up to this appeal is provided below.

1. **Statement of the Facts**

A significant historic site, which was assessed by the State Historic Preservation Division (SHPD) as an excellent example of a historic period homestead, was bulldozed in the Pu'u Lani Ranch Phase II Subdivision. Record on Appeal ("ROA") at 11. It looks as if it was deliberately destroyed because "the [bulldozing] was limited to the vicinity of the [historic] site." ROA at 11. PLRC, the developer of the subdivision, who is also the owner of the lot, was supposed to preserve the site as a condition of the final subdivision approval. ROA at 122 and 84 – 87, respectively. There had been previous correspondence in which the owner acknowledged their responsibility to protect archaeological sites. ROA at 104 -105. Yet, Newell Bohnett, President of PLRC, admitted under oath during a hearing before the Board on February 10, 2006 that he authorized the grubbing/bulldozing of the historical site. ROA at 360.

After being informed by SHPD of the destruction of the site, the Planning Director tried to find out who was responsible, and sent a letter asking Mr. Bohnett and the prospective purchasers, Mr. and Mrs. Glidden, to give any information they had about

the destruction. ROA at 114 -115 and 118 – 119, respectively. In the meantime, the Planning Director refused to give clearance for any building permit on the lot because of the non-compliance with the requirements of the subdivision approval, pending the investigation into who was responsible. ROA at 114 -115 and 118 – 119, respectively.

Rather than provide the requested information to the Planning Director, which was known by Mr. Bohnett at that time, PLRC asked its attorney to respond to the Planning Director's letter by stating that PLRC "has no objection to the disappearance of the site" or "to any bulldozing that occurred on the property," and that PLRC "has the right to do as [it] pleases with the site or feature." ROA at 122-123. However, Mr. Bohnett had previously stated in a letter dated September 18, 2003, that "[w]e are doing our best to comply with all of the policies and regulations of the State Department of Land and Natural Resources Historic Preservation Division." ROA at 104-105. In that same letter, Mr. Bohnett stated that "[t]he present policy for building now requires that the builder get approval from the DLNR-SHPD before he receives his grading permit." ROA at 104-105. At the end of that same letter, Mr. Bohnett stated that "[w]e will continue to do all that we can to help enforce this policy of obtaining approval before construction." ROA at 104-105.

The historic preservation process, for this project and generally, requires an "inventory survey" (to find out what is there and determine what is significant), and a "preservation plan" (sometimes called "mitigation".) Section 13-277-2 of the Hawai'i Administrative Rules (HAR) defines "mitigation" as "the measures taken to minimize impacts to significant historic properties." The preservation plan would normally include things like recording an easement around the site, marking it with yellow tape prior to

any land clearing, briefing any contractor about where it was, having other permanent markings, etc.

In order to get final subdivision approval, PLRC promised to do two things: (1) prepare an archaeological inventory survey, and (2) protect certain important historic sites identified by that survey. ROA at 84-85. The final subdivision approval was on condition that the developer “comply with all requirements of the State Department of Land and Natural Resources, Historic Preservation Division, related to historic sites.” ROA at 86-87. Specifically, PLRC was to prepare “detailed mitigation plans for the preservation and/or data recovery of all significant historic sites in the Phase II [subdivision],” the plans would have to be approved by SHPD and the County’s Planning Department, and SHPD and the County’s Planning Department would have to “verify in writing the successful execution of these plans.” ROA at 84-85. No land alterations were supposed to occur before the completion of these mitigation plans, without written approval of SHPD and the County’s Planning Department. ROA at 84-85. PLRC, through its attorney, agreed to these conditions. ROA at 84-85.

PLRC repeated these promises over the years. For example, in a February 4, 1994 letter, SHPD agreed that the developer’s surety bond could be released because PLRC was still committed to the conditions and “no new land alterations” would occur in the project area prior to the completion of the survey and the mitigation plans. ROA at 164-165.

The inventory survey was finally completed and approved by SHPD on September 10, 2002. ROA at 108-109. Among the sites that was significant, and which was supposed to be preserved, was the Henry Hao Homestead, site 18483. ROA at 100-

101 and 108-109. PLRC's archaeologist recommended that this site be preserved, and SHPD agreed in a letter dated May 15, 2001. ROA at 100-101. The SHPD letter specifically stated that "the next step in the review process would be submittal of a preservation plan for 18,483." ROA at 100-101. The preservation plan would have had the specific requirements (like proper marking) for the site, but it was already determined that it was supposed to be preserved. ROA at 100-101.

However, PLRC never did submit a preservation plan to SHPD. ROA at 112-113. Instead, PLRC tried to claim that this was the responsibility of the individual lot owners. ROA at 104-105. The Planning Director wrote the developer on Sept. 10, 2003 saying that a preservation plan must be prepared for site 18483 for the review and approval of DLNR-SHPD. ROA at 96-97. In response, Mr. Bohnett wrote a letter dated September 18, 2003, saying that all lot owners were being reminded that it was "mandatory" that they receive approval from DLNR-SHPD before they start construction. ROA at 104-105. Mr. Bohnett said "[w]e will continue to do all that we can to help enforce this policy of obtaining approval before construction." ROA at 104-105. Mr. Bohnett's lawyer, Philip Leas, wrote a letter dated September 6, 2003 stating that where lots containing known or suspected burials have been sold to third parties, it was the buyer's responsibility to fulfill the requirements for a preservation plan. ROA at 106-107. They did not disclaim responsibility, however, for lots they still owned, like Lot 54. ROA at 106-107.

