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November 30, 2006

Valta A. Cook Chairman
County of Hawaii
Board of Appeals
Planning Department
101 Pauahi Street
Hilo Hawaii 96720

BOA DR 06-000001

Dear Chairman Cook:

Re: November 20, 2006 Pre-Hearing Order:

There was one omission in the Board's Pre-Hearing Order, which I bring to your attention. At the November 20, 2006 pre-hearing conference, in response to Petitioners' November 2, 2006 "Request for Admissions Regarding the Authenticity of Documents", Christopher J. Yuen, by his attorney Corporation Counsel Amy Self, stipulated to the authenticity of the documents contained in the Exhibits attached to Petitioners' Petition for Declaratory Ruling. I have therefore attached a "Stipulation By Respondent Christopher J. Yuen Planning Director, County of Hawai'i Concerning the Authenticity of Exhibits contained in Petitioners' Petition for a Declaratory Ruling". I hope this is an acceptable manner in which to handle documentation of the Planning Director's stipulation.

Re: Petitioners Response to the Planning Director's Motion to Dismiss

Enclosed are the original and ten copies of Petitioners' Opposition to the Director's Motion to Dismiss and the accompanying Memorandum in Support of Petitioners' Opposition. Service to the parties has been made as set forth in the attached Certificate of Service.

Respectfully submitted,

Margaret Wille, representative for Petitioners

cc: Petitioner Jan R. Herron-Whitehead
Petitioner Laverne Till

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Attorney for Petitioners
Jan R. Herron-Whitehead
and Laverne Till

**BEFORE THE BOARD OF APPEALS
COUNTY OF HAWAII
STATE OF HAWAII**

In the Matter of Petition)	
for Declaratory Ruling)	
)	
JAN R. HERRON-WHITEHEAD	)	PETITIONERS' OPPOSITION TO
AND LAVERNE TILL, Petitioners	)	THE PLANNING DIRECTOR'S
vs.	)	MOTION TO DISMISS
)	
CHRISTOPHER J. YUEN,)	
PLANNING DIRECTOR,)	
COUNTY OF HAWAI'I, Respondent)	
vs.)	
)	
PARKER RANCH, INC. and)	
KAOMALO LLC, Intervenors)	

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

COMES NOW, Petitioners JAN R. HERRON-WHITEHEAD and LAVERNE TILL by and through their attorney, Margaret Wille, hereby moves this Board of Appeals (hereafter the "Board") to deny Respondent CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I's (hereafter the "Director") Motion to Dismiss Petitioners' Petition for Declaratory Ruling, in which Motion to Dismiss Intervenors PARKER RANCH, INC and KAOMALO LLC (hereafter collectively "Parker Ranch"), have joined.

Petitioners' Opposition is made pursuant to Rule 3-12(d)("Motions") and Rule 6-1("Petitions for Declaratory Rulings") of the Rules of Practice and Procedure of the Hawai'i County Board of Appeals (hereafter "BOA Rules") and is based upon and

supported by the Memorandum in Support of Petitioners' Opposition attached and incorporated herein by reference.

Dated: Kamuela, Hawai'i November 30, 2006

Petitioners Jan R. Herron-Whitehead
and Laverne Till

By: _____
Margaret Wille, Their Attorney

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**BEFORE THE BOARD OF APPEALS
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In the Matter of)	
Petition for Declaratory Ruling)	
)	
JAN R. HERRON-WHITEHEAD)	
AND LAVERNE TILL, Petitioners)	
vs.)	
	)	MEMORANDUM IN SUPPORT
CHRISTOPHER J. YUEN,	)	OF PETITIONERS' OPPOSITION
PLANNING DIRECTOR,)	TO THE PLANNING DIRECTOR'S
COUNTY OF HAWAI'I, Respondent)	MOTION TO DISMISS
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PARKER RANCH, INC. and)	
KAOMALO LLC, Intervenors)	

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

**I.
INTRODUCTION**

In their October 11, 2006 Petition, Petitioners January Herron-Whitehead and Laverne Till requested that the Board determine whether, in the context of Parker Ranch's Luala'i III subdivision, the Director has the authority to waive compliance with a condition of the Connector Road construction obligation contained in Rezoning Ordinance 96-117M(1)(b) and which obligation was referenced in the Director's March 2005 Tentative Approval letter for the Luala'i at Parker Ranch Phase III Subdivision plan (hereafter "Luala'i III"). Although he has not yet written a final decision, the Director's recent actions regarding the Luala'i III subdivision application are inconsistent with requiring compliance with the Rezoning Ordinance's Connector Road obligation.

