

LINCOLN S. T. ASHIDA 4478
Corporation Counsel

AMY G. SELF 7628
Deputy Corporation Counsel
County of Hawai'i
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720
Telephone: 961-8251
Facsimile: 961-8622
E-mail: aself@co.Hawai'i.hi.us

Attorney for CHRISTOPHER J. YUEN,
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,
MOTION TO DISMISS PETITION FOR
DECLARATORY RULING; MEMORANDUM
IN SUPPORT OF MOTION;
CERTIFICATE OF SERVICE

s:\b&c\boa\Till DR 06-000001\mntn to dismiss 11-17-06 AGSkd

CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I'S, MOTION
TO DISMISS PETITION FOR DECLARATORY RULING

COMES NOW, CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF
HAWAI'I (hereinafter "Director"), by and through his attorney, AMY G. SELF, Deputy
Corporation Counsel, hereby moves this Board of Appeals (hereinafter referred to as the

“Board”) motion to dismiss the Petition for Declaratory Ruling filed by JAN R. HERRON-WHITEHEAD and LAVERNE TILL (hereinafter referred to as “Petitioners”) on or about October 12, 2006.

This motion is made pursuant to Rules 3-12 and 6-4(4) of the Rules of Practice and Procedure of the Hawai’i County Board of Appeals and is based upon and supported by the memorandum in support of the motion attached and incorporated herein by reference.

DATED: Hilo, Hawai’i, November 17, 2006.

CHRISTOPHER J. YUEN, Planning
Director, County of Hawai’i, Appellee

By _____
AMY G. SELF
Deputy Corporation Counsel
His Attorney

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

MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. BACKGROUND

On or about October 12, 2006, Petitioners filed a Petition for Declaratory Ruling (hereinafter "Petition"), pursuant to Rule 6 of the Rules of Practice and Procedure of the Hawai'i County Board of Appeals. Petitioners' overall objective in requesting a declaratory ruling from the Board is "[t]o Determine Whether the County of Hawai'i Planning Director has the Authority to Waive Enforcement of a Rezoning Ordinance Approval Condition Required in Rezoning Ordinance No. 96-117(M)(1)(b): and Related Issues concerning the Uniform Information Practices Act, Hawai'i Revised Statute [sic] §92F, and the County's General Plan § 13.2.5.6.2(g) "Connector Road" Course of Action[.]" *See Petition to the Hawai'i County Board of Appeals for Declaratory Ruling (hereinafter "Petition") at 1.*

More specifically, Petitioners are requesting the Board to issue a declaratory ruling on the following three issues:

1. “Pursuant to the Hawai‘i County Charter 13-20(a) and the Uniform Information Practices Act, HRS 92-F11(b), Petitioners request that the Board of Appeals make a Declaratory Ruling declaring that the Planning Director must allow the public to have access to (to inspect and make copies of) its records regarding the processing of subdivisions, rezoning ordinance conditions, or other development matters, without exclusion of or removal of unprivileged documents from those files. . . .”
See Petition at 30.
2. “Petitioners request that the Board of Appeals make a Declaratory Ruling declaring that, in reviewing subdivision applications, the Planning Director must require conformity with relevant specific provisions of the General Plan, and in the case of the Lua‘i III subdivision, including insistence upon compliance with the “Connector Road” mandate, that is, Transportation Course of Action 13.2.5.6.2(g). Accordingly, the Planning Director must refrain from any further action on the Lua‘i III subdivision, or any other development with the Town Center project, unless and until Parker Ranch agrees complete Phases 1 and 3 of the Connector Road according to the time schedule set forth in the Lua‘i III Tentative Plan Approval letter. In the event that Parker Ranch/Kaomalo are unwilling to comply with this General Plan mandate – which simply implements the Connector Road provisions in Rezoning Ordinance 96-117.”
See Petition at 33.
3. “Petitioners request that the Board of Appeals make a Declaratory Ruling that the Planning Director does not have the authority to waive the “requirements of Rezoning Ordinance 96-117(M)(1)(b), which pursuant to the “adjacent development” timing trigger now requires construction of the Connector Road phases 1 and 3 in conjunction with the Lua‘i III subdivision. The Planning Director must not take any further action on any of the Lua‘i at Parker Ranch subdivision applications, or on any other proposed Town Center Development, unless and until Parker Ranch/Kaomalo commits to now complete Phases 1 and 3 of the Connector road, and acts in compliance with that obligation. The Planning Directory [sic] must stop accommodating this developer’s avoidance of it [sic] Connector Road obligation and immediately require revision of the Lua‘i III construction plans to show the infrastructure plans for Phases 1 and 3 of the Connector Road including the associated intersections, and otherwise administer this subdivision, including the requirement of bonding for road improvements, pursuant to the time frame set forth in the Planning Department’s March 22, 2005 Lua‘i III Tentative Approval letter.

