

BOARD OF APPEALS  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
DECEMBER 8, 2006

A regularly advertised hearing on the petition filed by **JAN R. HERRON WHITEHEAD AND LAVERNE TILL (DR 06-000001)** was called to order at 10:12 a.m. in the County of Hawai'i, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i, with Chairman Valta A. Cook presiding.

PRESENT: Valta A. Cook  
George Curtis  
David Drury  
Diane Gentry  
Joel Gimpel  
Peter Hendricks

ABSENT & EXCUSED: Anson Chong

Patricia O'Toole, Attorney for the Board of Appeals  
Alice Kawaha, Staff to the Board

Jan R. Herron Whitehead, Petitioner  
Margaret Wille, Attorney for the Petitioners  
Steven Lim, Attorney representing Parker Ranch Inc. and Kaomalo LLC  
Andrew Song, Steven Lim's Associate  
Riley Smith representing Parker Ranch  
Amy Self representing the Planning Director

And approximately 8 people from the public in attendance

**PETITIONERS: JAN R. HERRON WHITEHEAD AND LAVERNE TILL (DR 06-000001)** - Request for Declaratory Ruling to determine whether the Planning Director has the authority to waive enforcement of a condition of approval required in Parker Ranch rezoning Ordinance No. 96-117 (M)(1)(b); and related issues concerning the Uniform Information Practices Act, Hawaii Revised Statute §92F; and the County of Hawai'i General Plan §13.2.5.6.2(g) "Connector Road" Course of Action.

COOK: Okay, are we ready to proceed? I want to first explain that we did have a pre-hearing conference on this; and I think it was very productive. And one of the things that came out of that was a stipulation, I believe, for intervention of Parker Ranch and the associated characters there. And I understand that a stipulation to that effect has been signed by all parties and entered. So, Mr. Lim, you're representing Parker Ranch entities?

LIM: That's correct, Mr. Chairman. Steven Lim representing Parker Ranch Inc. and Kaomalo LLC, which is a joint venture between Parker Ranch Inc. and D. R. Horton, for development of the Luala'i Subdivision Project.

EXHIBIT A

COOK: Okay. I would ask the petitioner's attorney to introduce herself; and I believe she has her clients here today, so if you would introduce them also.

WILLE: My name is Margaret Wille, attorney for the petitioners; and one of the petitioners, Jan Herron-Whitehead is here with me. The other petitioner is elderly, she's not here today. A friend of hers is here. But anyway, Jan Herron-Whitehead is here.

WHITEHEAD: Hello, I'm Jan Herron-Whitehead, glad to be here today. Thank you.

COOK: Okay, welcome to the Board.

WHITEHEAD: Thank you.

COOK: And thank you, Ms. Wille. Let's see, Ms. Self, would you introduce yourself and your clients.

SELF: Amy Self, Deputy Corporation Counsel representing the Planning Department and the Planning Director.

COOK: Mr. Lim, you have two people with you. Would you introduce them, please.

LIM: That's correct. To my left is Mr. Riley Smith, who is with Parker Ranch, and he's the Vice-President. To his left is Mr. Andrew Song who's an attorney with my Hilo office.

COOK: Okay, well, welcome everyone; and I think we're ready to proceed. One of the things that came out of that pre-hearing conference was a sort of stipulation or an agreement that a motion to dismiss was going to be filed. And I think copies were distributed that day by the Planning Department, and it was subsequently filed. And we did receive a response to that motion for dismissal and also we received a response to the response. So the way we plan to do it, and I think we had the agreement of everyone, was that we would hear that motion to dismiss first thing today, and, hopefully, the Board will make a decision on that today; if the motion to dismiss is granted then the case is over as far as the Board is concerned; if the motion to dismiss is denied, then we will have a hearing on the merits two months from now, which would be, again, in February. And so with that in mind, and I want to thank counsels. I think the memorandums supporting and opposing the motion are well done and I think the issues are going to be pretty clearly drawn here. And, hopefully, the Board after hearing the arguments and having reviewed this can make a decision.

So, I think I'm going, Ms. Self has the motion to dismiss so I'm going to give her first shot here. After she makes her presentation, I'm debating whether to have the questions from the Board at that time or to wait until all the arguments are presented. I think what we'll do is wait until the three presentations are made, and then open to questions from the Board. Okay, Ms. Self, the platform is yours.

SELF: Thank you. So you just want the opening now and we'll later present our arguments, correct?

COOK: I'm sorry, I didn't hear you.

SELF: We'll just open and then you'll have arguments later, or are we going to present the whole thing now?

O'TOOLE: You're arguing the motion to dismiss.

SELF: I'm arguing it right now, okay.