Petitioners believe that the Director's actions are contrary to his obligation to faithfully execute his responsibilities including to "Render decisions on proposed subdivision plans pursuant to law." Hawaii County Charter Chapter 4, Section 6-4.2(f)(emphasis added). Despite the Hawaii County Code requirement (Code section 23-23) that subdivisions conform to the General Plan, in the context of the subdivision approval of Luala'i III, the Director has also failed to require compliance with the "Connector Road" mandate contained in the County's 2005 General Plan "Transportation" course of action, section 13.2.5.6.2(g). Additionally, the Director has prevented the inspection of unprivileged records relating to the Luala'i III subdivision application (Planning Department file SUB-2004-0221), which records contain information regarding the Director's non-enforcement of the Connector Road obligation. Failure to allow for inspection of unprivileged records relating to the Luala'i III subdivision has "closed the door" on Petitioners' ability to evaluate the proper administration of the Luala'i III subdivision application.

The Director's November 20, 2006 Motion to Dismiss, in which Parker Ranch has joined, challenges the Board's authority to issue a declaratory ruling in this case because the Director has yet to issue a final decision regarding the Luala'i III subdivision.

II.

PETITIONERS HAVE SOUND REASONS FOR REQUESTING A DECLARATORY RULING IN ADVANCE OF THE PLANNING DIRECTOR'S FINAL SUBDIVISION APPROVAL IN THE MATTER OF THE LUALA'I III SUBDIVISION.

Petitioners have legal and equitable reasons for requesting a declaratory ruling by the Board under the present status of the Luala'i III subdivision application.

A. "Zoning Estoppel":

The doctrine of "equitable estoppel" or "zoning estoppel" is especially complex in the context of the incremental nature of the subdivision approval process. Based on the principle of "zoning estoppel" when the Planning Director has "given the green light" to a developer's project, and that developer acts in good faith consistent with the project plans that have been fully disclosed, and thereafter the developer proceeds to spend substantial sums in good faith reliance upon reasonable assurances by an appropriate government official to proceed, (whether that "go ahead" is by way of a final written approval or otherwise), then in the event the agency later objects to the terms under which the developer was allowed to proceed, the agency may under certain circumstances be "estopped" from subsequently enforcing the relevant zoning conditions. Specifically, this doctrine is based on a change of position

. . . on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted but on official assurance on

which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.

County of Kauai v. Pacific Standard Life Insurance Company et. al. (“Nukoli‘i”) 65 Haw 318 at 327 (1982), quoting Life of the Land v City Council 61 Haw 390, at 453 (1980).

In his handling of the Luala‘i III Subdivision application, the Director’s current actions appear inconsistent with enforcement of the Connector Road obligation contained in Rezoning Ordinance 96-117(M)(1)(b), which calls for construction of the relevant phase(s) of the Connector Road “in conjunction with development in the immediately surrounding areas”. [Exhibit 7] That timing threshold obligating construction of the relevant portion of the Connector Road was “triggered” by the Luala‘i III subdivision project which is development immediately adjacent to the Connector Road corridor. [Exhibits 7, 23, 24, and 31 pages 6-7]. Yet in the April 25, 2006 e-mail to the Engineering Division of the Public Works Department, the Director or his representative advised:

It is okay to approve the construction plans for Luala‘i 3 internal roadway/water/drainage systems, which do not include any details regarding the connector road improvements. [Exhibit 43].

Likewise, the Director’s March 22, 2005 Luala‘i III Tentative Approval letter, approval condition (5) expressly required compliance with the Connector Road condition in Rezoning Ordinance 96-117 [Exhibit 29 – page 3], yet in response to the Engineering Department’s query concerning compliance with this requirement [Exhibit 30], Parker Ranch or its representative, responded to the Engineering Division that:

As discussed, Connector Road does not need to be constructed at this time. [Exhibit 35].

Consistent with the above stated position, Parker Ranch’s detailed grading plans for Luala‘i III, as submitted to the Engineering Division, did not contain plans for construction of any phase of the Connector Road and referred instead to the “Future Connector Road” location [Exhibits 32, 33, 34](emphasis added).