In addition, Petitioners request that the Board of Appeals also make a Declaratory Ruling declaring that the Planning Director enforce all other

provisions of Rezoning Ordinance 96-117 in a timely manner, including but not limited to requiring that Parker Ranch immediately submit the detailed annual self monitoring progress reports required in Rezoning Ordinance 96-117(K).”
See Petition at 40.

II. RELEVANT LAWS

Section 91-8 of the Hawai‘i Revised Statutes (“HRS”) provides:

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

Rule 6-4 of the County of Hawai‘i Board of Appeals Rules of Practice and Procedures (hereinafter referred to as the “BOA Rules”) provides:

The Board may for good cause refuse to issue a declaratory order where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts or facts that can be expected to exist in the near future;
- (2) The petitioner's interest is not of the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief;
- (3) The issuance of the declaratory order may affect the interests of the Board in litigation that is pending or may reasonably be expected to arise; or
- (4) **The matter is not within the jurisdiction of the Board.**
...
(Emphasis added.)

Section 6-10.2 of the Hawai‘i County Charter (2000), which establishes the jurisdiction of the Board, provides in pertinent part:

The board of appeals shall establish its rules of procedure and shall:

- (a) Hear and determine appeals from **final decisions of the planning director** or the director of public works **regarding matters within their respective jurisdictions.**
- (b) Conduct hearings in accordance with Chapter 91, Hawai‘i Revised Statutes, and this charter.
...
(Emphasis added.)

Section 25-2-20 of the Hawai‘i County Code 1983 (2005 Edition, as amended), which defines who may appeal from final decisions of the planning director regarding zoning issues, provides in pertinent part:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director’s written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
 - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person’s interest is clearly distinguishable from that of the general public; and
 - (2) The person is or will be adversely affected by the decision.... .

Section 23-5 of the Hawai‘i County Code 1983 (2005 Edition, as amended), which defines who may appeal from final decisions of the planning director regarding subdivision issues, provides in pertinent part:

Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the director’s decision, appeal the decision to the board of appeals.
... .

III. LEGAL ARGUMENT

The Board is without jurisdiction to issue a declaratory ruling on the issues presented in the Petition. Petitioners are essentially asking the Board to interpret provisions from the County Charter, the HRS, the County's General Plan, and Rezoning Ordinance No. 96-117.

As discussed below, the Board's authority to issue a declaratory ruling under Section 91-8 of the HRS is limited by the powers granted to the Board in the County Charter.

A. The Issues presented in the Petition fall outside the scope of § 91-8, HRS.

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, HRS. To fall within the scope of Section 91-8, HRS, the issues presented by the Petition must relate to a statutory provision or a rule or order of the Board. *See, Fasi v. Hawai'i Public Employment Relations Board*, 60 Haw. 436 (1979). "The words 'statutory provision' are limited by their context, and do not embrace every provision of the statute laws of the state." *Id.* at 443. The issues or questions presented by the Petition must be relevant to some action which the Board might take in the exercise of the powers granted by the Hawai'i County Charter. *Se, Id.* at 443.

The Hawai'i County Charter grants the following powers to the Board:

- (a) Hear and determine appeals from final decisions of the planning director regarding matters within his jurisdiction; and
- (b) Conduct hearings in accordance with Chapter 91, Hawai'i Revised Statutes, and the County Charter.

See County of Hawai'i Charter (2000), § 6-10.2. Therefore, the issues presented in the Petition must be relevant to appeals from final decisions of the Director regarding matters within the Director's jurisdiction to fall within the Board's authority to issue a declaratory ruling under Section 91-8, HRS.

B. The issues presented in the Petition fall outside the scope of the specific powers granted by the County Charter.

The issues presented in the Petition do not relate to any final decisions made by the Director regarding matters within the Director's jurisdiction. Instead, the Petitioners are requesting the Board to issue a declaratory ruling on matters that are clearly outside the scope of its powers granted by the Hawai'i County Charter.

