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PLANNING DIRECTOR, COUNTY OF HAWAI'I,  
the Appellee

IN THE BOARD OF APPEALS  
COUNTY OF HAWAI'I  
STATE OF HAWAI'I

In the Matter of the Petition for Declaratory  
Ruling  
of

JAN R HERRON-WHITEHEAD AND  
LAVERNE TILL

Petition for Declaratory Ruling relating to  
Change of Zone Ordinance No 96-  
117(M)(1)(b), Hawai'i Revised Statutes §92F,  
Uniform Information Practices Act, and  
County of Hawai'i General Plan  
§13 2 5 6 2(g) "Connector Road" Course of  
Action

BOA NO DR 06-000001

**CHRISTOPHER J YUEN, PLANNING  
DIRECTOR, COUNTY OF HAWAI'I'S  
REPLY MEMORANDUM TO  
PETITIONERS' OPPOSITION TO THE  
PLANNING DIRECTOR'S MOTION TO  
DISMISS, CERTIFICATE OF SERVICE**

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**CHRISTOPHER J YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I'S REPLY  
MEMORANDUM TO PETITIONERS' OPPOSITION  
TO THE PLANNING DIRECTOR'S MOTION TO DISMISS**

COMES NOW, CHRISTOPHER J YUEN, PLANNING DIRECTOR, COUNTY OF  
HAWAI'I (hereinafter "Director"), by and through his attorney, Deputy Corporation Counsel,

AMY G SELF, replies to PETITIONERS' OPPOSITION TO THE PLANNING DIRECTOR'S MOTION TO DISMISS as follows

**I PETITIONERS' REQUEST FOR A DECLARATORY RULING BY THE BOARD OF APPEALS ON THE BASIS OF ZONING ESTOPPEL IS PREMATURE**

Petitioners claim that they have legal and equitable reasons for requesting a declaratory ruling based on the doctrine of equitable estoppel or zoning estoppel. Although Petitioners infer that the Director has given Parker Ranch the "green light" to proceed with its project, Petitioners provide no evidence that the Director has given Parker Ranch official assurance that it may proceed without the need to comply with the conditions set forth in the Rezoning Ordinance No. 96-117<sup>1</sup>. Instead, Petitioners provide their interpretation of condition M of the Rezoning Ordinance No. 96-117 and certain documents obtained from the Planning Department's records regarding the development.

**A The Director has given no assurance to Parker Ranch that it may proceed without complying with the conditions of Rezoning Ordinance No. 96-117**

Contrary to Petitioners' allegations, there is no indication in the evidence provided by Petitioners or otherwise that the Director has taken any final discretionary action or given any official assurance on which Parker Ranch could rely to disregard the conditions of Rezoning Ordinance No. 96-117 and in fact, the Director is without legal authority to do so. The County Council is the only agency with authority to change the conditions of a rezoning ordinance. Should Parker Ranch expend substantial money on planning its development with disregard to the conditions of Rezoning Ordinance No. 96-117, it will do so at its own risk. *See County of Kauai v. Pacific Standard Life Insurance Company et al.*, 65 Haw. 318 at 330 (1982) (cited in Petitioners' Opposition to Planning Director's Motion to Dismiss).

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<sup>1</sup> Ordinance No. 96-117 was amended by Ordinance No. 02-25 and should be referred to as such. Condition M to which Petitioners refer did not change when Ordinance No. 96-117 was amended.

**B Petitioners' allegations are speculative and should be dismissed**

Although Petitioners are in agreement with the Tentative Approval requirements for Phase 3 of Parker Ranch's development as currently stated, Petitioners's argument is that the Director may someday change the current Tentative Approval requirements for Phase 3. Based on this, Petitioners are requesting a declaratory ruling that the Director cannot change the current Tentative Approval. It is speculative and premature at best to go through a declaratory ruling over what the ordinance requires when there is no current controversy between Petitioners and the Director. Therefore, the Petitioners Petition should be dismissed pursuant to Rule 6-4(1) of the County of Hawai'i Board of Appeals Rules of Practice and Procedure.

**II THE BOARD DOES NOT HAVE JURISDICTION TO ISSUE A DECLARATORY RULING ON ISSUES RAISED IN PETITIONERS' PETITION FOR DECLARATORY RULING**

The Board is without authority to issue a declaratory ruling on the issues presented in the Petition, unless they fall within the scope of Section 91-8, Hawai'i Revised Statutes (HRS). Section 91-8, HRS, allows an interested party to petition an agency for a declaratory order only as to "the applicability of any statutory provision or of any rule or order of the agency." HRS § 91-8. The Hawai'i Supreme Court in *Fasi v Hawai'i Public Employment Relations Board*, 60 Haw. 436, 443 (1979) held that the words "statutory provision" under Section 91-8, HRS, fairly imply that an administrative agency may issue a declaratory ruling only with respect to a question which is relevant to some action which it might take in the exercise of its powers. In that case, the Court determined that the Hawai'i Public Employment Relations Board had jurisdiction to issue a declaratory ruling because of the powers granted to it by Chapter 89, HRS.