Hawaii County’s subdivision and zoning ordinances, as codified in County Code Chapter 23 “Subdivision Code” and Chapter 25 “Zoning Code”, do not require that the developer wait for the Director’s final subdivision approval to begin its road infrastructure. [Exhibit 45]¹. Instead, prior to final approval of the subdivision plan, once the construction drawings and specifications have been approved “. . . the subdivider may proceed with the construction of the improvements and utilities.” Subdivision

¹ In some copies of Petitioners’ Petition for Declaratory Ruling, page 2 of Exhibit 45 was not printed. An extra copy of Exhibit 45, consisting of two pages, was attached to Petitioners’ November 2, 2006 “Request for Admissions regarding the Authenticity of Documents”.

Code § 23-80. For this reason, even without final subdivision approval, Parker Ranch could presumably proceed with construction of its Luaala'i III road infrastructure – omitting any Connector Road construction. The importance of obtaining the final approval of the subdivision is that thereafter the developer can begin to sell the lots. Subdivision Code §§ 23-79-81. [Exhibit 45]

Petitioners are cognizant that in the April 25, 2006 e-mail from the Director's representative to the Engineering Division, he stated:

The director has yet to issue a formal decision regarding Horton's [Kaomalo LLC's] request to delete the connector road requirement from its tentative approval. If the requirement for the connector road is preserved, then Horton will have to develop a new set of construction drawings for the connector road improvements before final subdivision approval can be granted." [Exhibit 43].

Yet, close to six months later the Engineering Division was still reviewing the "final" construction plans for the Luaala'i III subdivision project and there had been no evidence of change in the Director's accommodating approach to Parker Ranch's avoidance of the Connector Road obligation. Under these circumstances, there is the possibility that a further delay in the Board's consideration of this matter until the Director eventually rendered a written decision approving the Luaala'i III "final" plan, could prejudice Petitioners' interests – especially in light of the doctrine of "zoning estoppel".

The crux of the matter is that, without raising the question of the Connector Road obligation now, the Director's failure to fully enforce the Rezoning Ordinance's road construction obligation could, at some point, provide Parker Ranch with the possibility of a "zoning estoppel" argument (as a way to avoid having to construct any of the Connector Road in conjunction with the Luaala'i III subdivision project) even if the Director were to eventually issue a final decision requiring compliance with that road construction obligation. Put another way, by now raising in a legal proceeding the question of the Director's duty to enforce the Connector Road obligation, Petitioners preclude Parker Ranch from later advancing a "zoning estoppel" argument to justify non-compliance with the Connector Road obligation in the context of the Luaala'i III subdivision project.

In keeping with his public interest and public trust responsibilities to the people of Hawaii County one would suppose the Director would want to settle the question of Parker Ranch's Connector Road obligation now, to prevent the possibility of future litigation involving complex questions of equitable estoppel –which, unfortunately, is what happened in the somewhat similar "Hokulia" case. In Kelly v. 1250 Oceanside Partners (aka "Hokulia") 111 Haw 205 (2006) the Court held that the Counties, as political subdivisions of the State, have the affirmative duty to protect "Hawai'i's natural beauty and all natural resources" under the State of Hawaii Constitution Article XI, section 1, and that minimal oversight by the County's Planning Director over the

developer's compliance with land use obligations is unacceptable. See Kelly v. 1250 Oceanside Partners et. al., pages 221-223.

At an earlier stage in the "Hokulia" litigation, the landowner/developer, 1250 Oceanside Partners, raised the defense of "equitable estoppel" and related arguments based on its previous reliance upon actions and assurances by the Planning Director in order to justify non-compliance with the land use conditions later determined to be applicable to this development. Ultimately, but after protracted litigation of the issue, the Circuit Court rejected all of the landowner/developer's "estoppel" type arguments. Kelly v. 1250 Oceanside Partners Circuit Court of the Third Circuit Civil No. 00-1-0192K "Amended Findings of Fact; Conclusions of Law; Order Regarding Trial on Count IV of the Fifth Amended Complaint" dated October 22, 2003; a copy of the "Conclusions of Law" and "Order", on pages 15 to 31 is included as Attachment A.² (In its "Conclusions of Law" at pages 18 to 20, paragraphs 18 to 25, the Circuit Court portrays a situation of non-enforcement of pertinent land use regulations by the Planning Director, which scenario, appears similar to the Planning Director's accommodation of Parker Ranch's efforts to avoid compliance with the Connector Road obligation.)