COOK: We're only on the motion to dismiss -.

SELF: Okay.

COOK: I wanted to make that pretty clear. The merits of the case are only important insofar as they relate the motion today. And, you know, we did stipulate at the pre-hearing conference also to the introduction of, I think, all of the petitioner's exhibits. Did the County or the Planning Department have any, or were they all included with the petitioner's exhibits?

SELF: No, we didn't have exhibits.

COOK: Okay. So what we have before the Board then are the exhibits by the petitioner, and then the motion and the supporting memorandums. And so, you know, you're free to argue. We'd like this as succinct as you can because I thought the memorandums were quite good. Okay, well, Ms. Self? And please talk up, I don't have as good a hearing as I used to. I'm sure the other members of the Board do, but in any event -.

SELF: Okay. I just wanted to point out that even though the petitioners have raised other issues in their opposition to the Director's motion to dismiss, the only issue that's presently before this Board is to decide whether the Board actually has jurisdiction on the issues that are presented in the Petition for Declaratory Ruling.

This issue must be decided before the Board can proceed further. Regardless of whether the Board decides to grant or deny the Petition for Declaratory Ruling, whatever decision is made will essentially be an order which can be appealed to the Circuit Court. So that's why it's very important today that the Board follow Hawaii law in making this decision. In determining whether the Board has jurisdiction to issue a Declaratory Ruling on the issues that were presented in the petition, the Board must seriously consider the following laws:

First of all, Section 6-10.2 of the Hawaii County Charter creates this Board, the Board of Appeals. And it gives the powers, the following powers, to this body: First of all it gives the power to hear and determine appeals from final decisions of the Planning Director within his jurisdiction and, two, to conduct hearings in accordance with Chapter 91, Hawaii Revised Statutes and the County Charter.

Now the next law you have to look at is Section 91-8 of the Hawaii Revised Statutes which 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.” Now if you just read that and then you look at your own rules, which provides a rule for issuing a Declaratory Ruling, I’m sure the Board is probably wondering, well, when would we issue a Declaratory Ruling? Okay, now this language, if you read what I just read, it doesn’t really tell you much. But then if you turn to Hawaii case law, the Hawaii Supreme Court in Fasi versus Hawaii Public Employment Relations Board, the Hawaii Supreme Court determined that a board has authority to issue a Declaratory Ruling only on those issues that are relevant to some action which the Board might take in the exercise of its powers. So then you have to look back at the Charter. The County Charter is what gives this body its powers. And I’ve just read what your powers are under the Charter.

Presently there is no final decision of the Planning Director on appeal regarding any of the issues presented in the petition for Declaratory Ruling that’s before you today. That’s not to say that there will not be such a final decision in the future. If and when that occurs the petitioners will have an opportunity to appeal the Director’s final decision and could petition the Board for a Declaratory Ruling prior to the hearing of the appeal. Now this is when a Declaratory Ruling would be appropriate. The purpose of petitioning for a Declaratory Ruling, for example, would be to narrow the issues that will be heard before the Board at the appeal, or even maybe it would be procedural issues, whether or not certain evidence would come in or not. Maybe before the appeals hearing you’d want to know whether the Board, how the Board would use its rules to determine whether evidence would come in or not. Those are the types of things that this Board would rule on for a Declaratory Ruling.

Now the reason the Board seldom, if at all, I don’t even know if there has ever been a petition for Declaratory Ruling before this Board or not, but the reason it seldom happens is because the Board’s powers are limited under the Charter and they can only rule on things they’ve been given the power to rule on. So the Board’s practice has been to hold pre-hearing conferences to attempt to do the same thing that essentially a Declaratory Ruling would do. Just like, for example, in this case we had a pre-hearing conference to hash out some of the issues. And so that would be similar to what the purpose would be for a Declaratory Ruling, a petition for Declaratory Ruling.

Now, finally, I’d like to remind the Board that in a previous hearing before this Board during which I was representing the Planning Director, I believe it was the Puu Lani Ranch case, the Board determined that it did not have jurisdiction based on Section 6-10.2(a) of the County Charter to decide the appeal before, to decide on appeal. Because at the time of the appeal, there had been no final decision by the Director. If you’ll recall there was a letter that they based their appeal on; but it was determined by this Board that that was not a final decision by the Director. Therefore, the Board dismissed the case for lack of jurisdiction.

Now in keeping with the precedence that has already been set by this Board, we respectfully submit that the Board must again look to the powers granted to it in the County Charter and dismiss the petition for Declaratory Ruling for lack of jurisdiction. Thank you.

COOK: You want to also address the issue of the records? It seems to me that's one of the other issues here, whether or not the petitioners were given access to all of the records of the Planning Department reference to this action. I think that was discussed in your motion. You have anything to add to that?