In the case at hand, however, the Board of Appeals (hereinafter "Board") does not have jurisdiction to issue a declaratory ruling on the issues presented in Petitioners' Petition for Declaratory Ruling (hereinafter "Petition") because the issues do not relate to the limited powers

granted to the Board by the County Charter. Section 6-10.2 of the County Charter creates the Board and limits its powers to hearing and determining appeals from final decisions of the Director regarding matters within his respective jurisdiction and conducting hearings in accordance with Chapter 91, HRS, and the County Charter. If, for example, an appeal of a final decision of the Director was pending before the Board, the appellant or any party to the appeal could petition the Board for a declaratory ruling on how the Board will apply the Board's Rules with respect to evidence, oral arguments, or whether the Board will waive or suspend any of the Board's Rules, etc. In these examples, the Board would certainly have jurisdiction to issue a declaratory ruling because they relate to the powers granted to the Board by Section 6-10.2 of the County Charter. If the Board refused to issue a declaratory ruling regarding an issue over which it has jurisdiction, the Board's refusal to make a ruling could be appealed to the courts. See *Lingle v HGEA*, 107 Hawai'i 178 (2005).

Petitioners cite to the *Lingle* case for the proposition that the wording in Section 91-8, HRS, "was meant to induce agencies to issue declaratory rulings more frequently than had occurred in the past." However, this statement was taken out of context and is misleading as a result. The complete sentence to which Petitioners refer is as follows:

The language of this section does not necessarily require an agency to issue a declaratory order in every instance but is intended to induce them to do so more frequently than they may have been doing in the past.

The issue addressed by the Court in *Lingle* was whether the circuit court had jurisdiction over a refusal by the Hawai'i Labor Relations Board ("HLRB") to issue a declaratory ruling, not whether the HLRB had jurisdiction to issue a declaratory ruling. Although not addressed by the Court, the HLRB did have jurisdiction to issue a declaratory ruling because the issue related to an interpretation of a collective bargaining agreement. Unlike the HLRB in *Lingle*, the Board

does not have jurisdiction over the issues presented in Petitioners' Petition because they do not relate to an appeal of a final decision of the Director

Finally, the Petitioners misinterpret the argument presented in the Memorandum in Support of the Director's Motion to Dismiss regarding the jurisdiction of the Board. Petitioners mistakenly argue that the issues in the Petition are relevant to subdivision and zoning matters within the jurisdiction of the Director, which is not at issue in the matter at hand. The issues in the Petition must be relevant to matters within the jurisdiction of the Board in order for the Board to have authority to issue a declaratory ruling under Section 91-8, HRS. Consequently, the Board does not have jurisdiction to issue a declaratory ruling on the issues presented in Petitioners' Petition.

### **III THE BOARD DOES NOT HAVE JURISDICTION TO ISSUE A DECLARATORY RULING CONCERNING POTENTIAL VIOLATIONS OF THE UNIFORM INFORMATION PRACTICES ACT ("UIPA")**

As stated previously, the Board has jurisdiction only over matters which relate to the powers granted to the Board by the County Charter (i.e., to hear and determine appeals from final decisions of the Director regarding matters within his respective jurisdiction and to conduct hearings in accordance with Chapter 91, HRS, and the County Charter). Petitioners are under the mistaken impression that they must exhaust their administrative remedies with the Board before filing a complaint with the State of Hawaii Office of Information Practices ("OIP") or with the circuit court regarding alleged violations of the UIPA. Even though there is a provision in the County Charter that "[a]ll records of every agency of the county shall be open to the inspection of any person at any time during business hours, except as otherwise provided by law," the County Charter does not grant the Board jurisdiction over such matters unless it involves an appeal from a final decision of the Director. If Petitioners feel that a violation of the

UIPA has occurred, the proper forum for their complaint is either with the OIP or the circuit court

**IV CONCLUSION**

The Board's authority to issue a declaratory ruling under section 91-8, HRS, is limited by the powers granted to the Board by the Hawai'i County Charter. The powers granted by the Hawai'i County Charter to the Board are to hear and determine appeals from final decisions of the Director regarding matters within his jurisdiction. Because the issues presented in the Petition are not relevant to appeals from final decisions of the Director regarding matters within his jurisdiction, the Board is without authority to issue a declaratory ruling pursuant to 91-8, HRS.

Based upon all of the foregoing, the Director respectfully requests that the Board dismiss the Petition for Declaratory Ruling pursuant to Rule 6-4 of the BOA Rules.

Dated Hilo, Hawai'i, December 4, 2006

CHRISTOPHER J YUEN,  
Planning Director,  
County of Hawai'i,  
Appellee

BY



AMY G SELF  
Deputy Corporation Counsel  
His Attorney

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COUNTY OF HAWAI'I  
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Action

BOA NO DR 06-000001

CERTIFICATE OF SERVICE


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served upon the  
following on December 4, 2006

	<u>Hand</u> <u>Delivery</u>	<u>U S Mail</u>	<u>Email</u>
MARGARET WILLIE Attorney at Law 65-1316 Lihpalı Road Kamuela, Hawai'i 96743		X	X
VALTA A COOK, Chairman Board of Appeals County of Hawai'i 101 Pauahı Street, Suite 3 Hilo, Hawai'i 96720	X		

	<u>Hand Delivery</u>	<u>U S Mail</u>	<u>Email</u>
PATRICIA K O'TOOLE Office of the Corporation Counsel Hilo Lagoon Centre 101 Aupuni Street, Suite 325 Hilo, Hawai'i 96720 Represents Board of Appeals	X		
STEVEN S C LIM, ESQ Carlsmith Ball LLP 121 Waiianuenue Ave Hilo, Hawai'i 96720		X	X
CHRISTOPHER J YUEN Planning Director County of Hawai'i Planning Department 101 Pauahi Street, Suite 3 Hilo, Hawai'i 96720	X		

Dated Hilo, Hawaii, December 4, 2006

  
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 AMY G. SELF  
 Deputy Corporation Counsel  
 County of Hawai'i