B. The Importance of Government Officials Making Determinations at the Appropriate Time and In the Proper Order In the Development Approval Process:

According to the Director's March 22, 2005 Tentative Subdivision Approval for Luala'i III, Parker Ranch had until March 22, 2006 to seek final approval of this subdivision. Yet, as of October 4, 2006, there has been no final approval or denial of this subdivision and no request has been made for an extension of time in which to seek final approval. [Affidavit of Robert M. Hunter; Exhibit 37]. This situation leaves Petitioners in a state of limbo, not knowing what is going on "behind closed doors" between Parker Ranch and the Director. Initially the Director, or his representative, advised Parker Ranch that both of the Connector Road triggers "adjacent development" and "unit/lot count" must be complied with in the context of the Luala'i III subdivision project [Exhibit 31, pages 6-7]. However, thereafter it appeared the Director "caved in" to Parker Ranch's request to waive the Connector Road obligation in the context of the Luala'i III subdivision, as was evidenced by his authorization to the Engineering Division to approve Luala'i III construction plans that omit plans to construct any of the Connector Road [Exhibit 43].

As has been pointed out by the Hawaii Supreme Court, the timing of determinations has a legal effect on others than the developer and the governmental agency. See Town v Land Use Com'n 55 Haw. 538, 544 (1974). In Town, the Court pointed out that "The interested party [an adjoining property owner] should not be placed in a state of limbo at the discretion of the [developer] applicant or the appellee [administering agency]". See also Hui Alaloe v Planning Commission of Maui 68 Haw.135, 136 – 138 (1985). In Hui Alaloe, the Court stressed the need for the agency to

² The Circuit Court's opinion in its entirety may be found on the internet at waimeaplan.org, link to "Land Use" at "Hokulia Court Decision".

assess compliance with the relevant policies and objectives prior to the issuance of any permits. Furthermore, as indicated by the Court in Sierra Club v. Office of Planning, State of Hawai'i et. al. 109 Haw. 411, 418 (2006), evaluating compliance with regulatory requirements must come at a point where there can assessment by interested persons of the agency's adherence to legal requirements, so as to safeguard against the agency issuing a "post hoc rationalization" to support actions already permitted.

For the above reasons, Petitioners believe that guidance from the Board at this point in time, by way of a declaratory ruling, is appropriate regardless of the theoretical possibility that the Director could eventually issue a final decision in which he reverses his current posture and requires compliance with the Connector Road obligation in conjunction with the Luala'i III subdivision project.

III

THE HAWAI'I COUNTY BOARD OF APPEALS HAS THE JURISDICTIONAL AUTHORITY TO HEAR AND DECIDE DECLARATORY RULING PETITIONS REGARDING THE DIRECTOR'S ADMINISTRATION OF SUBDIVISION AND ZONING MATTERS IN THE ABSENCE OF A FINAL DECISION

Hawaii Revised Statute Chapter 91-8 (hereafter HRS 91-8) expressly authorizes declaratory rulings by agencies, and the Board of Appeals is an "Agency" for purposes of HRS Chapter 91³. HRS 91-8 "Declaratory Rulings by Agencies", provides in pertinent part:

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.

According to the legislative history relating to HRS Chapter 91-8, the wording of this provision was meant to induce agencies to issue declaratory rulings more frequently than had occurred in the past. See Lingle v. HGEA et al. 107 Haw 178, at 188- 189 (2005) concurring opinion of Judge Acoba in which he discusses the legislative history of the Revised Model Administrative Procedures Act Rule 8 upon which HRS 91 section 8 was modeled. Judge Acoba explains that the drafters of the Revised Model Act were "determined to make it more difficult for agencies to decline to issue declaratory rulings." Id., 107 Haw. at 190, concurring opinion of Judge Acoba, quoting Frank E. Cooper, State Administrative Law 242 (1965). As explained in one law review commentary, the purpose of declaratory rulings is to "narrow the issues and, by so doing, to dispose of disputes in their initial stages, before they have become full-grown battles with their accumulation of bitterness and impaired relations." Elizabeth L. Hisserich, Comment "The Collision of Declaratory Judgments and Res Judicata 48 U.C.L.A. L. Rev. 159, at

³ HRS 91-1(1) provides that " 'Agency' means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branch." (emphasis added)

162-163 (2000). The circumstances in the present controversy seem particularly well suited for resolution by way of a declaratory ruling.

Pursuant to the statutory authority under HRS 91-8, BOA Rule 6-1⁴ sets forth the Board's Authority to hear and decide petitions for declaratory rulings:

On petition of an interested person or agency, the Board may issue a declaratory order as to the applicability of any statutory provision, ordinance, or of any rule of order of the Board.

BOA Rule 6 does contain limitations to issuance of a declaratory ruling by the Board, but those limitations do not include the requirement for a final decision by the Director. Specifically, BOA Rule 6-4 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 need 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.

It is this last limitation of "matter not within the jurisdiction of the Board", BOA Rule 6-4(4), which the Director argues requires that the declaratory judgment must relate to a "final decision" by the Director. In his Memorandum at page 7, the Director argues that Petitioners "do not point to any particular final decision made by the Director" Granted, the Director has yet to issue a final decision regarding the Luala'i III subdivision. There is, however, no requirement of a "final decision" for issuance of a declaratory ruling: not in HRS § 91-8 which is the statutory authority for agencies to make declaratory rulings, not in HRS 46 relating to the general authority of the Counties, not in Hawai'i County Code Chapter 23 (Subdivision Code Ordinance), not in Hawai'i County Code Chapter 25 (Zoning Code Ordinance), and not in any BOA Rule. Besides, once there is a "final decision" by the Director, interested parties may file an appeal with the Board, and the alternative route of a declaratory ruling would be unnecessary.

⁴ Board Rule 6 "Declaratory Rulings" is set forth in its entirety at Attachment B.

Section 6-4.2(e) and (f) of the Hawai‘i County Charter (hereafter the “HC Charter”), provides that the Planning Director’s responsibilities include:

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

(f) Render decisions on proposed subdivision plans pursuant to law. (emphasis added)

Section 6-10.2 of the HC Charter provides that the Board of Appeals has the following responsibilities:

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 [HRS] Chapter 91, Hawaii Revised Statutes, and this charter.

In keeping with HC Charter section 6-10.2(b), Chapter 9 authorizes agencies to issue declaratory rulings and hold hearings pertaining to declaratory rulings. HRS 91-8. While HC Charter section 6-10.2 does not spell out that Board is permitted to issue declaratory rulings under certain circumstances, the HC Charter does not refute the authority granted to the Board under HRS 91-8, to issue declaratory rulings. There is no justification for reading the HC Charter section 6-10.2 as in conflict with HRS 91- 8, which expressly authorizes agencies, such as the Board, to issue declaratory rulings.

In his Motion to Dismiss, the Director does not cite any authority for the proposition that HRS 91-8 or BOA Rule 6-1, limit the use of declaratory ruling petitions to when the Director has issued a final decision. Instead, in support of his position, the Director relies on ordinance provisions relating to appeals of final decisions to the Board. For example, in his Motion to Dismiss, the Director cites Zoning Code section 25-2-20, which designates who can file an appeal from a final decision of the Director regarding zoning issues; and also cites Subdivision Code section 23-5, which designats who can file an appeal from a decision of the Director regarding subdivision issues. The Director is confusing the criteria for an appeal made to the Board, with the criteria for a petition for a declaratory ruling made to the Board.

In his Motion to Dismiss, the Director also points to the need for relevancy, citing Fasi v. Hawai‘i Public Employment Relations Board 60 Haw. 436 (1979). Yes, clearly there must be relevancy to the area of the Director’s jurisdiction, which as stated in his Motion to Dismiss, includes “subdivision and zoning matters”. However, there is no

authority for bootstrapping on the requirement of a final decision made by the Director regarding these matters.

Each of Petitioners issues is relevant to subdivision and zoning matters within the jurisdiction of the Director. The issues presented in Petitioners' Petition relate to the Director's actions regarding the approval of the Luala'i III subdivision plans (Planning Department file SUB 2004-0221).

The primary issue in the Petition relates to the Director's wrongful waiver of a key road condition in Rezoning Ordinance 96-117(M)(1)(b) compliance with which is required for approval of the subject subdivision project, Luala'i III. That issue is certainly relevant to the Director's responsibility for subdivision and zoning matters".

The other two issues are preliminary and relate to the Director's administration of the subdivision approval process of Luala'i III. First: In apparent violation of the Uniform Information Practices Act, HRS 92F-11(b)⁵ and the parallel provision of the HC Charter § 13-20(a)⁶, Petitioners discovered that unprivileged records relating to the Luala'i III subdivision application were being withheld by the Director from inspection by interested parties and the public generally. Petitioners are therefore also concerned about what other unprivileged subdivision records have been withheld from public inspection in the context of the Luala'i III subdivision approval process. Providing access to unprivileged records relating to the Luala'i III subdivision application is certainly relevant to the Director's jurisdiction over subdivision and zoning matters.

The second preliminary issue, relates to the Director failure to require conformity of the Luala'i III subdivision with the 2005 County General Plan. As required by Hawaii County Subdivision Ordinance §23-23:

Subdivisions shall conform to the County general plan

The Director's recent actions regarding the Luala'i III subdivision approval is inconsistent with requiring implementation of the 2005 General Plan Course of Action dictated for South Kohala mandate, General Plan section 13.2.5.6.2(g):

To relieve traffic congestion through Waimea town,
implement construction of a) Parker Ranch's connector
road from Kamamalu Street to Mamalahoa Highway . . .

⁵ HRS § 92F-119b) provides that " Except as provided in section 92F-13 [privileged documents], each agency upon request by any person shall make government records available for inspection and copying during regular business hours."

⁶ HC Charter § 13-20(a) provides that "All books, minutes, and records of any 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."

That specific General Plan mandate reflects the Rezoning Ordinance 96-117(M)(1)(b) condition containing Parker Ranch’s Connector Road obligation. As the Court made clear in Leslie v. Board of Appeals and Christopher Yuen, in his capacity of Planning Director of the County of Hawai‘i 109 Haw 384, 389 (2006) the Director does not have the discretion to ignore assessing compliance with the County’s General Plan:

Section 23-23 [of the Hawaii County Code Chapter 23] is unambiguous regarding the fact that Subdivisions must comply with the County general plan, State law, and County requirements, as well as the Subdivision Control Code.

Evaluation of the Director’s assessment of the Luala’i III subdivision’s conformity with the County General Plan is clearly relevant to the Director’s jurisdiction over “subdivision and zoning matters”.

Finally, the Director argues that matters otherwise relevant to the Board’s jurisdiction, are outside of its jurisdiction if the matter relates to access to government records. In effect the Director contends that the State of Hawai‘i Office of Information Practices (“OIP”) has exclusive jurisdiction to address matters that potentially violate the Uniform Information Practices Act (“UIPA”) HRS Chapter 92F, and the parallel provision in HC Charter §13-20. It seems illogical that the County Planning Director is claiming that the County’s Board of Appeals does not have the right to hear and decide issues relating to access to public records regarding County zoning and subdivision matters. There is nothing in the UIPA or the HC Charter indicating that the State, through its OIP, has exclusive authority to review issues relating to access to government records. In fact, a party complaining of a potential violation of the UIPA may seek to remedy that violation through the State OIP, directly to the circuit court under HRS 92F-15(a)⁷, or in Hawaii County, the context of an appeal or declaratory judgment regarding subdivision and zoning matters, to the Board of Appeals. Whereas in this case, the UIPA issue is intertwined with issues that require exhaustion of administrative remedies, Petitioners included the UIPA matter in the Petition for Declaratory Ruling. Moreover, for the Board to refuse to hear Petitioners’ preliminary issue relating to non-disclosure of unprivileged records concerning the Luala’i III subdivision application, would certainly be inconsistent with the general “openness to government” intent of the UIPA, HRS Chapter 92F-2(“Purposes; rules of construction”).

For the above reasons the Board has the jurisdictional authority to hear and decide the issues raised in Petitioners’ Petition for Declaratory Ruling.

IV SUMMARY AND CONCLUSION

⁷ HRS 92F-15(a) authorizes direct appeal to the circuit court by “[a] person aggrieved by a denial of access to a government record” without exhaustion of administrative remedies. See e.g. Kaapu v. Aloha Tower et. al. 74 Haw. 365, 383 (1993)(discussing the parallel provision in HRS 92-12 “Sunshine Law”).

In his Motion to Dismiss, the Director takes an excessively restrictive view of the authority of the Board of Appeals to hear Petitions for Declaratory Rulings under BOA Rule 6. Yet the same time, in the administration of the Luala'i III subdivision application, the Director takes an excessively broad view of his authority to selectively enforce the terms of the applicable Rezoning Ordinance 96-117. One would normally expect the Planning Director to support prompt resolution by the Board of the controversial questions concerning Parker Ranch's Connector Road obligation. Instead, by way of this Motion to Dismiss, the Director is seeking to expand his "behind closed doors" policy, so that even the Board is shut out from reviewing his actions relating to a zoning and subdivision matter. The Director is here espousing such a restrictive view of the Board's authority and jurisdiction, that if the Director were to prevail on his argument that without a "final decision" the Board lacks jurisdiction to make a declaratory ruling, the authority of the Board to issue any substantive declaratory rulings would be eliminated.

Generally in the context of the Luala'i III subdivision, the Director's actions appear aimed at accommodating the interests of Parker Ranch to avoid and delay the construction of costly road infrastructure rather than advancing the public interest and public trust in the implementation of an important zoning ordinance road condition that is reflected in the County's General Plan. Under these circumstances, the Board's consideration of the Director's enforcement of Parker Ranch's obligation to construct the Connector Road (an obligation initially imposed in 1992 but yet to result in one inch of road construction) is needed to improve confidence in the Hawai'i County government.

Were the Board to grant the Director's Motion to Dismiss, the Board would effectively eliminate its own authority to issue Declaratory. The Director cannot ignore BOA Rule 6-1's explicit authorization for the Board to issue Declaratory Rulings:

On petition of an interested person, the Board may issue a declaratory order as to the applicability of any statutory provision, ordinance, or of any rule or order of the Board."

The statutory authority for BOA Rule 6-1, which is HRS § 91-8 "Declaratory Rulings By Agencies", was meant to induce counties to more readily address controversies through petitions for declaratory rulings. There is no County Charter, statutory, ordinance, or BOA rule providing that declaratory rulings can only address subdivision and zoning matters once a "final decision" has been made by the Director.

For these reasons, Petitioners Jan R. Herron and Laverne Till respectfully ask the Board to deny the Director's Motion to Dismiss.

Dated: Kamuela, Hawai'i November 30, 2006

Petitioners Jan R. Herron-Whitehead
and Laverne Till

By: _____
Margaret Wille, Their Attorney

ATTACHMENTS
to Memorandum in Support of Petitioners' Opposition
to the Director's Motion to Dismiss

1. October 22, 2003, Third Circuit Decision in Kelly et al v. 1250 Oceanside Partners et al , Civil No. 00-1-0192K “Amended Findings of Fact; Conclusions of Law; Order Regarding Trial on Count IV of the Fifth Amended Complaint”, page 1, and “Conclusions of Law” and “Order” at pages 15 to 31.
2. Hawaii County Board of Appeals Rule 6 “Declaratory Rulings”, 2 pages.

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Attorney for Petitioners
Jan R. Herron-Whitehead
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PLANNING DIRECTOR,)	MOTION TO DISMISS;
COUNTY OF HAWAI'I, Respondent)	CERTIFICATE OF SERVICE
vs.)	
)	
PARKER RANCH, INC. and)	
KAOMALO LLC, Intervenors)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on November 30, 2006 upon the persons listed below. Attachments A and B are included in the mailed copy only. The e-mailed copies, provided as a courtesy, are unsigned.

Valta A. Cook Chairman
c/o Alice Kawaha
County of Hawaii
Board of Appeals
101 Pauahi Street
Hilo Hawaii 96720

by e-mail and regular mail
one original and ten copies

Patricia O'Toole, Deputy Corporation
Counsel for the Board of Appeals

by e-mail only

Certificate of Service –Page 2.

Amy Self, Deputy Corporation Counsel
Attorney for Christopher J. Yuen,
Planning Director
Hilo Lagoon Centre
101 Aupuni Street Suite 325
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by e-mail and one copy by
regular mail

Steven S.C.Lim and Andrew D. Son
Attorneys for Parker Ranch and Kaomalo LLC
121 Waianuenue Avenue
Hilo, Hawai‘i 96720

by e-mail to both, and
one copy by regular mail

Dated: Kamuela, Hawai‘i November 30, 2006

Petitioners Jan R. Herron-Whitehead
and Laverne Till

By: _____
Margaret Wille, Their Attorney

MARGARET WILLE 8522
65-1613 Lihipali Road
Kamuela, HI 96743
Tel: 808-887-1419
Fax: 808-887-1489

Attorney for Petitioners
Jan R. Herron-Whitehead
and Laverne Till

**BEFORE THE BOARD OF APPEALS
COUNTY OF HAWAII
STATE OF HAWAII**

In the Matter of Petition)	
for Declaratory Ruling)	
)	
JAN R. HERRON-WHITEHEAD	)	THE PLANNING DIRECTOR'S
	)	STIPULATION TO THE
AND LAVERNE TILL, Petitioners	)	AUTHENTICITY OF THE
vs.	)	EXHIBITS IN PETITIONERS'
	)	PETITION FOR A
CHRISTOPHER J. YUEN,	)	DECLARATORY RULING
PLANNING DIRECTOR,)	
COUNTY OF HAWAI'I, Respondent)	
vs.)	
)	
PARKER RANCH, INC. and)	
KAOMALO LLC, Intervenors)	

**THE PARTIES' STIPULATION TO CHRISTOPHER J. YUEN,
THE PLANNING DIRECTOR'S STIPULATION TO THE
AUTHENTICITY OF THE DOCUMENTS CONTAINED IN THE
EXHIBITS TO THE PETITION FOR DECLARATORY RULING**

IT IS HEREBY STIPULATED, by and between Respondent CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAII (hereafter the Director), by and through his attorney, Amy G. Self, Deputy Corporation Counsel, and Petitioners JAN R. HERRON-WHITEHEAD and LAVERNE TILL, by and through their attorney, Margaret Wille, and Intervenors PARKER RANCH, INC and KAOMALO LLC by and through their attorneys, Carlsmith Ball LLP, (hereafter collectively referred to as the Parties"), that the Parties agree that, in response to Petitioners' November 2, 2006 Request for Admissions Regarding the Authenticity of Documents" that the DIRECTOR, by and through his attorney Amy G. Self, at the November 27, 2006 Pre-hearing

conference, stipulated to the authenticity of the documents contained in the Exhibits to Petitioners' Petition for a Declaratory Ruling in the above-captioned proceedings.

Dated: Kamuela, Hawai'i November 30, 2006

Petitioners Jan R. Herron-Whitehead
and Laverne Till

By: _____
Margaret Wille, Their Attorney

**BEFORE THE BOARD OF APPEALS
COUNTY OF HAWAII
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In the Matter of Petition)	
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JAN R. HERRON-WHITEHEAD)	THE PLANNING DIRECTOR'S
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)	PETITION FOR A
CHRISTOPHER J. YUEN,)	DECLARATORY RULING
PLANNING DIRECTOR,)	CERTIFICATE OF SERVICE
COUNTY OF HAWAI'I, Respondent)	
vs.)	
)	
PARKER RANCH, INC. and)	
KAOMALO LLC, Intervenors)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on November 30, 2006 upon the persons listed below. The e-mailed copies, provided as a courtesy, are unsigned.

Valta A. Cook Chairman c/o Alice Kawaha County of Hawaii Board of Appeals 101 Pauahi Street Hilo Hawaii 96720	by e-mail and regular mail one original and ten copies
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Patricia O'Toole, Deputy Corporation Counsel for the Board of Appeals	by e-mail only
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Amy Self, Deputy Corporation Counsel Attorney for Christopher J. Yuen, Planning Director Hilo Lagoon Centre 101 Aupuni Street Suite 325 Hilo Hawai'i 96720	by e-mail and one copy by regular mail
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Certificate of Service – Page 2.

Steven S.C.Lim and Andrew D. Son
Attorneys for Parker Ranch and Kaomalo LLC
121 Waianuenu Avenue
Hilo, Hawai'i 96720

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Dated: Kamuela, Hawai'i November 30, 2006

Petitioners Jan R. Herron-Whitehead
and Laverne Till

By: _____
Margaret Wille, Their Attorney