SELF: Well, I think before you can even get to that point, I responded to that, but before you even get to that point, you first have to decide whether you have jurisdiction in this matter. Because it's the same issue. This Board does not, if you notice under the County Charter, the County Charter has not given you that power. They've given you the power to hear final decisions by the Planning Director. And that's the only thing that's in the Charter that's in the form of a power that has been given to this body. So I think before you can even go to that issue you have to determine, first of all, whether you even have jurisdiction.

COOK: Okay, thank you. Before we get to the petitioner, Mr. Lim, you didn't file a memo, you just filed a joinder. Do you have anything you want to add to what Ms. Self has indicated here?

LIM: No. I think, we've already joined in the arguments. I think that the, you know, just as an overall practical issue is if the petitioner or any one else like the petitioner could file an appeal to the Board of Appeals on issues that have not been finally determined by the Planning Director, or the Office of Information Practices, or any of the other regulatory agencies that are charged with the responsibility of making final decisions on her issues, then, you know, why even wait for the Director, just go ahead and file your appeal and don't let it matter. So I think as a practical matter I think that the Board should recognize the net effect of taking this petition prematurely. So we would join in the County's argument. Thank you.

COOK: Okay, Ms. Wille.

WILLE: Thank you, Chairman. Pursuant to the Board's rules, the Board performs various functions, rule-making, appeals, variances, declaratory rulings. Each of those as they appear has its own stated criteria for that function. Rule 8 which has to do with appeals has certain requirements, including generally a final decision by the Planning Director. Rule 6 for Declaratory Rulings has certain specific criteria. But as presented in the Declaratory Ruling Rule 6 it does not include the requirement of a final decision by the Planning Director. If the Board wanted to have that as a requirement, since this is a discretionary function, it could add that requirement. The function of Declaratory Rulings is not an open door. It has some very specific criteria. Let me say that it is discretionary. The Board may issue a declaratory order. And it provides that the Board for good cause may refuse to issue a Declaratory Ruling where: one, 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, so there's a lot of controversy going on; 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; and the issuance of the declaratory order may affect the interest of the Board in pending litigation; and the matter is not within the jurisdiction of the Board. So those are the conditions under which the Board presents itself as this function being available.

The authority for the Board to issue a declaratory order as to the applicability of any statutory provision, ordinance, or of any rule or order of the Board comes from the Hawaii Administrative Procedures Act, Chapter 91, Section 8 which grants to the Boards, grants to agencies including this Board the right to hear and decide Declaratory Rulings.

Essentially what the Planning Director is arguing is that Rule 6 which is authorized by Statute is in conflict with the County Charter. Turning to the authority granted the Board in the County Charter, what that does is it tells the Board what its obligations are. It is obligated to hear appeals. It is obligated to conduct hearings in accordance with Chapter 91. And let me say this, the statutory rule authorizing the Board to hear Declaratory Rulings is in Chapter 91, Section 8. The County Charter does not obligate the Board to hear Declaratory Rulings; and it wouldn't make sense for it to do so because that is a discretionary authority. In fact, if this Board wanted to it could decide to eliminate the whole section on Declaratory Rulings and only do appeals. So one is an obligatory function; and Declaratory Rulings by agency is by statute, may issue them. The requirements for doing so as the Board sets forth in its rules do not include the requirement of a final decision of the Board.

Let me just say, Ms. Self brought up the Board's case of Puu Lani Ranch, which I don't have with me and it was not argued in her motion. But my, so if that did become a sticking point I would like to respond to that -. But my recollection of that case is that that was a case where really the wrong party was there. There was a permit granted to a particular lot owner, it wasn't really Puu Lani Ranch. In other words, it didn't just rest on this issue of, there was no Declaratory Ruling involved.

I see Declaratory Rulings and appeals as separate functions, each one having their own purpose. And it's actually, I agree that it is rare where you get the circumstance where there's really a live controversy going on and there hasn't been a final decision. But that's exactly this case where there is a live controversy, where the Director is allowing the developer, Parker Ranch, to proceed with its development as if approving, proceeding without complying with a condition of the rezoning ordinance, the connector road requirement. That's in the rezoning ordinance. That's required to be followed in terms of complying with the tentative approval plan, tentative approval plan that was approved by the Planning Director in March of 2005. So the final decision would presumably, according to the tentative plan, have been issued by March of 2006. Since March, the Director has through, and there are exhibits indicating giving approval for engineering to allow the developer to proceed omitting that requirement. So what I'm getting at is really that there's a live concern of you need a real controversy to be going on, which there usually is not until there's a final decision.