On November 23, 2006, PLRC's attorney filed an appeal based on a letter from the Planning Director dated October 24, 2005. ROA at 114-115. The appeal was heard by the Board on February 10, 2006, but the Board voted to continue the hearing on the

appeal to April 13, 2006. At the April 13, 2006 hearing, the Board determined that the Planning Director's October 24, 2005 letter was not a final decision of the Planning Director and the appeal was dismissed based on the grounds that the Board did not have jurisdiction.

In a letter dated March 20, 2006, the Planning Director informed PLRC of his final decision to take the following steps: 1) establish the approximate location of the historic site on the lot including a ten feet buffer and once established, issue building permits for Lot 54, so long as no development area falls within the established site boundary; 2) PLRC is ordered to reconstruct the historic site to its approximate condition before the bulldozing occurred. ROA at 404 – 407. PLRC's attorney filed an appeal from that decision and is scheduled to be heard by the Board on July 14, 2006.

II. LEGAL ARGUMENT

1. **The Planning Director is Authorized under the Hawai'i County Charter to Enforce Conditions of Subdivision Approval**

It is well established that "an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted." *Morgan v. Planning Department, County of Kauai*, 104 Haw. 173, 184; 86 P.3d 982, 993 (2004). Generally, an administrative agency has only those powers that the legislature expressly confers upon it, but an agency may also have implied powers that are reasonably necessary to carry out the express responsibilities given to it by the legislature. *See id.* The reason for such implied powers is that "as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency." *Id.*

The Hawai'i County Charter ("Charter") expressly confers upon the Planning Director the following powers in pertinent part:

Section 6-4.2. Planning Director.

...
(e) Administer the subdivision and zoning ordinances and regulations adopted thereunder.

...
(i) Perform such other related duties and functions as may be necessary or required pursuant to law and this charter.

Although the Charter does not confer upon the Planning Director the express power to grant final subdivision approval subject to certain conditions, such power is implied under Section 6-4.2(i) of the Charter because it is necessary for administering the subdivision code, the purpose of which in part is to protect the health and safety of the residents of Hawai'i County. Accordingly, it also stands to reason that the Planning Director has the implied power to enforce the conditions upon which final subdivision approval is granted by the Planning Director. Without such implied power, there would be no reason to make such conditions because the subdivision applicant would never be held accountable to complying with the conditions once final subdivision approval is granted.

On the other hand, the Planning Director could require the completion of all conditions prior to granting final subdivision approval, but this would preclude developers from securing final subdivision approval prior to completion of construction of improvements secured by a bond or other security. As a result, most developers would be unable to obtain a loan to cover the cost of the improvements because they would be unable to sell any lots until securing final subdivision approval.

In other words, it is illogical to think that the Planning Director is without implied powers to enforce the conditions imposed for final subdivision approval after final subdivision has been granted. The Planning Director's powers are broadly stated in Section 6-4.2 of the Charter because as a practical matter, the County Council cannot foresee all the problems incidental to carrying out the duties and responsibilities of the Planning Director.

As a condition of final subdivision approval, PLRC was required to preserve a historic site, which it failed to do. Like any other condition required for securing final subdivision approval, the Planning Director has implied powers to enforce the condition. The remedial action required by the Planning Director as stated in his March 20, 2006 letter to PLRC does not require PLRC to do any more than what PLRC was originally required to do to secure final subdivision approval.

As for the withholding of a building permit: the ability to get a building permit for a house on this lot was contingent upon final subdivision approval. The subdivision allowed PLRC to make many lots, on each of which, PLRC could get a building permit for a farm dwelling. The final subdivision approval was on condition that the preservation plan be finished (which included the actual preservation of the site.) The condition has been breached. While it is impossible to undo the subdivision by re-consolidating this lot with an adjoining property (because adjoining lots do not belong to this owner), it is possible to prevent PLRC from realizing the benefit of the subdivision by issuing building permits for Lot 54, only so long as no development area falls within the established site boundary.

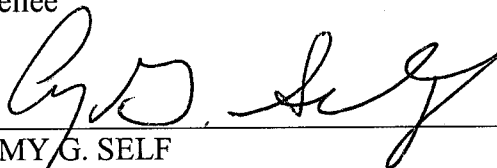
2. **The Planning Director has not Denied PLRC Fundamental Due Process by Rendering a Decision Without Notice of an Opportunity for a Hearing**

As previously discussed, the Planning Director has implied powers to enforce the conditions of final subdivision approval. PLRC was required by SHPD to preserve historic site 18483, pursuant to Section 6E-42 of the Hawai'i Revised Statutes, which was made a condition of final subdivision approval by the Planning Director. In his letter dated March 20, 2006, the Planning Director informed PLRC of his final decision regarding PLRC's violation of its condition of final subdivision approval and provided PLRC with notice of its right to appeal such decision within thirty days of the date of the decision to the Hawai'i County Board of Appeals, pursuant to County of Hawai'i Board of Appeals Rules of Practice and Procedure and Chapter 91 of the Hawai'i Revised Statutes. Therefore, PLRC has not been denied fundamental due process by the Planning Director.

Based on the foregoing, the Planning Director respectfully requests that the Board of Appeals uphold his March 20, 2006 decision pertaining to PLRC's violation of condition of final subdivision approval.

DATED: Hilo, Hawai'i, July 6, 2006.

CHRISTOPHER J. YUEN, PLANNING
DIRECTOR OF THE COUNTY OF HAWAI'I,
Appellee

By 
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