In the first issue presented in the Petition, Petitioners are actually asking the Board to interpret Section 13-20(a) of the Hawai'i County Charter and Section 92F-11(b), HRS, to declare that the Director must allow the public to have access to information in the Planning Department's records regarding the processing of subdivisions, rezoning ordinance conditions and other related matters. This issue clearly does not relate to a final decision made by the Director regarding matters within the Director's jurisdiction. Matters regarding public access to government records under the Uniform Information Practices Act ("UIPA"), Chapter 92F, HRS, are under the jurisdiction of the State of Hawai'i Office of Information Practices ("OIP"), not the Board. If Petitioners are claiming that the Director is in violation of the UIPA or Section 13-20(a) of the Hawai'i County Charter, they have the option to file a complaint against the Director with the OIP. They do not, however, have the option of obtaining a declaratory ruling from the Board because the Board is without jurisdiction to issue such a declaratory ruling.

In the second issue presented in the Petition, Petitioners are asking the Board to rule that the Director must require conformity with relevant specific provisions of the General Plan regarding the Luala'i III subdivision and that the Director must refrain from any further action on the Luala'i III subdivision unless and until Parker Ranch agrees to complete Phases 1 and 3 of the Connector Road according to the schedule set forth in the Luala'i III Tentative Plan Approval

letter. Petitioners do not point to any particular final decision made by the Director within the Director's jurisdiction as a basis for their request for a declaratory ruling. The Board has no authority to make a declaratory ruling which essentially dictates how the Director must perform the duties of his position.

The Director's duties and responsibilities are provided in Section 6-4.2 of the Hawai'i County Charter, which requires the Director to "administer the subdivision and zoning ordinances and regulations" and to "render decisions on proposed subdivision plans." Once the Director renders a final decision regarding matters within his jurisdiction (i.e., subdivision and zoning matters), the Board has the power to hear and determine appeals from that final decision. The issue is not relevant to some action which the Board might take in the exercise of the powers granted by the Hawai'i County Charter. Therefore the Board is without authority to issue a declaratory ruling on the issue pursuant to Section 91-8, HRS.

Finally, in the third issue presented in the Petition, Petitioners are asking the Board to make a declaratory ruling that the Director does not have the authority to waive the requirements of Rezoning Ordinance No. 96-117(M)(1)(b). In addition, Petitioners are asking the Board to interpret Rezoning Ordinance No. 96-117 to mean that the condition requiring the construction of the connector road Phases 1 and 3 in conjunction with the Lua-la'i III subdivision has already been triggered and that the Director must not take any further action on any of the Lua-la'i at Parker Ranch subdivision applications until Parker Ranch/Kaomalo commits to now complete Phases 1 and 3 of the connector road. Petitioners make no mention of any final decision made by the Director relating to the conditions of Rezoning Ordinance No. 96-117.

There are no provisions in the Hawai'i County Charter that authorize the Board to interpret an ordinance, unless it is relevant to the Board's determination of an appeal from a final

decision by the Director regarding matters within his jurisdiction. Likewise, the Board is not authorized under the Hawai‘i County Charter to make a declaratory ruling which essentially orders the Director not to perform the duties of his position as required under the Hawai‘i County Charter. Because the issue is not relevant to some action which the Board might take in the exercise of the powers granted by the Hawai‘i County Charter, the Board is without authority to issue a declaratory ruling on this issue, pursuant to Section 91-8, HRS.

C. If a final decision was made by the Director, the appropriate action would have been to appeal the decision to the Board.

If any of the issues presented in the Petition relate to a final decision that was made by the Director regarding matters within his jurisdiction, with the exception of the first issue over which the OIP has jurisdiction, Petitioners should have appealed the decision to the Board within thirty days of the Director’s final decision, pursuant to Section 23-5 of the Hawai‘i County Code for subdivision issues or Section 25-2-20 of the Hawai‘i County Code for zoning issues. Failure to file an appeal within the thirty days results in a waiver of the right to an appeal. If, for whatever reason, Petitioners failed to appeal any final decisions by the Director and thus waived their right to an appeal, they cannot now petition the Board for a declaratory ruling concerning issues that are outside the Board’s jurisdiction. Because the issues in the Petition are not within the jurisdiction of the Board, good cause exists for the Board to refuse to issue a declaratory order, pursuant to Rule 6-4 of the BOA Rules.

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 Section 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, November 17, 2006.

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

By _____
AMY G. SELF
Deputy Corporation Counsel
His Attorney

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served upon the
following on November 17, 2006.

MARGARET WILLIE
Attorney at Law
65-1316 Lhipali Road
Kamuela, Hawai'i 96743

Hand
Delivery

U.S. Mail

X

VALTA A. COOK, Chairman
Board of Appeals
County of Hawai'i
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720

X

**Hand
Delivery**

U.S. Mail

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 Waianuenue Ave.
Hilo, Hawai'i 96720

X

CHRISTOPHER J. YUEN
Planning Director
County of Hawai'i Planning Department
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720

X

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