The question here is not really what the Board thinks it would be the best procedural way to handle the case, whether, like just wait for an appeal, why don't you push the Planning Director to get his decision made, but it's whether you are prohibited from hearing this petition. This is jurisdictional. Can argue not allow -. Do you read Rule 6 as applied here as in violation of, at Rule 6, and Statute, Chapter 91-8, as in conflict with the County Charter? I believe they're complementary. There's nothing stated that says you are required to have a final decision here.

Let me say, typically, typically these jurisdictional issues would be coming up in a case where instead of going to the agency the petitioners had gone through the statutes, I think it's

Chapter 6-23, for Declaratory Ruling to the Court. And the agency would be arguing, “Hey, why are you looking at this Declaratory Ruling? Shouldn’t you be allowing the agency to look at its own business and have a crack at, what, this is the area of subdivisions and rezoning? And if there’s an issue, let us address it.” So in a way I feel the petitioners are defending the Board’s jurisdiction and that the Planning Director is confusing the purpose, and function, and requirements of appeals versus Declaratory Rulings. The categories or questions in this case are pertinent to Board issues. There’s the meaning, in effect, of a rezoning ordinance in the context of a subdivision approval. And let me just say on that point that the Planning Director points to the case of Fasi. In that situation, in that case, the Court was looking at whether the Board would be interfering with a collective bargaining agreement and a provision in that. It determined that even in that case where there was a pending arbitration, bargaining or dispute in progress that it was within, appropriate, permissible for the Board to issue a Declaratory Ruling.

And second question in terms of, or the sort of two threshold preliminary issues, one being sort of the Director’s processing of this application and whether under the statute that requires disclosure and open government records, the absence of the substantive documents and approvals of allowing the development project to proceed is a process and a procedure issue which the Board looks at -- were notices put out, were proper procedures given. I think Ms. Self also brings up, well, there are other ways to proceed to address that issue, whether it’s through the Office of, I think it’s Information, Planning, or directly to the Circuit Court. Neither of those avenues is exclusive. And, again, in this case where their issues are intertwined, it seemed more appropriate for the agency to be allowed to look at it as, in its, the constellation. Rather, so rather than proceeding in two different avenues certainly the more efficient method was to present it all to the Board first and not go separate to the Court or separate to some state office.

And the third issue is, really goes to the criteria that the Director uses to evaluate projects. And what that really gets to is in a context of subdivisions, is the Director really required to assess conformity with the General Plan, and where there is a specific provision relating to the property involved in the subdivision, is he required to consider that criteria, and did he do so in this case, and whether that was proper. So I don’t think this is a hypothetical theoretical question. I did also bring up that in terms of the cases that have recently gone to the Supreme Court repeatedly, that timing is important that you make the decisions and then you allow permits to proceed. You don’t permit and on the condition that maybe if we change our mind you’re going to have to redo all of these, redo your preliminary plans and engineering. Let me just say that there’s also like this is something that’s a very important issue in Waimea and of public interest, that part of this is the hope of getting together in trying to work through to get this road done, you know. That’s what, it’s not a minor issue between a contractor or private party that doesn’t affect others. And I think it was in the Kelly or the Leslie case, the Court, Kelly, stressed that it’s really not the developer there that’s out, his job to police, it’s for really the County has the obligation to say no you can’t do this, you guys have got to adhere to these requirements, just like everybody else. So I think in that way there is a fairness, and hopefully you will appreciate that you have the right and authority to proceed with this Declaratory Ruling. Thank you.

COOK: Okay, the way I’m going to proceed, I’m going to give the movant here a chance to respond and also briefly Mr. Lim, and then I’ll let you have the last word, Ms. Wille. Okay, you have any response you’d like to make here, Ms. Self?

SELF: Yes, I do. There are several issues that Ms. Wille brought up that I'd like to respond to. First of all, I think she's confusing the order of the various laws you have to follow. She said that I was arguing that the Board's rules are in conflict with the Charter. I'm not arguing that at all. The Board's rules for Declaratory Rulings if you look at that, it states exactly what 91-8, HRS, says in the very beginning. There's no conflict between the Board's Rule 6, Part 6 for Declaratory Rulings, and the Charter. What I'm saying is that the Board can only issue Declaratory Rulings on matters that, on which they can take action that are within their powers given to them by the County Charter. The powers of this Board come from the Charter. The Charter trumps the Rules, if I can put it in those terms. The Rules don't drive the Charter. The Charter drives what this Board does. And so you have to look to the Charter to see what your responsibilities and powers are. So when you look at that it is clearly, that's why you're called the Board of Appeals. You're formed in order to hear final decisions that are made by the Planning Director.

The other issue is she mentioned that the Board could delete the section on Declaratory Rulings if it wanted to. You can't do that because Section 91-8 of the Hawaii Revised Statutes says the agencies are to, that anybody may petition an agency or Board to issue a Declaratory Ruling. That is very true. So you have to, you've been given that authority under 91-8, so you have to have a rule for that. In fact, the Statute even says "Each agency shall adopt rules," not "may," "shall adopt rules prescribing the form of the petitions and the procedures for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders." So per Section 91-8 of the Hawaii Revised Statutes, you had to adopt a rule on issuing Declaratory Rulings. But my argument before this Board is that the language of 91-8, if you look at it, it says "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." Those words are the words that were defined by the Hawaii Supreme Court in the Fasi case. And it's true when she mentioned that the Board in that case had jurisdiction to issue a Declaratory Ruling. That's very true because they had jurisdiction, they had the powers given to it under Chapter 89 of the Hawaii Revised Statutes by the Legislature. So they already had, it was within their jurisdiction to issue a Declaratory Ruling.

In this case, this Board does not have the jurisdiction because they don't have, if the County Charter had given you other powers besides the ones you have, maybe she would be correct in that you can issue a Declaratory Ruling. But that's just not the case. And you have to follow, you have to follow the Hawaii Supreme Court, the highest court in our State; and they have limited what agencies can issue Declaratory Rulings on. If there was no limitation, which is specifically why I looked, I researched this so that I could find something to define this. Because if you didn't have limits on this, this Board could issue a Declaratory Ruling on anything, having nothing to do with what your actual work is supposed to be. So, and in this case, in some of her issues she's actually asking this Board to do the work of the Planning Director, to tell the Planning Director how to do his job; and that should not be permitted.

So I'm hoping that you will follow the law of the Hawaii law here and dismiss this petition. Thank you.

COOK: Mr. Lim, do you have anything to add?

LIM: Thank you. I think the crux of Ms. Wille's request to the Board is that she recognizes and admits that under Rule 8, which is your appeals rule, that the Board has to hear an appeal of a final decision by the Planning Director, in this case. And what she is basically asking you to do under Rule 6 for Declaratory Rulings is to take it up before the Planning Director makes his final decision. So we think that is not proper, we don't think that's the function of the Board. In addition, Rule 6 is a discretionary review. It's not a mandatory review from an appeal like Rule 8 is. I think the practical, again, practical issue is if the Board turns down this petition for a declaratory judgment is Ms. Wille forever bared from raising these issues; and the answer, obviously, is no. She just has to wait until the Planning Director makes his final decision and appeal that pursuant to your Rule 8 to the Board of Appeals. So we just think that the petition is premature and that the Board should reject the petition. Thank you.

COOK: Ms. Wille, if you can address the issues that were raised by the previous two counsels.

WILLE: Yes. With regard to the discretionary aspect of Declaratory Rulings, perhaps I should be clearer. The Rule 6 said, of course, the Board may issue a declaratory order, and then provides the circumstances under which it may issue that order. Under Rule 8 for appeals, it is that the Board shall, is obligated to address all appeals from a final decision of the Planning Director.

When Ms. Self spoke about which trumps, what rule trumps what, it is clear; and I agree with her, it is the County Charter that states what your obligations are. It does not, it states you're obligated to determine appeals; but that should not be read as in contradiction with the statutory grant of authority. They can read as complementary. And, again, it wouldn't make sense for the Charter, which states your obligations, to state that you are obligated to issue declaratory orders on the applicability of statutory provisions, ordinances, or rules.

I think that Mr. Lim's point that, for practical purposes, that he would suggest it would be better for the petitioners to wait unless and until the Director issues a final decision, I can accept that that is his opinion; but that is not the issue before the Board. The Board could state here, you know, we agree and we think it would be practical to just wait for his final written decision, but the question is whether you are prohibited from hearing this. And there is nothing in these ordinances, in Rule 6, in the Chapter 91, Section 8, or the Board's rule that sets them in conflict.

And I just want to add one last comment really -- and this is to Ms. Self's comment that she researched and found something in a case, and it may sound as if there's some question here, and that that should be read into the Board's rule -- that ultimately we all live by reading laws and rules, and that it should be you can pick up what you do, what the conditions are for bringing on an appeal, what the conditions are for a Declaratory Ruling or rule making or a variance, and that it should be understandable to those of us who are governed by those laws.

COOK: Okay, thank you, Ms. Wille. I'll start with my left here. Mr. Drury, you have any questions?

DRURY: I may in a minute.

COOK: You want to wait?

DRURY: Not right now. I may in a minute, so go on with others.

COOK: Okay. How about to my right there? We'll start at the end. Mr. Gimpel, you don't have any -? Peter, you have no questions?

HENDRICKS: No.

GIMPEL: I think I understand the arguments pretty well. I don't have any questions because I understand the points that were made.

COOK: Okay. Mr. Gimpel, you have no questions. George?

CURTIS: No.

COOK: Well, I've got a couple. One of the issues that was raised was this question of, I guess, it's development estoppel or equitable estoppel. And as I understood that argument, and I wanted to ask Mr. Lim about it cause he sort of touched on it. As I understand the argument it's that if the Planning Director doesn't require this infrastructure, that is the construction of these roads now, then the developer goes ahead and pretty much completes the development, and then the Planning Director basically says, well, now you've got to do the roads, and he says, oh, too late, you're estopped now because I put out all this money. What about that argument, Mr. Lim? Would that be an argument that the Parker Ranch, the developer, would use in this case?

LIM: I think from the record that was submitted by Ms. Wille and the schedule of events, number one, the Director has not made his final decision on that issue as to whether Parker Ranch has to develop the connector road in conjunction with this Luala'i project; and that's clear from the e-mails and things that you see in the record. So our position is that she has to wait until he makes that decision to appeal the issue.

Secondly, you know, we're getting into zoning estoppel, vested rights, equitable estoppel, those types of things. Essentially, and maybe the best thing to do is to quote from some of the language out of the Hokulia case that the petitioner in this case has cited. But essentially what the Hokulia case says about zoning estoppel or equitable estoppel is that the developers cannot rely on an invalid permit or a mistake made by the County to say that, hey, you know, you didn't require of me then so too bad you can't require of me now. So, in addition, as far as that, equitable estoppel and zoning estoppel requires the developer to have a good faith reliance on representations from the County. At the time, at least at the time of the filing of Ms. Wille's petition in this matter on October 11, 2006, which we received a copy of on October 12, 2006, the developer, Parker Ranch, Inc. and Kaomaluu LLC have notice of the issue. So what the Courts typically would say is that from that point on you have knowledge of the issue. So if you start spending a lot of money trying to vest your rights that that might not count. This is kind of a complex area with the law; but I think that's kind of our overall take on her position.

COOK: So you're saying even if Parker Ranch later were to decide they wanted to claim that equitable estoppel they wouldn't be able to because they've had prior notice? Is that what you're basically saying?

LIM; That's what some people would say. I don't know if that's what I would say right now.

COOK: What about the Planning Director? What position would they take on this equitable estoppel issue?

SELF: Well, they have in the rezoning ordinance, that's the condition of the rezoning ordinance, is the connector road has to be built. And if Parker Ranch were to proceed in disregard to that rezoning ordinance, I think they'd be, well, to put it simply, pretty stupid. Because that, I mean, they know that this connector road is part of their conditions for the rezoning ordinance. And that, there is a problem with the rezoning ordinance in the interpretation of the rezoning ordinance. And if you read that rezoning ordinance, those conditions can be interpreted in different ways. Not that you can interpret it that the connector road does not have to be built, it's just that it's depending on what triggers which part of that connector road will be built when. But they have to build it. It's part of the rezoning ordinance. And that's on the record already, that's law.

COOK: So the question about where we are on the trigger would only come if this Board decides we have the jurisdiction to decide these issues; and then we'd have a hearing on the merits? Is that where we are?

SELF: Well, in this particular case, I don't see how you can even get to that issue because first you have to determine jurisdiction. The other forum for them is Circuit Court. They could even petition the Circuit Court for a Declaratory Ruling on the rezoning ordinance to get the Court to make a decision on when the trigger occurs. So, but this just isn't the forum for that, this Board is not the forum for what they're trying to accomplish.

COOK: Okay, anybody? Yes, we have a question.

DRURY: Mr. Cook?

COOK: Well, I'll start over here. David, go ahead.

DRURY: Yes, just a small question for Ms. Self. Now, just to confirm, in your interpretation of Section 91-8 and the Charter, a Declaratory Ruling for this Board would be something that would happen always in the context of an appeal and would relate to procedural matters or to narrow the issues before an appeal was heard? Is that -?

SELF: That's how the Hawaii Supreme Court has interpreted it. They have determined that the language of the Statute, the words, the Court defined this language, "Any statutory provision or of any rule or order of the agency." So that means any rule of this Board, any statutory provision of this Board, or any order of this Board. And they interpreted that as any, any matter that is something that you have the power to take action on. So, in other words,

EXHIBIT A

to issue a Declaratory Ruling, the issues in the petition for Declaratory Ruling have to relate to the powers that have been given to this Board. And your powers come from the Charter. The Charter created you; and so that's where you look to see what your powers are. So, in this case, I know it sounds, I know it's difficult because you're probably feeling like, well, we need to help her; and I understand that. But this is not the forum for that. You don't have that jurisdiction. You don't have those powers to issue a Declaratory Ruling on. She has another forum. She has Circuit Court and also she, like I said, it doesn't mean that there won't be a final decision regarding the issues in her petition, at which point she could appeal. And the only way I see that you would issue a Declaratory Ruling, I don't know if you've ever issued a Declaratory Ruling, this Board; and that's probably why, because your powers are so limited. Planning Commission would probably have more of an opportunity to issue a Declaratory Ruling because their powers are much different from your powers.

But the way I look at what your function is, I just don't see -. I mean, I gave you examples of when I see that you could issue a Declaratory Ruling in matters that, like for instance if someone files an appeal of a final decision by the Planning Director and, you know, it takes a couple of months to get a hearing. Well, there may be rules that they want you to issue a Declaratory Ruling on to determine how you're going to apply your rules to that particular proceeding. Those are the types of things I could see you or see someone petitioning you to issue a Declaratory Ruling on. But in this particular instance, I just don't, I don't see how you would have the jurisdiction to do that.

COOK: Let's see, Peter you had a question down there?

HENDRICKS: Well, I was pointing to David. He had a question.

COOK: Oh, you were pointing, okay. Joel, you had a question?

GIMPEL: Yeah, just a bit of a clarification to make sure I understand it correctly after all these excellent arguments. So I understand the flow here is that Chapter 91, Section 8 of Hawaii Revised Statutes requires or permits persons to petition an Agency, i.e. the Board of Appeals, as to the applicability of any statutory provision or rule or order of the agency; and we have to adopt rules. We did adopt rules, Rule 6, which pretty much mirrors that statutory language and says that we may issue a declaratory order as to the applicability of any statute, ordinance, or rule or order of us. And we've heard ample argument that that would rarely occur because of, number one, we don't have any statutes, we don't pass statutes; number two, we don't adopt ordinances; number three, we do adopt rules; and number four, we do issue orders. I think that would be the most likely place where we would be asked to issue a Declaratory Ruling on an order we've already issued saying, hey, what did you meant by that order. So I can understand that.

My difficulty here is figuring out how we have anything to do with the statutes that we're being asked to issue a ruling on or with the absence of a final action of the Director that we're being asked to issue an order on. I understand that it's pretty well stipulated by the parties that there has been no final order of the Director. Is that correct?

SELF: Correct.

EXHIBIT A

LIM: That's correct.

GIMPEL: No final action. Had there been a final action, then certainly we would have jurisdiction to hear an appeal from that final action, or perhaps the failure to take final action is final action. You might think of that. But absent that argument, I see no way that I could vote to grant the petition. Thank you.

COOK: George, you had a question?

CURTIS: Ms. Wille, could I summarize your motion as saying that you would like the Board to anticipate the final action of the Planning Director and the developer, and accept that we should have a hearing on the anticipated outcome at this stage?

WILLE: No. I would frame it as that you are here looking at the responsibilities of the Planning Director and declaring what his responsibility is with regard to these issues. In terms of an appeal, the appeal you're looking at, we're looking at what the determinations of liability are for the developer. The rules relating to Declaratory Rulings as stated here, statutory provisions, the Zoning Code, which is what these ordinances implement, the County's general authority under Chapter 46 regarding police power, subdivision review are implemented in your ordinances. That is what is the statutes, ordinances that you review in this matter. So you are looking at what is the responsibility, or in this case of the Planning Director, his authority, does he have authority to waive a provision of the ordinance. This rule does not require a final decision. It does require a live controversy of facts or facts that can be expected to exist in the near future. So, as it reads, it does not require that condition of only when there is a final decision has been made.

In terms of the real world the Director was to have made this decision by last March 2006; and we're now in December. That it's almost like one is manipulating the situation here of allowing to proceed and there's no formal written opinion. What he has allowed to go on in terms of these, like that we're premature, you're premature. Right now the developer and the engineering department are going back and forth with an enormous quantity of work in terms of all of these very defined infrastructure requirements. This is not something oh, let's, you know, let's just wait, this is not a significant aspect to leave out the connector road. This is, in the real world this is not premature and it certainly is a situation where an argument such as zoning estoppel could be raised. I'm not saying, hopefully it wouldn't be found against the County if it were raised, but this is a live controversy. And that was really why, and why all of the commentaries on Declaratory Ruling. See, this is where this is something live going on. It's not ready for appeal, so that you can address it before things proceed down the line -.

CURTIS: I'm unable to see how those factors fall under the purview of this Board.

COOK: Anyone else have any questions? I have one more, Ms. Wille. On page 10 of your argument or your responsive memo here you talk about the Board's authority under Rule 6, and you have there four reasons why the Board may refuse to issue a declaratory order. And then there's four there, and the fourth one, I wanted to ask you about that, "The matter is not within the jurisdiction of the Board." That, seems to me that's the central issue here. And how

EXHIBIT A

do you bring it within the jurisdiction of the Board when our rules basically or the Charter basically says we're here to oversee final decisions of the Planning Director and it's admitted there is no final decision of the Planning Director? So, I mean, my problem is getting, you know, in order to allow your petition to go forward would be to get by this argument or this statement here that it has to be within the jurisdiction of the Board; and I'm just not convinced it's within our jurisdiction.

WILLE: The Charter sets forth your obligations. It doesn't state the following obligations are the only obligations or powers of this Board. It sets forth "The Board shall do the following." The Statute that authorizes Declaratory Rulings authorizes you to make Declaratory Rulings. The question in terms of jurisdiction is what is the area that is pertinent that this Board reviews determinations relevant to zoning and subdivision. The Director's decision, the Director is required to render decisions in subdivisions pursuant to law. You review that. That is, all of these questions have to do with those areas that are pertinent to the expertise and kuleana area of this Board.

COOK: Our authority doesn't come from that State Statute, I don't think. Our authority comes from the County Charter which sets out, it creates this Board and sets our authority. Are you saying that the authority that's set out by the Charter to us somehow includes additional authority than is actually stated in the Charter?

WILLE: It doesn't exclude your having authority under a Statute.

COOK: Wait a minute. We get the authority from the Charter. The Charter gives is "x" authority. How can we exceed that authority, you know, as a body here since we were created by that Charter? I don't understand the idea that it would have to say however you're, you know, you are excluded from A, B, C and D. I don't understand that logic.

WILLE: It doesn't say that the Board can only issue appeals. If you ruled that way, such a narrow view of your jurisdiction, you're basically ruling out the authorization under Chapter 91, Section 8 to issue Declaratory Rulings, because otherwise it would all be in the context of an appeal.

COOK: But what's wrong with it being in context of appeal? We'd then have definitions, final decisions that have been made by the Planning Director. We still have the authority to come in and review that; and, you know, based on our criterion for overturning the Director, we still would be reviewing it. So I just don't see how we can get by, at least from my standpoint, the jurisdiction question, the original jurisdiction question. But thank you for your answer. Anybody else have any questions? Well, I would invite a motion either to grant the motion to dismiss or to deny it; and then we will have, and if I get a second then we'll have some discussion and we'll vote on it. Do I have a motion?

GIMPEL: I'll move to grant the motion to dismiss.

COOK: Do I have a second?

CURTIS: Second.

COOK: Okay. We've got a motion to grant the motion to dismiss and we have a second. Okay, the floor is open for discussion. Does anyone on the Board have any discussion?

DRURY: I just want to commend everyone on some very good clear written legal arguments. Thank you.

GIMPEL: I'll second that. Being a retired attorney, I especially enjoyed all of this reading.

COOK: Yeah, I think I indicated at the very beginning that I was very, very please with the quality of both the -. And I might add the original petition was very inventive, I thought, and brought up a lot of issues. And we have not, to my knowledge, at least not during my tenure on the Board, had a declaratory judgment petition. Ms. Gentry was on the Board way before me -.

GENTRY: Yeah, we didn't make any declaratory judgment.

COOK: But it's a very interesting approach. And, again, I appreciate the, and I'm glad that the issues were brought squarely before the Board today in the motion. Yes, Peter?

HENDRICKS: I'm a long-time resident of Waimea; and I appreciate the need for infrastructure as it is needed around our island. And I appreciate this process and compliment the petitioner. And, obviously, we have to vote under the rules which we have, so this process will go on in another venue, perhaps, if we vote in one way. But I really appreciate this. I personally have a bias to try to push forward our infrastructure in our own town as quickly as possible. So thank you.

COOK: Yeah, I'm sure we all agree with the sentiment that, you know, we have problems on the island and, but -. Okay, any other comments? Okay, well, then I'm going to call for the question.

KAWAHA: Mr. Gimpel?

GIMPEL: Aye.

KAWAHA: Mr. Curtis?

CURTIS: Aye.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Gentry?

GENTRY: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Chair Cook?

COOK: Yes.

KAWAHA: Chair, there are six ayes. Motion is carried.

COOK: Okay, well, thank you for your participation everyone.

CURTIS: Well, I certainly hope you can get the State and County moving on a by-pass road. It's 10 or 20 years overdue.

The discussion ended at 11:23 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary