

Margaret Wille
Attorney at Law
65-1316 Lihipali Road
Kamuela, Hawaii 96743
808-887-1419

October 11, 2006

County of Hawaii
Board of Appeals
Planning Department
Attention: Alice Kawaha
101 Pauahi Street
Hilo Hawaii 96720

Re: Petition for Declaratory Ruling:
Under Rule 6 of the Board's Rules
of Practice and Procedure

Dear Alice Kawaha:

Rule 6 of the Board of Appeals Rules of Practice and Procedure provides that "On Petition of any person or agency, 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." This Petition for a Declaratory Ruling relates to a Landowner/Developer's failure to comply with the terms of a Change of Zone Ordinance, and the Planning Director's ongoing failure to enforce the terms of that ordinance regarding construction of Parker Ranch's Town Center Connector Road, as well as other related issues.

Enclosed please find one original and ten copies of this Petition for Declaratory Ruling submitted by Petitioners Jan R. Herron-Whitehead and Laverne Till to the Board of Appeals pursuant to Rule 6 of the Boards Rules of Practice and Procedure. I understand from you that there is no filing fee for a Board of Appeals Declaratory Ruling petition.

If for any reason I have not provided all of the information required, or have not provided the information in the proper form, please advise so that I can correct the document in question. As I will be off island during part of the next couple weeks, if you need to reach me, leave a message at the above telephone number, or feel free to call my cell number: 808-443-8211.

The Affidavits of Petitioners Jan R. Herron-Whitehead and Laverne Till are included. These affidavits set forth facts sufficient to establish that Petitioners' individual interests are of the type that would give them standing to maintain an action if they were to subsequently seek judicial relief.

By certified mail, I have mailed one copy to each of the following:

Christopher J. Yuen
Planning Director
County of Hawaii Planning Department
101 Pauali Street Suite 3
Hilo Hawaii 96720

Parker Ranch Foundation Trust (Parker Land Trust)
Trustees John Ray, Timothy Johns, and Warren Haruki,
65-1435 Mamalahoa Highway Kamuela, Hawaii 96743

Parker Ranch Inc.
Chris Kawasawa, Chief Executive Officer
65-1435 Mamalahoa Highway
Kamuela, Hawaii 96743

Kaomalo LLC/ D.R. Horton-Schuler Homes Inc
828 Fort Street Mall 4th Floor
Honolulu Hawaii 96813

The Corporation Company Inc
Registered Agent for Kaomalo LLC
1000 Bishop Street
Honolulu Hawaii 93813

Whereas this matter involves an administrative hearing before the County of Hawaii Board of Appeals, at this time I inform the parties involved that, in the event this matter is subsequently pursued as a civil matter in Court, to the extent applicable, I will seek attorney's fees under Hawaii Revised Statute §607-25, and Hawaii Revised Statute §92-12(c), and as otherwise permitted.

Respectfully submitted,

Margaret Wille, as representative for Petitioners

cc: Jan R. Herron-Whitehead
Laverne Till

**PETITION TO THE HAWAII COUNTY BOARD OF APPEALS
FOR DECLARATORY RULING**

PURSUANT TO RULE 6 OF THE BOARD OF APPEALS
RULES OF PRACTICE AND PROCEDURE

SUBMITTED BY PETITIONERS:

JAN R HERRON WHITEHEAD

LAVERNE TILL

AND REPRESENTED BY:

MARGARET WILLE
ATTORNEY AT LAW
65-1613 LIHIPALI ROAD
KAMUELA, HAWAII 96743

DATED: OCTOBER 11, 2006

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ATTACHMENTS: (without page numbers)
Hawaii Office of Information Practices Memorandum Opinion Letter 90-8.
Hawaii Office of Information Practices Memorandum Opinion Letter 90-20.

**SUMMARY OF PETITION FOR DECLARATORY RULING
SUBMITTED TO THE COUNTY OF HAWAII BOARD OF APPEALS**

OVERALL OBJECTIVE: To Determine Whether the County of Hawaii Planning Director has the Authority to Waive Enforcement of a Rezoning Ordinance Approval Condition Required in Rezoning Ordinance 96-117(M)(1)(b): and Related Issues concerning the Uniform Information Practices Act, Hawaii Revised Statute §92F, and the County's General Plan §13.2.5.6.2(g) "Connector Road" Course of Action

PETITIONERS:

Jan R. Herron-Whitehead: A Resident of Department of Hawaiian Homelands Lands Pu'u Kapu Farmlots 64-768 Ainahua-Alanui Street, Lot #21 TMK 3-6-4-008-041, Waimea Hawaii; (Ainahua Alanui Street is accessed from Kamamalu Street which borders Parker Ranch's Town Center parcel); her mailing address is P.O. Box 1538 Kamuela Hawaii 96743 Phone: 808-885-5825

Laverne Till: Resident of the County of Hawaii, Waimea Housing Foundation, Waimea Elderly Housing 67-5165 Kamamalu Street, TMK 3-6-7-002 Lot 47 Waimea, Hawaii; her mailing address is P.O. Box 2765 Kamuela Hawaii 96743 Phone: 808-887-2469. This parcel of land was part of Parker Ranch's original Town Center parcel that was subject to the original Town Center Rezoning Ordinance 92-65.

PETITIONER'S REPRESENTATIVE:

Margaret Wille, Attorney at Law
65-1316 Lihipali Road Kamuela, Hawaii 96743 Telephone: 808-887-1419

THE GOVERNING ENTITY AND ADMINISTRATOR:

Christopher Yuen, in his capacity as Director of the Hawaii County Planning department, and the **County of Hawaii Planning Department:** address: Aupuni Center 101-Pauahi Street Suite 3 Hilo, Hawaii 96720

THE DEVELOPER/SUBDIVIDER:

Landowner: Parker Ranch Foundation Trust (Parker Land Trust): Trustees John Ray, Timothy Johns, Warren Haruki, the mailing address for which is 65-1435 Mamalahoa Highway Kamuela, Hawaii 96743

Subdivider: Kaomalo LLC (a joint venture of Parker Ranch Inc and D.R. Horton-Schuler Homes Inc): the address for **Kaomalo LLC and D.R. Horton-Schuler Homes** is 828 Fort Street Mall 4th Floor Honolulu Hawaii 96813; Kaomalo LLC's agent's address is: The Corporation Company Inc 1000 Bishop Street Honolulu Hawaii 93813.

Parker Ranch Inc, a for-profit entity engaged in real estate development and ranching, has its principal place of business at 65-1435 Mamalahoa Highway Kamuela, Hawaii 96743. Chris Kawazawa is the Chief Executive Officer of Parker Ranch Inc.

DATED: OCTOBER 11, 2006

**THE INTERESTED PARTIES:
INCLUDING PETITIONERS' INTEREST IN THE SUBJECT MATTER
AND THEIR REASONS FOR SUBMISSION OF THIS PETITION**

JAN R. HERRON-WHITEHEAD: As more fully set forth in the attached "Affidavit of Jan R. Herron-Whitehead", Petitioner Herron-Whitehead is a natural person residing at 64-768 Ainahua-Alanui Street, Pu'u Kapu Farmlots, Lot #21 TMK 3-6-4-008-041, which farmplot is leased to her husband Samuel Whitehead, by owner Department of Hawaiian Home Lands. Petitioner Herron-Whitehead's current employment includes being a caregiver for an elderly woman living in Waikoloa, on the South Kohala Coast, Hawaii. This employment requires that she travel through Waimea's single intersection of Mamalahoa Highway and Lindsey Road. In the absence of Parker Ranch's Town Center Connector Road (or at least that portion of the road from Mamalahoa Highway to the Lindsey Road Extension that would provide an alternate way around the congestion at this single intersection), her employment is adversely affected by the increased time and stress involved in traveling through the traffic congestion on the single route through Waimea town. Petitioner Herron-Whitehead's day-to-day life is also adversely affected by the absence of the Parker Ranch Town Center Connector Road in terms of her day-to-day driving into the center of Waimea. In April 2006 Petitioner Herron-Whitehead was the victim in a "rear-end" automobile accident on Mamalahoa Highway near Pukalani Road, which accident was in part caused by the traffic congestion on Mamalahoa Highway at the time of the accident (this traffic would be reduced if the alternate traffic route through the Parker Ranch Town Center area were required to be constructed). If the Planning Director were to require that Parker Ranch/Kaomalo construct Phases 1 and 3 of the Connector Road from Mamalahoa Highway to Pukalani Street", or at least that portion along the Luaia III subdivision project site to the Lindsey Road extension, the traffic through the Waimea's single intersection would be reduced and the harm caused Petitioner Herron-Whitehead by the prolonged delays and stress from this traffic congestion would be alleviated.

LAVERNE TILL: As more fully set forth in the attached "Affidavit of Laverne Till", Petitioner Laverne Till, age 79, is a natural person residing at 67-5165 Kamamalu Road, Waimea Elderly Housing Apartment 4A, Waimea, Island of Hawaii (TMK 3-6-7-02-47). Petitioner Laverne Till's employment doing childcare requires that she drive the children for whom she cares from Mana Road area on the east side of Waimea through Waimea's single intersection of Mamalahoa Highway and Lindsey Road to their home off Kawaihae Road on the west side of Waimea. She then returns through the late afternoon traffic congestion in Waimea on her way home to Kamamalu Street. In the absence of the Parker Ranch Town Center Connector Road, or at least the portion from Mamalahoa Highway to Lindsey Road Extension which would avoid Waimea's choke point intersection, her employment and her day to day driving through town, causes her harm, economic and otherwise, as well as emotional stress. If the Planning Director were to require that Parker Ranch/Kaomalo construct Phases 1 and 3 of the Connector Road from Mamalahoa Highway to Pukalani Road (or at least that portion of the road along the Luaia III subdivision project site from Mamalahoa Highway to Lindsey Road) the

traffic through Waimea’s single intersection would be reduced and the harm caused Petitioner Till by the prolonged delays and stress from this traffic congestion would be substantially alleviated.

THE COUNTY OF HAWAII DEPARTMENT OF PLANNING, is a Department of the County of Hawaii, which Department is charged with the enforcement and oversight of county land use matters including the administration of subdivision and zoning ordinances pursuant to the Hawaii County Charter Chapter 4

CHRISTOPHER YUEN, in his capacity as Director of the County of Hawaii Planning Department, is the chief planning officer of the county and administrative head of the Planning Department; and as set forth in the Hawaii County Charter, his responsibilities include rendering decisions on proposed subdivision plans pursuant to law, preparing a general plan and amendments thereto, and generally administer the subdivision and zoning ordinances and regulations. Hawaii County Charter Section 6-4.2.

THE DEVELOPER The following landowner and subdivider are entities, collectively referred to as “Parker Ranch/Kaomalo” or as the “Developer”, are involved in the business of real estate development of all or a portion of the Waimea Town Center Project, in Waimea, Hawaii:

LANDOWNER: THE PARKER RANCH FOUNDATION TRUST: “PARKER LAND TRUST”: The landowner of the Waimea Town Center property at the time of the original Rezoning Ordinance 92-65 was the Richard Smart Personal Revocable Trust, which subsequent to Richard Smart’s death was and continues to be the Parker Ranch Foundation Trust, or “Parker Land Trust”. The current trustees are John Ray, Warren Haruki, and Timothy Johns. The headquarters for the Trust is 65-1184 Mamalahoa Highway Kamuela Hawaii 96743. This Trust continues to own most of the Town Center Project area in Waimea including Lots 57, 59, and 60 along the Connector Road that is currently being developed as the Lua’i at Parker Ranch Phase III subdivision. The Town Center Connector Road corridor is located solely on this Town Center parcel of land owned by the Trust.

SUBDIVIDER: KAOMALO LLC: JOINT VENTURE OF PARKER RANCH INC AND D.R. HORTON-SCHULER HOMES INC: Kaomalo LLC, is a Hawaii Domestic Limited Liability Company, and its principal place of business is at 828 Fort Street Mall 4th Floor Honolulu Hawaii 96813. Kaomalo LLC is a joint venture of Parker Ranch Inc and DR Horton-Schuler Homes Inc with the purpose of residential development of the Lua’i at Parker Ranch residential portion of the Town Center Project located on a portion of the subject rezoned parcel. Parker Ranch Inc. is a real estate development and cattle ranching enterprise, its Chief Executive Officer is Chris J. Kanazawa, with its principal place of business located at 67-1435 Mamalahoa Highway Kamuela Hawaii, 96743. D. R. Horton-Schuler Homes Inc. is a real estate development company with its principal place of business at 828 Fort Street Mall 4th Floor Honolulu Hawaii 96817

STATEMENT OF FACTS

I.

BACKGROUND: PARKER RANCH 2020 PLAN FOR WAIMEA COMMUNITY AND CHANGE OF ZONE ORDINANCE 92-65 (HEREAFTER REFERRED TO AS REZONING ORDINANCE 92-65)

A. Richard Smart's 2020 Plan for Parker Ranch and the Waimea Community Included Plans for An Alternate Way Around Congestion at the Mamalahoa Highway-Lindsey Road Intersection

In the 1980's Richard Smart, the owner of Parker Ranch, began working on the Parker Ranch 2020 plan for the future of Waimea. He understood that unless the town center area was expanded into Parker Ranch lands, Waimea would develop as a lineal town. Exhibit 1 : "Parker Ranch: Waimea Town Center Plan" at [www.Parker Ranch.com/ParkerRanch/214/Waimea-Town-Center-Plan](http://www.ParkerRanch.com/ParkerRanch/214/Waimea-Town-Center-Plan), page 1. In the preface to his "Parker Ranch 2020" Publication, Richard Smart explained his 2020 Plan vision:

"Our Foundation is a Master Plan for the town center.

I have personally selected PARKER RANCH 2020 as the name for this plan, since it implies great foresight and commitment to this community for the sake of our children It is our greatest hope that in the year 2020, our children's children shall look back at this planning effort in the same light with which we today perceive the early 1900 efforts of the legendary A.W. Carter to improve and strengthen the Ranch and the community."

Parker Ranch 2020 "Big Island of Hawaii Master Plan for the Town Center" publication (1988?) at page 1, Exhibit 2: Parker Ranch 2020 "Big Island of Hawaii Master Plan for the Town Center" (1988?) hereafter this publication is referred to as the 2020 Master Plan Publication.

With respect to traffic, the 2020 Master Plan Publication stated:

"Traffic congestion at certain peak times at the main intersection of Mamalahoa and Lindsey Roads. Strip development and the lack of secondary arterials have made this intersection a virtual choke point. Accessibility to emergency medical, fire, and police facilities during times of congestion and seasonal parades is almost impossible."

Exhibit 2 at page 2: 2020 Master Plan Publication, "Primary Community Issues for the 80's". To address that traffic concern, the publication stated:

Circulation and Safety: [The 2020 Plan] proposes local connector streets within the town center to relieve high traffic pressure that currently exists on the Mamalahoa Highway, especially where it intersects Lindsey Road."

Exhibit 2 at page 3: 2020 Master Plan Publication "Consistency with the Waimea Design Plan and the County General Plan".

B. 1992 Rezoning Ordinance No. 92-65 Incorporated Richard Smart's Commitment to Provide An Alternate Route Through Its Waimea Town Center Development

The Parker Ranch 2020 Plan commitments to the Town Center project culminated in the June 1992 Rezoning Ordinance 92-65. Shortly after passage of Ordinance 92-65, Richard Smart died. His assets were bequeathed to the Parker Ranch Land Trust to benefit residents in Waimea community, and he designated four local non-profit organizations as its beneficiaries. Exhibit 1, www.ParkerRanch.com/ParkerRanch/214/Waimea-Town-Center-Plan.

As a condition of Rezoning Ordinance 92-65 Parker Ranch (then the Richard Smart Personal Revocable Trust) was required to construct a "Town Center Arterial Road" across the rezoned property in the Town Center from Mamalahoa Highway in the vicinity of the vacuum cooling plant and rodeo grounds to Kamamalo Street. This Rezoning Ordinance required that the Town Center Arterial Road be completed in its entirety in advance of residential or commercial development. Specifically Rezoning Ordinance 92-65(D) provided in pertinent part:

the entire Town Center arterial road consisting of two lanes within an 80 foot right of way shall be constructed in conjunction with the final subdivision approval of any residential development within the Waimea Town Center or prior to issuance of a certificate of occupancy for any portion of the commercial area, whichever comes first.

Exhibit 3 at page 47-48: Rezoning Ordinance 92-65; pages 1 and 46-51 are attached as Exhibit 3 which includes the section on the Waimea Town Center Area in its entirety other than property description provisions. Other provisions relating to construction of the Town Center Arterial Road included that the intersections on Mamalahoa and Kamamalu Street be completed in conjunction with development of the Town Center Arterial Road, and prior to any residential subdivision approval or issuance of a certificate of occupancy in the commercial area, whichever came first Exhibit 3: Rezoning Ordinance 92-65, pages 48-49.

In December 1991, the Planning Department had recommended approval of Parker Ranch's proposed Town Center rezoning based, in part, on Parker Ranch's commitment to complete the Town Center Arterial Road. To wit, the Planning Department's recommendation stated:

As a condition of this approval, the construction of the entire mini-bypass road would be required prior to issuance of occupancy for any portion of the commercial or residential development. This major roadway would be constructed within a minimum 80-foot wide right-of-way. The applicant proposed an initial two-lane construction with additional improvements to be constructed as those areas fronting the road are developed. The installation of curbs, gutters and sidewalks would be made with the development of each increment. Another safety measure is the installation of pedestrian improvements

from the Waimea Elementary School to the mini-bypass intersection along Mamalahoa Highway on the mauka (town center) side of the road.

....

The uncertain state of the proposed Waimea By-Pass has placed Waimea in a predicament, where the rapid growth in regional traffic must travel through the only two-lane road passing through the town. It is acknowledged that the mini-by-pass will not provide a permanent solution to the situation. However, the construction of the mini-bypass will give an alternate travelway to motorists wishing to avoid the congestion within the existing town.

Exhibit 4 at pages 5 and 6: County of Hawaii Planning Department Revised Recommendation dated 12/13/91; Richard Smart Revocable Personal Trust: State Land Use Boundary Amendment 89-2; Change of Zone Application 89-19; including all of the section pertaining to the “Waimea Town Center development, pages 1 to 6.

II.

The 1996 Rezoning Ordinance Amendments Reduced Parker Ranch’s Connector Road Obligation to Construction of the Relevant Road Phase Concurrent with Development Adjacent to that Phase

In 1996, Parker Ranch sought amendments to Rezoning Ordinance 92-65, including eliminating the requirement to complete the Town Center Road in advance of any residential or commercial development. With respect to the Town Center area, these amendments would increase the amount of land zoned commercial from about 50 acres to about 100 acres, and decrease the density for single and multi-family dwellings from 880 to 729 units. Exhibit 5 at Table “I”: April 9, 1996 letter from Parker Ranch to County of Hawaii Planning Department requesting amendments to Ordinance 92-65 including “Table I”. With respect to the Town Center Road, Parker Ranch proposed the road instead be constructed:

“concurrently with the development of the areas immediately adjacent to the road. This will provide for the incremental development of the Town Center Area and the provision of infrastructure commensurate with the impacts of the project.”

Exhibit 5 at page 6: April 9, 1996 letter from Parker Ranch to County of Hawaii Planning Department requesting amendments to Ordinance 92-65 (without attached draft amendments); see also Exhibit 6: July 11, 1996 letter from Parker Ranch Consultant PBR Hawaii to Planning Department and attachments documenting notification to adjacent property owners of the proposed ordinance amendment along with the July 25, 1996 Planning Commission Agenda which included this agenda item. (Neither the Consultant’s notification letter to adjacent property owners nor the accompanying Planning Commission Agenda disclosed that Parker Ranch’s was requesting to defer or reduce the Town Center Arterial Road construction obligation.)

Rezoning Ordinance 96-117, approved on December 26, 1996, divided this Town Center Road (hereafter referred to as the Connector Road) into three separate sections:

- Kaomaloa Street to Pukalani Road was designated as Phase 1;
- Pukalani Street to Kamamalu Street (with an alternative exit onto Mamalahoa Highway near the Civic Center) was designated as Phase 2; and
- Mamalahoa Highway to Kaomaloa Street was designated as Phase 3.

. Exhibit 7 at pages 72-74 Rezoning Ordinance 96-117, Condition 96-117(M)(1)(b): Exhibit 7 contains Rezoning Ordinance 96-117 page 1 and pages 61 to 80, and “Exhibit D” (Waimea Town Center Connector Road Phasing Plan), excluding boundary descriptions. In Rezoning Ordinance 96-117 the “Town Center Arterial Road” was renamed “Connector Road”. Exhibit 7 at page 72: Rezoning Ordinance Condition 96-117(M)(1)(b).

Rezoning Ordinance 96-117 contained two mandatory road timing triggers for each of the three road phases:

- 1) “adjacent development” trigger; specifically the Ordinance required that Phase [1, 2, and 3] of the Connector Road: **shall be constructed in conjunction with development in the immediately surrounding areas.** . .(emphasis added); and provided further for the
- 2) “unit/count” trigger: meaning construction of these three road phases upon reaching a certain number of development units in certain zoning areas without regard to proximity to the Connector Road corridor: the three thresholds are: 300 residential units in residential zoning for road phase 1; and 450 residential units in residential zoning for road phase 2; and 579 residential units in residential or commercial zoning for phase 3. See Exhibit 7 at pages 72-74: 1996 Rezoning Ordinance Condition 96-117(M)(1)(b).

With respect to the primary “adjacent development” road trigger, the order in which the road phases were to be constructed depended upon the location of incremental development within the Town Center project. That concurrent development arrangement made sense. Inclusion of the “unit/count” trigger, as a secondary trigger also made sense so that development did not occur everywhere within the Town Center other than adjacent to the road corridor without triggering construction of the Connector Road.

Completion of the Mamalahoa Highway and Kamamalu Street intersections were also required to be completed in conjunction with construction of the immediate surrounding portion(s) of the connector road. Exhibit 7 at pages 74-75: Rezoning Ordinance 96-117 (M)(1)(c). Also included among the many other 1996 Waimea Town Center amendments, Parker Ranch requested that the Town Center Road be reduced from arterial width and design to the narrower collector road width and design standards, which proposed amendment was also approved. Exhibit 7, page 71: Rezoning Ordinance 96-117; and Exhibit 8: County of Hawaii “Street Cross Section with Sidewalk” R-32 Standard Details” showing that a secondary arterial road is 60 feet wide paved travel lanes (each being 30 feet wide) and a collector road is 42 feet wide (21 foot wide travel lanes).

Rezoning Ordinance 96-117 did not give the Planning Director authority to waive or modify either the “adjacent development” or the “unit/count” road construction timing triggers. Exhibit 7: Rezoning Ordinance 96-117. In contrast, this Rezoning Ordinance authorizes the Planning Director to waive other rezoning ordinance conditions. For example, in consultation with the Department of Public Works, at the time of plan approval or preliminary subdivision review, the Planning Director is authorized to waive the requirement of curbs, gutters, and sidewalks in residential zones. Exhibit 7, page 77: Rezoning Ordinance 96-117(M)(1)(g).

III.

THE 2002 AMENDMENT TO REZONING ORDINANCE 96-117

In 2002 Rezoning Ordinance 96-117 was amended to provide for the relocation of a park. Exhibit 9: Rezoning Ordinance 02-25 pages 1, and 35 -52, including the section on the Waimea Town Center. That 2002 amendment did not affect the road construction obligations set forth in the 1996 version of this Ordinance. For that reason, reference will continue to be made to the 1996 Ordinance 96-117. The ordinance section numbers relating to the Connector Road requirements, under condition M are however the same in both the 1996 and the 2002 versions.

NOTE OF EXPLANATION: To determine whether the threshold for either of the triggers requiring construction of the Connector Road have occurred, it is necessary to determine whether there has been “development in immediately surrounding areas” to any of the Connector Road phases; and in the case of the “unit/count” trigger, it is necessary to determine the total number of residential units in the various zones of this Town Center rezoned property. A detailed account of all development that has occurred to date in this project has not been submitted to the Planning Department. The following account is gathered from documents that are otherwise available to the public.

IV.

DEVELOPMENT ADJACENT TO THE CONNECTOR ROAD CORRIDOR OTHER THAN THE “LUALAI AT PARKER RANCH” RESIDENTIAL DEVELOPMENT

A. Transfer of Residential zoned Acreage Abutting the Connector Road corridor Phase 2 to the County for Elderly Housing residential units:

At about the same time as Ordinance 92-65 was being amended, Parker Ranch transferred 4.7 acres of residentially zoned land to the County of Hawaii for 40 residential units (Elderly Housing Units) within the Town Center area at the intersection of Kamamalu Street and the easterly end of the Connector Road corridor. This transfer to the County was made pursuant to Rezoning Ordinance 92-65(E) and the original 1987 rezoning of the entire Town Center parcel from Agriculture to Urban by the State Land Use Commission. On the basis of this transfer, Parker Ranch received a maximum number of “fair share” housing credits in the Town Center development. Exhibit 3 Rezoning Ordinance 92-65(E) at page 41; Exhibit 10: County Tax Map 3-6-7-02 printed

October 12, 2005: Exhibit 11: Bureau of Conveyances TMK3-6-7-02 Lot 47 map and identification key for County of Hawaii Waimea Housing Foundation (Elderly Housing Units). Exhibit 12: State of Hawaii Land Use Commission Order in the Matter of the Petition of Richard Smart Revocable Personal Trust Docket #A86-601; the exhibit includes the cover page of “Findings of Fact, Conclusions of Law, and Decision and Order”, and the “Order” set forth on pages 33 to 36 and Exhibit A “Location Map”. In this Land Use Commission Order, the attached “Exhibit A Location Map” shows that this Waimea Elderly Housing property, now TMK 3-6-7-02 Lot 47, is located within the Town Center rezoned parcel. The Land Use Commission “Findings of Fact, Conclusions of Law, and Decision and Order” may be viewed in its entirety at <http://luc.state.hi.us/cohawaii/a86-601smart.pdf>.

B. Residential Development Adjacent to Phases 1 and 2 of Connector: Holoholo-ku

In about 2002, in association with Kamuela Associates, Inc. Parker Ranch undertook a residential development on the south side of the Connector Road Phases 1 and 3 within a commercially zoned area. Of the proposed total of 132 units, 44 have been completed. Exhibit 13: Parker Ranch/Schuler Homes “Location Map” which shows the Holoholo ku residential project area within a commercially zoned area; Exhibit 14 at page 1: March 7, 2003 letter from William L. Moore Planning to the Planning Department, regarding “March 2003 annual status report on the Waimea Town Center”; Exhibit 15 at page 4: July 15, 2002 Letter from Kamuela Associates to Planning Department regarding Holoholo Ku at Parker Ranch Street Names TMK 6-7-002-001, and which includes Conceptual Plan on page 4.

C. Transfer of Commercially Zoned Land Located Abutting the Connector Road Phase 2 to North Hawaii Hospital, a beneficiary of the Parker Ranch Trust

In December 2004, the Parker Land Trust, by its Trustees, transferred 15.219 acres of commercially zoned land, to the North Hawaii Community Hospital Inc., which is one of the four beneficiaries of the Trust. This parcel, TMK 3-6-7-02 Lot 51 is next to the North Hawaii Community Hospital Inc.’s existing property TMK 3-6-7-02-13 and abuts Phase 2 of the Connector Road corridor for 577.04 feet. Exhibit 15. Exhibit 10: County Tax Map 3-6-7-02 for Lot 51; Exhibit 16: December 16, 2005 “Correction Quitclaim Deed” from Trustees of Parker Land Trust to North Hawaii Community Hospital, Inc page 1 only, for TMK 3-6-7-02 lot 51, and State Bureau of Conveyances maps for TMK 3-6-7-02 Lot 51 and the currently developed North Hawaii Community Hospital parcel TMK 3-6-7-02 Lot 13.

D. Pursuant to Rezoning Ordinance 96-117 condition (F), Parker Ranch is in the Process of Conveying a Parcel of Land Located Along the Connector Road corridor at the Lindsey Road intersection for Expansion of the Waimea Elementary and Middle School campus

Pursuant Rezoning Ordinance 96-117(F) Parker Ranch was required to:

provide its pro rata share for school facilities . . . The pro rata share determination and its implementation (i.e. dedication of land, construction of classroom or funding) shall be approved by the Planning Department, in consultation with the Department of Education, in conjunction with final subdivision approval of any residential lot subdivision for any area of development.”

Exhibit 7 at page 64: Rezoning Ordinance Condition 96-117(F). (Condition F was the same in the original Rezoning Ordinance 92-65 and in the most recent revision Rezoning Ordinance 02-25 at page 37)

In June 2000, Parker Ranch Land Trust and the State entered into the “Waimea Development Agreement” to satisfy Condition F of Ordinance 96-117 whereby Parker Ranch would transfer land abutting the Department of Education Waimea school campus at the intersection of the Connector Road corridor and Lindsey Road for expansion of the Waimea Elementary and Middle School Campus in fulfillment of its school facilities condition under Rezoning Ordinance 96-117(F). Pursuant to this agreement Parker Ranch would transfer 4.8 acres to the State Department of Education. In that agreement the State also agreed to transfer to Parker Ranch a .78 acre parcel of land, which conveyance would allow Parker Ranch to realign to the south the Lindsey Road/Connector Road intersection and to reduce the area identified for the Waimea school expansion. Exhibit 17: June 20, 2000 “Waimea Development Agreement” between Parker Land Trust and State of Hawaii (Department of Education) and Exhibit 18: August 8, 2003 “Department of Land and Natural Resources Final Approval of Land Exchange” pages 1-6 and attached “Project Site Map” which shows the location of the parcels to be exchanged. According to Barbara Lee, Project Development Specialist, Land Division DLNR, this transaction is ready to be completed as soon as Parker Ranch provides some documentation to the state. Exhibit 19: August 28, 2006 email from Barbara Lee, Project Development Specialist, Land Division DLNR to Margaret Wille. A copy of the June 2000 “Waimea Development Agreement” is in the Planning Department Rezoning file for Ordinance 96-117, however no other information could be found in that file about the ensuing implementation of this property exchange. See Affidavit of Margaret Wille (Item 14) stating that as of September 15, 2006, the Planning Department file for Rezoning Ordinance 96-117) contained the Exhibit 17 “Waimea Development Agreement but no later documentation about the subsequent implementation of this Agreement and Rezoning Ordinance condition F.

V.

THE LUALA’I AT PARKER RANCH DEVELOPMENTS

A. Luala’i at Parker Ranch Subdivision Phases I and II and 2001 Planned Unit Development

In 2000 Parker Ranch and D.R. Horton –Schuler Homes Inc created a joint venture “Kaomalo LLC” to develop “Luala’i at Parker Ranch” with a proposed total of approximately 322 residential units in 75 acres of Parker Ranch’s Waimea Town Center residentially zoned land. On a 25 acre portion of this parcel Parker Ranch/Kaomalo

requested and was approved for a Planned Unit Development (PUD) for a total of 92 lots, 84 of which would be less than the 7500 square foot minimum lot zone, and there would also be reductions in other zoning and subdivision requirements. Exhibit 20: October 2, 2001 Planned Unit Development Application for a portion of Lot 57 and Lot 58, page 1 only; See also Exhibit 13: Parker Ranch Schuler Homes Community “Location Map”, an attachment to the 2001 Planned Unit Development Application, which shows the Luaala’i PUD in relationship to the other zoning and development within the Town Center area. The first two Luaala’i at Parker Ranch subdivision phases, Luaala’i at Parker Ranch Phase I and Phase II totaled 133 residential home lots, and received tentative approvals in 2002 and 2003 respectively. Exhibit 21: January 10, 2002 Tentative Approval for Lualla’i at Parker Ranch Phase I (SUB 2001-0139) and August 4, 2003 Tentative Approval for Luaala’i at Parker Ranch Phase 2 (SUB 2003-0046) These lots are located between Mamalahoa Highway and the Connector Road corridor, but not next to the Connector Road. A portion of the PUD was included in Luaala’i III. Exhibit 13: Parker Ranch Schuler Homes Community “Location Map”; Exhibit 10: County Tax Map 3-6-7-02.

B. 2004 Subdivision Application for Luaala’i at Parker Ranch Phase III Subdivision - hereafter referred to as Luaala’i III (or 3), which development abuts the Connector Road corridor.

On December 2, 2004, Parker Ranch/Kaomalo submitted an application for an 86 lot development to be located on TMK 3- 6-7-02: lots 57, 59, and 60, along the north side of the Connector Road between Mamalahoa Highway and Lindsey Road. With the exception of two large lots, these lots average 7500 square feet in the single family zoned area and 5000 square feet in the multi-family zoned area. Exhibit 22: December 2, 2004 Luaala’i at Parker Ranch Phase III “Subdivision and/or Consolidation Application Form and attachments 1) County Real Estate Tax Clearance notice and 2) “ESRI ArcExplorer 2.0 Untitled zoning map which shows Lot 60 zoned as single family residential and Lot 57 zoned as multi-family residential (Lot 59 is a road lot for Kaomaloa Street located between Lots 57 and 60); and Exhibit 23: Luaala’i III Preliminary Plan, which Plan is labeled “ Luaala’i Subdivision at Parker Ranch – Phase 3”; Exhibit 24: detail of the ‘vicinity map” on the Luaala’i III Preliminary Plan (Exhibit 23) outlining the Luaala’i III Subdivision “Project Site”.

Along with its subdivision application for Luaala’i III, Parker Ranch/Kaomalo did not submit a list of proposed improvements pursuant to Subdivision Code Section 23-63(7), nor or any letter of explanation about the scope of this proposed subdivision. See Affidavit of Margaret Wille (Item 9), stating that according to the Planning Department’s Luaala’i III Subdivision file (2004-0221), no additional information (such as a list of proposed improvements) was submitted in conjunction with the Subdivision/Consolidation application form. In December 2005, Section 23-66(7) of the Subdivision Code required that the preliminary plan submission include

Improvements to be made by the developer and the approximate time such improvements are to be completed. Sufficient detail regarding proposed improvements shall be submitted so that they may be checked

for compliance with objectives of these regulations, State laws and other applicable County ordinances.

Section 23-66(7) of the Hawaii County Code, section 23 “Subdivisions”, hereafter referred to as the Subdivision Code section 23-66(7) (At the request of the Hawaii County Planning Director, this provision 23-66(7) of the Subdivision Code was subsequently deleted from the Code effective July 3, 2006 pursuant to County Ordinance 06-24 (Bill 246 Draft 5, page 8).

The Luala’i III project site, as shown on the Preliminary Plan map, included all of Phase 3 of the Connector Road, and approximately half of Phase 1 of the Connector Road (with the inclusion of the transfer to the Department of Education for the expansion of the school campus. Exhibit 23: Luala’i III Preliminary Plan Map; Exhibit 25: Superimposed “Conceptual Land Use Plan Waimea Town Center” prepared by consultant PBR for Parker Ranch superimposed by Margaret Wille with the approximate locations of the Town Connector Road Phases; Exhibit 7: Rezoning Ordinance 96-117 at Exhibit D “Waimea Town Center Connector Road Phasing Plan”.

The Luala’i III Subdivision project included TMK 3-6-7-02 lots 57, 59, and 60, totaling 42.108 acres, which lots are in areas immediately surrounding the Connector Road corridor, and abut the Connector Road corridor as follows:

- Lot 57 is a 18.986 acre parcel that extends from the future intersection of Connector Road and Lindsey Road along Phase 1 of the Connector Road corridor to Kaomaloa Street. Luala’i III subdivision’s proposed lot #227 is within existing Lot 57, that is a 10.180 acre lot and (although not noted on the Luala’i III Subdivision plan) includes all of the land along the Connector Road that is in the process of being transferred to the State Department of Education for the expansion of the Waimea Elementary and Middle School campus. Exhibit 26: Bureau of conveyances Map for 3-6-7-02 Lot 57; Exhibit 10: County Tax Map 3-6-7-02 showing Lot 57; and Exhibit 18 at “Project Site Map”: August 8, 2003 “Department of Land and Natural Resources Final Approval of Land Exchange”; and,
- Lot 59 is the Kaomaloa Street corridor, a .949 acre road lot that intersects with the Connector Road corridor. Exhibit 27: Bureau of Conveyances Map for TMK 3-6-7-02 Lot 59; Exhibit 26: Bureau of Conveyances “Map” for TMK 3-6-7-02 Lot 59 and Exhibit 10: County Tax Map 3-6-7-02, showing Lot 59. Where Kaomaloa Street and the Connector Road will intersect is the dividing point for Phases 1 and 3 of the Connector Road. Exhibit 7: Rezoning Ordinance 96-117(M)(1)(b), Exhibit 25: Superimposed “Conceptual Land Use Plan Waimea Town Center”.
- Lot 60 is a 22.173 acres parcel that abuts the entire phase 3 of the Connector Road corridor from Kaomaloa Street to Mamalahoa Highway by the rodeo grounds. Exhibit 28: Bureau of Conveyances Map for TMK 3-6-7-02 Lot 60, and Exhibit 10: County Tax Map 3-6-7-02, showing Lot 60.

On March 22, 2005 the Parker Land Trust/Kaomalo's "Luala'i at Parker Ranch – Phase 3" received Tentative Subdivision Approval from the Planning Department. Included as a condition to that Tentative Approval was Condition 5, which provided: Comply with all applicable conditions of Change of Zone Ordinance 02-25, which includes, but are not limited to, the following:

.....
d) Condition M(1)(b) – **construct that portion of the connector road abutting the proposed subdivision in a manner meeting with the approval of the Department of Public Works.** (emphasis added)

Exhibit 29 at page 3, "Tentative Approval" Letter for Luala'i at Parker Ranch-Phase 3, dated March 22, 2005, from Christopher Yuen, Planning Director, to Sidney M. Fuke, Planning Consultant.

The March 22, 2005 Luala'i III Tentative Approval letter contained a specific time limit for completion of all of the tentative approval conditions, therefore including the condition to complete the relevant portion of the connector road under Tentative Approval condition 5(d). The approval letter stated as follows:

Time Limit: Subdivider shall complete all requirements specified as conditions for tentative approval of the preliminary plat map within three (3) years of said tentative approval, on or before **March 22, 2008**. An extension of no more than two (2) years any be granted by the director upon timely request of the subdivider. (emphasis in original)

Exhibit 29 at page 4: March 22, 2005 Tentative Approval Letter for Luala'i at Parker Ranch Phase 3

C. Communications Between the County (the Planning Department –Planner Daryn Arai and the Engineering Division of the Public Works Department-Engineer Kiran Emler) and the Developer (Parker Ranch Kaomalo LLC and its consultant Barry Muranaka of Akinaka Associates and Rilev Smith, Vice President of Parker Ranch) regarding Parker Ranch/Kaomalo's obligation to construct the Connector Road in conjunction with development of the Luala'i III subdivision. In the course of these communications, Planner Arai spells out to the Consultant that the Section or Phase of the Connector Road Adjacent to the Luala'i III Project Site must be Constructed along with the Intersection on Mamalahoa Highway

Between January 13, 2006 and February 28, 2006 there were a series of email communications between Parker Ranch/Kaomalo and the Engineering Division of the Department of Public Works and the Department of Planning discussing Parker Ranch/KaomaloLLC's obligation to construct a portion of the Connector Road in conjunction with the Luala'i III development. Exhibit 30: Email from Ki Emler dated January 13, 2006 to Parker Ranch/Kaomalo's consultant Barry Muranaka of Akinaka Associates; and Exhibit 31: Series of emails between Parker Ranch/Kaomalo and the County dated February 2, 2006 to February 28, 2006:

- January 13, 2006: email from Engineer Emler to Consultant Muranaka, states he is giving Developer “a preview to our response” regarding final review of Lua’i 3, which list of items included the following: “Address Tentative Approval Condition 5d [regarding construction of the connector road]: **We will need a revised Tentative Approval letter from the Planning Department if this is not required.**” (bold in original); Exhibit 30: January 13, 2006 email;
- February 2, 2006: email from Consultant Muranaka to Engineer Emler requests clarification of the connector road condition, so that they can proceed for final approval of the subdivision: “The last outstanding item would be the matter of having to construct the intersection on Connector Road. Hopefully Planning can shed some light on that and we can resolve it (one way or the other). We could then go for final approval.” (Exhibit 31, page 8);
- Engineer Emler to Consultant Muranaka: responds that the Ordinance requires construction of the connector road abutting the subdivision, and not just an intersection (Exhibit 31 page 8);
- February 2, 2006: email from Consultant Muranaka to Engineer Emler disputes that requirement: “Ki – We are disputing that thte statement in the T.A. [Temporary Approval] is not consistent with the Ordinance that it refers to. I can’t find anywhere in the Ordinance that says “construct that portion of the connector road abutting the proposed subdivision” (Exhibit 31 page 8);
- February 3, 2006: email from Engineer Emler to Muranaka responds that this requirement “is a condition of the Tentative Approval. Planning Director’s call” (Exhibit 31, page 8);
- February 14, 2006: email from Consultant Muranaka to Engineer Emler asks if they can get the grading permit and avoid “the potential intersection area for now” (Exhibit 31, page 7);
- February 22, 2006: email from Planner Arai to Consultant Muranaka responds by quoting from section M(1)(b) of the Ordinance, and then states:
 - --- “So the ordinance **does** require construction of this section of the collector road adjacent to the Lua’i –Phase III project site, as well as related intersection improvements at its connection with the Mamalahoa Highway.” (emphasis in the original);
 - --- “I see two specific triggers in the ordinance that would demand this collector road; 1) development adjacent to its alignment, and 2) unit/lot count.”
 - --- “If the applicant’s position is to further defer these improvements, its something we can consider”;
 - ---.”Someone has to brief us on the phasing of development within the Parker 2020 project so that we can better respond to questions like this. The Parker Land Trust should have a detailed scheduling program of infrastructure installation and phased development that would satisfy the timing requirements of the change of zone ordinance. Since that

information was not disclosed to us, we are interpreting these requirements and simply triggering these required roadway improvements at its earliest point when demanded by the ordinance” (Exhibit 31 at pages 6- 7);

- February 22, 2006: email from Consultant Muranaka to Planner Arai responds by calculating that the three Luala’i subdivisions total 218 units, and points out that (under the unit/count trigger) there would have to be 579 residential units. Consultant Muranaka does not address the “adjacent development” timing trigger. (Exhibit 31 at pages 5-6);
- February 22, 2006: email from Planner Arai to Consultant Muranaka, asks about the previously built Holoholo-ku residential development. (Exhibit 31 at page 5);
- February 22, 2006: email from Consultant Muranaka to Planner Arai responds that Holoholo-ku is not included because it is exempt in the unit count.” [Consultant Muranaka does not address Hololo-ku development with regard to the “adjacent development” road construction trigger.] (Exhibit 31 at page 4).

Between February 22, 2006 and February 28, 2006, the Planning Department and Parker Ranch/Kaomalo continued emailing regarding the unit/count timing trigger and whether the development could move forward and resolve “the interpretation of the zoning ordinance 96-117, at a later time”. The February 27, 2006 email from Riley Smith, Vice President of Parker Ranch, to Planner Arai, stated as follows:

. . . After reviewing this string of emails (that started with a concern from Ki Emler), we believe that the primary goal is to move the final approval of the phase 3 subdivision forward, as well as obtain the grading permit. This will allow D.H. Horton to give their contractor (Isemoto), notice to proceed. The secondary (yet very important) issue, is which specific units are included in the tally that will trigger construction of phase 1 of the Connector Road. Since inclusion of the Holoholo Ku project count of 44 units, along with phases 1,2, 3 (218 units total) of the Luala’i project, will NOT reach this 300 unit total, can we address the interpretation of the zoning ordinance 96-117, at a later time? I understand from Sid[ney Fuke] that you would like definition from Parker Ranch on our projected timing of our infrastructure improvements. I am happy to discuss this matter when we meet on Wednesday. Just trying to focus on what we need to resolve at our meeting. . .
Exhibit 31 at pages 1-3: including the February 27, 2006 email from Riley Smith of Parker Ranch to Planner Arai, page 2.

In the February 27, 2006 email from Parker Ranch’s Vice President Riley Smith, he does not address the primary “adjacent development” timing trigger, which separate trigger was explained by Planner Arai in his February 23, 2006 email. In his tally of residential development units in the Luala’i subdivision, Parker Ranch’s Riley Smith also does not mention that at that at the same time as this series of emails was taking place, on February 14, 2006, Parker Ranch/Kaomalo submitted the Luala’i at Parker Ranch Phase IV subdivision application for 75 lots. Exhibit 31 page 2:email from Parker Ranch to

Planner Arai. (Parker Ranch/Kaomalo's Luala'i at Parker Ranch Phase IV subdivision is discussed below in Section VII.)

On or about July 1, 2006, the above series of emails was obtained by Margaret Wille from the Planning Department in Hilo Hawaii. At that time, a Planning Department Staff person, Jonathan Holmes, told her she should not have been given these documents. He said that documents (such as these) attached on the left side of the subdivision file folder are removed before members of the public are given the file. See Affidavit (Item 12) of Margaret Wille.

D. March 3, 2006 Meeting Between Representatives of Parker Ranch/Kaomalo and Planner Daryn Arai; The Planning Department appears Willing to Accommodate Parker Ranch/ Kaomalo's Efforts to Circumvent the Connector Road Obligation in Conjunction with the Luala'i III Subdivision

According to the information in the February 27, 2006 email from Parker Ranch representative Riley Smith to Planner Arai, a meeting between Parker Ranch/Kaomalo was scheduled for March 3, 2006 at the Planning Department. Exhibit 31: String of emails between County Departments and Parker Ranch/Kaomalo, page 1. On or about March 10, 2006 Parker Ranch's Riley Smith and Petitioner's Representative (prior to representation of Petitioners) met at Parker Ranch Headquarters in Waimea, Hawaii. At that time Riley Smith told Margaret Wille of the meeting with Daryn Arai at the Planning Department and said that the Planning Department was going to remove the Luala'i III Tentative Plan condition 5d (requiring Connector Road construction in conjunction with the Luala'i Phase III development). See Affidavit (Item 6) of Margaret Wille.

On or about March 10, 2006, Margaret Wille also spoke by telephone with Planner Arai and asked whether the proposal to remove the connector road obligation from the Luala'i III Subdivision was "a done deal". Planner Arai indicated that he thought the Director "had it on his desk" but that he was not sure if it was finalized. Margaret Wille asked Planner Arai to review again the connector road condition of Ordinance requiring construction of the relevant phase of the Connector Road "in conjunction with development in the immediately surrounding areas." Planner Arai responded that Parker Ranch believes that this trigger only kicks in when there is development on both sides of the Connector Road. Margaret Wille also asked Planner Arai why there was not any information in the Subdivision file about these negotiations with Parker Ranch. Planner Arai said that the Department's final decision would be placed in the Luala'i III subdivision file. Margaret Wille responded that after the Director issues his final decision the public no longer has any meaningful chance for input, because then only those with "standing" can challenge the Department's determination through an expensive appeal process. See Affidavit (7) of Margaret Wille.

E. The Public Works Department Issued Parker Ranch/Kaomalo's Luala'i III Grading Permit without Requiring Grading for any section of the Connector Road

On the same date as that March 3, 2006 Parker Ranch/Kaomalo meeting with the Planning Department, Parker Ranch/Kamalo LLC submitted a final set of grading plans to the Department of Public Works for the Luala'i III . The cover sheet for the Luala'i III Grading Plans, labeled "Construction Plans" is stamped "March 3, 2006", "APPROVED FOR GRADING PURPOSES ONLY", and "Approval of the mass grading of the subject property does not imply approval of any development on the property as no plans for approval have been submitted to this department. These Luala'i III Grading Plans do not show any plans for grading earthwork in the Connector Road corridor, which road corridor is labeled "**Future Connector Road**". (emphasis added) ". Exhibit 32: Luala'i III Grading Plans, Plan Cover Sheet labeled "Construction Plans" Exhibit 33: "Location Map" detail of Exhibit 32 Luala'i III Grading Plan Cover Sheet. Exhibit 34: Luala'i III Grading Plans Sheet 5 "General Layout" of 21 Plan sheets.

Attached to the Luala'i III Grading Plans is a copy of the Engineering Department's previous January 13, 2006 email to Parker Ranch/Kaomalo's consultant, outlining items that needed to be addressed on the grading plans (Exhibit 30). On this copy of that email, next to the item that read "Address Tentative Approval Condition 5d We need a revised Tentative Approval letter from the Planning Director if this is not required.", Parker Ranch/Kaomalo's consultant penciled in the following response:

As discussed, Connector Road does not need to be constructed at this time.

Exhibit 35: January 13, 2006 copy of email from Engineer Emler to Consultant Muranaka re: "Luala'i Phase 3-Final Review" with penciled-in notations.

On or about April 4, 2006 Parker Ranch/Kaomalo's grading permit for Luala'i III subdivision was approved by the Department of Public Works. The permit was signed by both Public Works and the Planning Department. Exhibit 36: Department of Public Works Grading Permit # 91572 dated 4/4/06 (which includes an attached letter from the Division of Historic Preservation asking that the archeological Monitoring for Luala'i III be in compliance with the 2003 Archeological Plan for Luala'i I, II, and III).

VI. THE DEADLINE FOR THE FILING OF THE LUALA'I III SUBDIVISION PLAN WAS MARCH 22, 2006 AND THAT PLAN HAS YET TO BE FILED

Pursuant to the conditions in the Luala'i III Tentative Approval letter, the deadline for submission of the Luala'i III Final Plan map was March 22, 2006. The Luala'i III Final Plan Map was not submitted prior to March 22, 2006, and as of September 15, 2006, had not yet been submitted to the Planning Department. Parker Ranch/Kaomalo did not request an extension of time in which to file the Final Plan and the Planning Department has not granted an extension beyond the March 22, 2006 filing deadline. Exhibit 29: March 22, 2005 Planning Department Tentative Approval letter for Luala'i III. See Affidavit (Item 10) of Margaret Wille, stating that as of September 15, 2006 in the Planning Department's Luala'i III file there was no request for an extension, and there was no letter granting an extension of time for submission of the Final Plan. Exhibit 37: Department of Planning 2004 "Subdivision Log", including for the Luala'i

III Subdivision (SUB 2004-221), which shows that the last action taken by the Planning Department regarding this subdivision was the March 22, 2005 Tentative Plan Approval.

VII.

ON FEBRUARY 14, 2006 THE SUBDIVISION APPLICATION FOR “LUALA’I AT PARKER RANCH PHASE IV” WAS FILED WITH THE PLANNING DEPARTMENT; THIS PROPOSED LUALA’I PHASE IV SUBDIVISION IS IN A PORTION OF THE PENDING LUALA’I PHASE III SUBDIVISION AND THE SUBJECT LOT ABUTS THE CONNECTOR ROAD CORRIDOR; THERE IS NO MENTION IN THIS SUBDIVISION APPLICATION REGARDING THE CONNECTOR ROAD OBLIGATION

On February 14, 2006, Parker Ranch/Kaomalo filed with the County’s Planning Department for a fourth Luaala’i at Parker Ranch Subdivision “Luaala’i at Parker Ranch Phase IV” for 75 lots to be located on TMK 3-6-7-02 Lot 62 along Mamalahoa Highway (mistakenly referred to as Lot 82) and on a portion of Lot 60 (which portion of Lot 60 is proposed lot 226 of the not yet approved Luaala’i Phase III project), abutting the Connector Road corridor. This Luaala’i IV Subdivision application was submitted by Subdivider Kaomalo LLC and Landowner: Parker Ranch Land Trust, signed by Riley Smith. Exhibit 38: Subdivision and/or Consolidation Application for Luaala’i IV Subdivision; Exhibit 24: Luaala’i III Preliminary Plan Map; Exhibit 10: County Tax Map 3-6-7-02.

The Luaala’i IV Subdivision Application form, as filed with the Planning Department, was accompanied by a Subdivision Plat Plan map and a letter dated February 14, 2006 signed by Consultant Sidney Fuke noting compliance with various provisions of the Subdivision Code’s Preliminary Plan. However nowhere in this submission to the Planning Department is there any disclosure or indication of the Connector Road obligation under the controlling Rezoning Ordinance 96-117(M)(1)(b). Exhibit 38: Subdivision and/or Consolidation Application for Luaala’i at Parker Ranch Phase IV; Exhibit 39: Luaala’i at Parker Ranch Phase IV Subdivision Plan Map. Exhibit 40: February 14, 2006 letter from Consultant Sidney Fuke to Planning Director (without attached copy of covenants “Use Restrictions”). With respect to proposed improvements, Consultant Fuke’s letter stated:

The subdivider intends to make the improvements for this subdivision as soon as the required infrastructure construction plans have been approved. Hopefully this will be initiated within the next 6 months and completed 12 months thereafter. In conjunction with the preparation of the construction plans, the various government agencies must review the plans to assure compliance with the appropriate State and/or County requirements. Exhibit 40: February 14, 2006 letter From Sidney Fuke to Planning Director.

On April 21, 2006 the Planning Department responded to this Luaala’i IV subdivision application in a letter signed by Planning Director Christopher Yuen. In that letter, several items that will need to be corrected are pointed out including that Lot 62

was referred to as Lot 82, and that a couple lots do not meet the minimum lot size requirements. The Planning Department's April 21, 2006 letter however, does not mention construction of the relevant phase or section of the Connector Road and the intersection of the Connector Road with Mamalahoa Highway. Exhibit 41: April 21, 2006 Letter from the Planning Department to Consultant Sidney Fuke. (In fact this area of the Connector Road and the Mamalahoa Highway intersection should be completed as part of the Luala'i III Subdivision approval, since all of Lot 60 was included in that Luala'i III subdivision application.)

VIII.

PARKER RANCH'S EXPLANATION OF ITS OBLIGATION UNDER THE REZONING ORDINANCE 96-117 (02-25) CONNECTOR ROAD CONDITION

On March 20, 2006, Parker Ranch wrote to the Planning Department regarding "Zoning Ordinance No. 02-25 Parker Ranch Waimea Town Center". Exhibit 42: March 20, 2006 Letter from Parker Ranch, signed by Riley Smith Vice President, Parker Ranch Land and Asset Management, to Christopher Yuen Planning Director. That letter addresses application of both the "unit/count" and the "adjacent development" timing triggers. With respect to the "unit/count" trigger, Parker Ranch's Riley Smith states that the first unit/count threshold point of 300 residential units has not been reached. He states that the number of units in Luala'i Phases I, II, and III totals 217 units, and that even adding in the 44 Holoholo Ku units, the combined total is still under the 300 unit threshold. The letter makes no mention of the recently submitted subdivision application for 75 lots in Luala'i Phase IV, or the 40 residential units in the Waimea Elderly Housing development, for which Parker Ranch received maximum "fair share" housing credits. Exhibit 7 at 63: Rezoning Ordinance 96-117(E).

With respect to the "adjacent development" timing trigger, Parker Ranch's Riley Smith took the position that the language "development in the immediately surrounding areas" only applies when there is development on both sides of the Connector Road corridor, and that this trigger did not apply to the Holoholo-ku development because there are not residential units on the north side of the Connector Road corridor across from the Holoholo-ku development, and further than this requirement related additionally to construction of the access from the subdivision and the road width standards of the road corridor right of ways. Specifically he stated:

Upon development of the immediately surrounding areas, which is triggered by residential [*footnote 3 in the text*] development **on both** sides of the Connector Road (e.g. "immediately surrounding areas"). Additionally, the phase (sic)"shall be constructed in conjunction with the development of the immediately surrounding areas" was intended to ensure construction of the limited access (no direct access or driveways from the lots) "two lane collector standard within a 80 foot right of way" as required by Condition M(1)(a), and not simply the 60-foot wide standard residential roadway as would normally be required by the

Subdivision Code. (emphasis in the original)
Exhibit 42 at Page 3: March 20, 2006 Letter from Parker Ranch to Planning Department.
Footnote 3 in the letter stated:

Although the Holoholo ku residential condominium development is located on the south side of the Connector Road alignment, the development on the north side across from that project is commercial, not residential development.

Exhibit 42 at Page 3: March 20, 2006 Letter from Parker Ranch to Planning Department

IX.

THE REZONING ORDINANCE REQUIREMENT TO SUBMIT A DETAILED ANNUAL REPORT DISCLOSING THE STATUS OF DEVELOPMENT IN EACH AREA OF THE TOWN CENTER PROJECT AND REPORT COMPLIANCE WITH THE CONDITIONS OF APPROVAL

Rezoning Ordinance 96-117(K) also contains the following condition:

an annual progress report shall be submitted to the Planning Director prior to the anniversary date of the approval of this change of zone the report shall address, in detail, the status of the development of each area (including number of lots created, number of units constructed, developed and undeveloped commercial and industrial areas) and the compliance with the conditions of approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

Exhibit 7: Rezoning Ordinance Condition 96-117(K) which is the same as in Rezoning Ordinance 02-25(K), and which was the same as in the original Ordinance 92-65(M).

During 2004, 2005, and 2006, Parker Ranch did not submit any annual progress reports setting forth the status of development in each area of the town Center Project and compliance with the conditions of the Rezoning Ordinance Approval. See Affidavit (Item 11) of Margaret Wille, stating that there are no Annual Status Reports for the entire Town Center Project contained in the Planning Department's Luiala'i III subdivision file 2004-0221.

In a February 28, 2006 email to the Planning Department, Parker Ranch acknowledged its failure to comply with this annual progress report condition:

. . . After checking our files, I think that we may be delinquent in providing with Annual Status Reports for both 2004 and 2005.

This is my responsibility and I will update, get then to you (soon).

Exhibit 31 at page 1: email from Riley Smith to Planner Arai dated February 28, 2006.

On March 20, 2006 Parker Ranch did submit a letter to the Planning Department outlining its position with regard to its Connector Road obligation. That letter did not contain any detail regarding the development of each area (e.g. a list of both its developments and transfers to other entities throughout the Town Center Project) and did not report compliance, or lack thereof, with each condition of the Rezoning Ordinance as required by Rezoning Condition (K). Exhibit 42: March 20, 2006 letter from Parker Ranch to Director of Planning. As specifically relates to development along the Connector Road, this letter omits mention of the following:

- -the February 14, 2006 preliminary subdivision application for a Luala'i IV residential development to be located in part within the pending Luala'i III project site adjacent to the Connector Road;
- -the December 2005 transfer to the North Hawaii Hospital for expansion of the hospital campus along the connector road corridor; and
- -the in-process transfer to the Department of Education for expansion of the Waimea school campus along the Connector Road corridor.

Exhibit 42: March 20, 2006 Letter from Parker Ranch to Planning Department.

X.

THE PLANNING DEPARTMENT HAS AUTHORIZED PARKER RANCH/KAOMALO TO PROCEED WITH CONSTRUCTION PLANS TO DEVELOP LUALA'I III SUBDIVISION WITHOUT CONSTRUCTION OF ANY PORTION OF THE CONNECTOR ROAD

A. The Planning Department authorized the Engineering Division to Approve Luala'i III Construction Plans that Omit Plans for Construction of Any Part of the Connector Road, and does so without including documentation of that authorization in the Department of Planning's Subdivision file that is accessible to the public.

On April 25, 2006, the Planning Department authorized the Engineering Division of the Public Works Department to approve Luala'i III infrastructure/construction development plans for the Luala'i III subdivision that construction of any portion of the Connector Road. On April 25, 2006, Planner Arai emailed Engineer Emler in the Engineering Division of the Public Works Department as follows:

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 roadway improvements. Approval of the construction drawings minus the connector road details is okay and will not represent the deferral or removal of any requirement by Horton to build the connector road, which is still a requirement of the tentative approval at this time.

The director has yet to issue a formal decision regarding Horton'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. We will enforce all requirements of the tentative approval.

Exhibit 43: April 25, 2006 email from Planner Daryn Arai to Engineer Kiran Emler .

On or about July 7, 2006 the April 25, 2006 email from the Planning Department to the Engineering Division was found in the Luaala'i III Subdivision file at the Kailua-Kona Engineering Division of the Public Works. As of September 15, 2006, the Planning Department's file for the Luaala'i III Subdivision, as shown to the public, did not contain this email. See Affidavit of Margaret Wille (Item 13).

A few days before (following a July 2, 2006 inquiry as to the official status of the Luaala'i III subdivision) Planner Arai in an email to Margaret Wille stated as follows:

The Luaala'i Phase III subdivision still remains pending with this office. We have not changed our tentative approval that requires the construction of that part of the connector roadway fronting the project site. The director is still in discussions with the applicant and I have not heard any thing to the contrary prior to his leaving for vacation."

Exhibit 44: July 3, 2006, email from Planning Staffer Arai to Margaret Wille, and cc to Chris Yuen, Planning Director. Notably there was no mention in this email communication that the Planning Department had authorized the Engineering Division to approve construction plans for the development that omit any construction of the Connector Road.

B. The Planning Department's Decision Not to Require Inclusion of the Connector Road in the Final Construction Plans for this Development Was a Significant Action on the Part of the County

Once a subdivider had tentative approval of his preliminary plan that subdivider prepares construction plans for the proposed improvements including "specifications showing details of road construction, drainage structures, sewers, water mains and all other utilities proposed to be installed in the proposed subdivision. Subdivision Code § 23-79. Once the construction drawings and specifications have been approved by the various departments, including Public Works and Planning, "the subdivider may proceed with the construction of the improvements and utilities" Subdivision Code §23-80. After the construction plans have been approved and the subdivider signs an agreement secured by a bond to ensure completion of the improvements, under Subdivision Code §§ 23-82 and 23-83, then the subdivider can submit a Final Plan for approval, after which approval the subdivider is permitted to sell the lots even if the required improvements have not been completed.. Subdivision Code §23-81. The Final Subdivision Plan, however, first be determined to be 'substantially similar" to the original Preliminary Plan. Subdivision Code §23-73.

Christopher Yuen, the Planning Director recently explained this subdivision approval process as follows:

And just to give you a little bit of background here, there are two big stages in subdivision approvals. The first stage is called tentative approval. Tentative approval basically gives you the layout, say that the layout of your subdivision is okay, where you're planning to put the roads, where the lots are laid out. And it sets out a series of conditions that you have to meet, for example construct a 20 foot wide paved road with curbs, gutters and sidewalks. That would be a typical condition of a tentative subdivision approval. Then final approval comes after the subdivider has either made all of the improvements required or has bonded the improvements. So tentative approval is important because after tentative approval if you want you can take your construction plans to the Department of Public Works, get them approved, and then you can start building your streets. The significance of final approval is that after final approval is you can sell your lots. Final approval is really the last stage; after final approval you're really out the door.

Exhibit 45 at page 2 County of Hawaii Planning Commission Hearing Transcript March 9, 2006, Minutes of the Planning Commission, Speaker: Christopher Yuen, Planning Director, page 2 at paragraph 3; only pages 1-2 of the Hearing Transcript are included in the Exhibit.

Whether or not a particular improvement is required in a subdivision's construction plans is important. According to staff at the Kailua-Kona Engineering Division, the execution and review procedures for both grading and construction plans is often a lengthy process in which the subdivider's proposed set of plans are passed back and forth a number of times between the subdivider's engineering consultant and the Engineering Division, as well as other departments, with "red-lining" changes (made in red pencil) requested by the Engineering Division (or other department), followed by one or more resubmissions as the requested changes are made by the subdivider's consultants. See Affidavit (Item 15) of Margaret Wille.

XI.

THE COUNTY GENERAL PLAN "COURSE OF ACTION" REGARDING PARKER RANCH'S CONNECTOR ROAD AND THE COUNTY'S "LALAMILO" CONNECTOR ; THE TIME FRAME RELATIONSHIP BETWEEN THESE TWO CONNECTOR ROADS; AND THE PARSONS BRINKERHOFF CIRCULATION TRAFFIC STUDY

A. The General Plan Mandate To Relieve Traffic Congestion In Waimea

One of the South Kohala Transportation "Courses of Action" in the 2005 County of Hawaii General Plan (Hawaii County Ordinance 05-25) contains a specific directive

for the implementation of Parker Ranch's Connector Road and the County's extension thereof (from Mamalahoa Highway to Kawaihae Road):

To relieve traffic congestion through Waimea town, implement construction of a) Parker Ranch's connector road from Kamamalu Street to Mamalahoa Highway; and b) the County's extension of this road, between Mamalahoa Highway and Kawaihae Road in the vicinity of the Waimea solid waste transfer station.

Exhibit 46: 2005 County of Hawaii General Plan Transportation "Courses of Action" § 13.2.5.6.2(g) pages 13-11 to 13-12.

B. The Additional Significance of the the Parker Ranch Connector Road in combination with the County's Mamalahoa Highway to Kawaihae Road Extension Road (hereafter referred to as the Lalamilo Connector Road")

The added significance of Parker Ranch's Connector Road in combination with the County's "Lalamilo" extension thereof, from Mamalahoa Highway to Kawaihae Road, is evident from a map showing how these two connector roads provide an alternate way around the choke point at the single intersection in Waimea at Lindsey Road and Mamalahoa Highway. Exhibit 47: Waimea Community Development Planning Committee Notice: showing "Waimea Town" Map. This "Waimea Town" map diagrams the Proposed Road Projects in the Waimea area, including the Parker Ranch Connector Road marked in green as "Waimea Town Center Connector", and the County's Extension Road marked in red squares as "Mamalahoa Hwy-Kawaihae Rd Connector" prepared by Nino Walker, University of California Graduate Student

C. Time Frame Relationship of the Parker Ranch Connector Road and the County's Extension Road

In March 2006, when Bruce McClure, the Director of the County's Public Works Department, was asked why he told members of the Waimea Community that the County's "Lalamilo" Connector Road would not be constructed soon with the County's ten million dollar bond fund, Director McClure responded that he sees construction of the County's "Lalamilo" Connector Road as dependent upon completion of Parker Ranch Connector and that it doesn't make sense to start the County's section until the Parker Ranch section is under construction. See Affidavit (Item 8) of Margaret Wille.

D. The Preliminary Results of the 2006 Waimea In-Town Traffic Circulation Study Confirm the Obvious Need for Parker Ranch's and the County's Connector Roads

The consulting firm of Parsons Brinkerhoff Quade & Douglas (hereafter Parsons Brinkerhoff) is conducting a traffic circulation study to recommend short-term in-town solutions to Waimea's traffic congestion. Exhibit 47: Waimea Community Development Planning Committee Notice concerning the Waimea Circulation Study. The preliminary findings of the Parsons Brinkerhoff Circulation Study, as told to the Waimea community on June 1, 2006, indicated that Parker Ranch's Connector Road and the County's

Lalamilo Connector Road seem to be the feasible alternative way around the Mamalahoa Highway –Lindsey Road intersection. The following are some of the Waimea Circulation Study preliminary findings:

1. A lot of the traffic in Waimea town is local traffic (over 60% of the total);
2. All Traffic passes through Lindsey/Mamalahoa” and “There are currently no Alternatives”;
3. There is a need to “Accelerate In-Town Traffic Circulation” as follows:
 - Provide additional route between Lindsey and Kamamalu [which is the northeasterly half of the Parker Ranch Connector Road], and
 - Provide alternate west access to Town Center [which would presumably include the southwesterly half of the Parker Ranch Connector Road, and the County’s Connector Road from Kawaihae Road to Mamalahoa Highway];
4. That locating alternate routes around the Lindsey Road –Mamalahoa Highway to the north side of Town “do not seem feasible”;
5. That locating an alternate route around the Lindsey Road –Mamalahoa Highway to the south side of Town “seems more feasible” and that the “Lalamilo Connector Road and Parker Ranch Connector Road are more suitable to Waimea Town Traffic”;
6. the “[State] Waimea and Kawaihae Bypasses are Appropriate for Regional Traffic”
7. That in terms of time frame:“Parker Ranch Connector Road is Dependent on Development Pace” and that the County’s “Lalamilo Connector Road is five to six years away”. (underlining emphasis added)

Exhibit 48: June 1, 2006 Parsons Brinkerhoff-County of Hawaii Waimea Traffic Circulation Study Power Point : including pages 2, 3, 8,16, 18, 22 and 36. (This Power Point Presentation is available in its entirety on the Waimea Development Plan Committee Internet Site: www.WaimeaPlan.org and click “Roadways” to Waimea Traffic Circulation Study).

XII.

AT THE REQUEST OF PARKER RANCH, WHILE THE LUALA’I III SUBDIVISION APPROVAL WAS PENDING, THE PLANNING DIRECTOR SOUGHT TO DELETE THE GENERAL PLAN’S “CONNECTOR ROAD” MANDATE

In October 20, 2005, during the period that Parker Ranch’s Luala’i III subdivision application was pending, the Planning Director proposed General Plan Interim Amendments including the deletion of section 13.2.5.6.2 (g), that is, the provision mandating implementation of Parker Ranch’s and the County’s connector roads Exhibit 49 at page 3: October 20, 2005 General Plan Interim Amendments Planning Director Proposed Changes to General Plan Document pages 1-3.

The Planning Director’s explanation for proposing to delete this “Connector Road” mandate, stated as follows:

Rationale: Do not lock in this course of action as the solution. There may be other possibilities. Currently, this road is a

condition of Ordinance No. 02-25 (Parker 2020), so if the County wants to keep this requirement in place, the rezoning condition will assure it. If the County wants to change the requirement, the rezoning ordinance will still have to be amended. Exhibit 49 at page 3: October 20, 2005 General Plan Interim Amendments.

There was no other documentation provided in support of this Director proposed amendment. Exhibit 49: October 20, 2005 General Interim Plan Amendments, page 3. Notably, in contrast to the General Plan's procedures for an interim amendment proposed by a member of the public, there is no requirement that the Planning Director provide supportive documentation for his proposed changes under the Interim Amendment Procedures. Exhibit 50: 2005 County of Hawaii General Plan "Interim Amendment Procedures" 16.2(2) and 16.2 (3).

Subsequently, letter dated March 30, 2006, the Planning Director decided to defer action until a later date on this proposed amendment. According to the Planning Director, this deferment was in response to public concern and in light of the on-going Parsons Brinkerhoff traffic study. In his letter, Director Yuen explained:

Unfortunately, but understandably, some members of the public have taken the proposed General Plan amendment as a retreat from the concept of a parallel route for traffic in Waimea. In addition, to date, I have not been shown any plans by Parker Ranch for a way to have this alternate route without implementing something like the road called for in the rezoning ordinances, and it seems that it would be very difficult to do so. Exhibit 51: March 30, 2006 letter from Planning Director Christopher Yuen to the Planning Commission regarding General Plan Interim Amendments.

ISSUE I
ACCOUNTIBILITY IN THE HANDLING OF SUBDIVISION APPLICATIONS

PETITIONERS' CONTENTION: THE PLANNING DIRECTOR'S POLICY OF REMOVING UNPRIVILEGED DOCUMENTS FROM ITS SUBDIVISION FILES PRIOR TO ALLOWING A MEMBER OF THE PUBLIC TO VIEW THOSE FILES VIOLATES HRS § 92-F-11(B) OF THE UNIFORM INFORMATION PRACTICES ACT WHICH REQUIRES THAT "[EXCEPT FOR PRIVLEDGED DOCUMENTS] EACH AGENCY UPON REQUEST BY ANY PERSON SHALL MAKE GOVERNMENT RECORDS AVAILABLE FOR INSPECTION AND COPYING. . .", AND ALSO VIOLATES THE PARRALLEL PROVISION OF THE HAWAII COUNTY CHARTER §13-20 "RECORDS AND MEEETING OPEN TO THE PUBLIC".

The Context:

When a request is made at the County of Hawaii Planning Department (Hilo, Hawaii) to view a subdivision file, such as that of Parker Ranch/Kaomalo's Luala'i Phase III Subdivision file (SUB 2004-221), before the requesting member of the public is given the file, Planning Department staff first remove communications between the Department and the subdivider/developer, including those containing substantive matters concerning the approval conditions. In addition, Planning Department staff remove from its subdivision files (or excludes from its files altogether), records of inter-agency or intra-agency communications that are substantive decisions and are not exempt under the state statutory "predecisional and deliberative" communication exception.

Memorandum of Points and Authorities:

Hawaii County Charter section 13-20(a) provides that:

All books, minutes and records of every agency of the county shall be open to the inspection of any person at any time during business hours, except as otherwise provided by law.

The corresponding section of the Uniform Information Practices Act, Hawaii Revised Statute (hereafter referred to as HRS) section 92F-11(b) 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."

There is no "email" exemption to this policy of access to agency records. In HRS 92-3 "Governmental Record" is defined as "information maintained by an agency in writing, auditory, visual, electronic, or other physical form."

The statutory exceptions to the general rule of disclosure are limited. Those exceptions, as set forth in HRS 92F-13 include:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of privacy;

...

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.

Consistent with HRS 92F-2 “Purposes; Rules of construction”, this policy of disclosure is required to be liberally construed, and any question of uncertainty resolved in favor of disclosure. The policy reasons underlying maximum disclosure include the following:

- (1) Promote the public interest in disclosure;
- (2) Provide for accurate, relevant, timely and complete government records;
- (3) Enhance governmental accountability through a general policy of access to government records. . . .

HRS 92F-2 (1-3). Understandably therefore, in the event of a civil action pursuant to this Act:

The agency has the burden of proof to establish justification for nondisclosure.

HRS§F-15(c): Judicial enforcement of the “Uniform Information Practices Act”:

In the context of communications about a rezoning or subdivision condition between the Planning Department or the Public Works Department and a developer, there is little likelihood of any “unwarranted invasion of privacy” issue arising. See e.g. OIP Op. Ltr. 90-20 Hawaii Office of Information Practices Memorandum dated June 12, 1990 concerning “Public Inspection and Duplication of Building Plans and Permit Applications”. And in this same context, inter-agency or intra-agency communications that relate to a zoning or subdivision question or policy, those communications, by email or otherwise, must also be available to the public unless clearly “predecisional and deliberative”. The fact that a final plan approval regarding the subdivision application has not yet occurred cannot be used to justify nondisclosure of any policy or decision that has been reached concerning that development. In contrast, for example, draft correspondence is predecisional and deliberative “because it reveals the author’s preliminary and tentative views and may contain editorial judgments made in the review process.” OIP Op. Ltr. 90-8 at page 5: Hawaii Office of Information Practices Memorandum dated February 12, 1990 concerning “Drafts of Correspondence and Staff Notes About an Alleged Zoning Violation”, a copy of which OIP Letter is attached to this Petition. As stated in that OIP Op. Ltr. 90-8 regarding agency communications and documents:

Consequently when the decision-making process has ended on a particular decision or policy, any record describing the final decision or policy is not protected by the deliberative process privilege.

OIP Op. Ltr 90-8 at page 5: Hawaii Office of Information Practices Memorandum dated February 12, 1990 concerning “Drafts of Correspondence and Staff Notes About an Alleged Zoning Violation”.

The current practice at the County of Hawaii Hilo Planning Department office is to remove all email communications, and perhaps other forms of communications, between the Department and the subdivider/developer, prior to allowing public access to the subdivision file. The communications at issue relate to matters concerning subdivision approval conditions. The subject matter of these documents do not involve subjects that would invoke the Act's "unwarranted invasion of privacy" exception. In addition, inter-agency and intra-agency containing substantive decisions that are not "predecisional and deliberative" are also withheld from the public. The Planning Department's current policy and practice of concealment violates the State's Uniform Information Practices Act, HRS 92F-11(b). See e.g. OIP Op. Ltr. 90-20 Hawaii Office of Information Practices Memorandum dated June 12, 1990 concerning "Public Inspection and Duplication of Building Plans and Permit Applications", a copy of which Memorandum is attached to this Petition; and see OIP Op. Ltr. 90-8 at page 5: Hawaii Office of Information Practices Memorandum dated February 12, 1990 concerning "Drafts of Correspondence and Staff Notes About an Alleged Zoning Violation", a copy of which Memorandum is attached to this Petition.

Clearly, the following documents concerning rezoning and subdivision approval conditions should not have been removed from the Planning Department's Luala'i Phase III subdivision file (SUB-2004-221) prior to inspection by a member of the public:

- --the email contained in Exhibit 30: January 13, 2006 Email from Engineer Emler to Parker Ranch/Kaomalo consultant Muranaka);
- --the emails contained in Exhibit 31: February 2, 2006 to February 28, 2006 Series of emails from the Engineering Division and the Planning Department to Parker Ranch/Kaomalo consultants and representatives);
- --the email contained in Exhibit 43: April 25, 2006 email from Planner Daryn Arai to Engineer Kiran Emler .

Inspection and copying of these documents was only possible because the emails listed in Exhibits 30 and 31 were inadvertently left in the Luala'i III subdivision file on one occasion; and because the Exhibit 43 April 25, 2006 email written by Planning Department Staff, was found on July 7, 2006 in the Luala'i III file at the Engineering Division of the Public Works Department in Kailua Kona, Hawaii. Affidavit of Margaret Wille (item 13).

The inter-agency April 25, 2006 email (Exhibit 43) authorizing the Engineering Division to allow Parker Ranch/Kaomalo to circumvent a condition of the Rezoning Ordinance and corresponding condition in the Tentative Approval letter, cannot be fairly characterized as "deliberative and predecisional". There was a clear cut decision made by the Planning Department to allow Parker Ranch/Kaomalo to proceed with its Luala'i III construction plans without requiring inclusion of plans for the required Connector Road. Likewise any document that is connected to the rezoning or subdivision approval conditions for the Town Center Project should also be included in the Town Center Rezoning file, or where appropriate in the pertinent subdivision file. For example why is not a copy of the April 4, 2006 Luala'i III Grading Permit #91572 to be found in the Planning Department's Luala'i III file?

Whereas allowing public access to all unprivileged records can understandably be an additional burden to an agency, this disclosure or transparency requirement is consistent with an important principle of a democracy. That principle is made clear in the statement of purpose to the State’s Uniform Information Practices Act, HRS§92-F-2:

In a democracy, the people are vested with the ultimate decision-making power Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest. Therefore the legislature declares that it is the policy of the State that the formulation and conduct of public policy – the discussion, deliberations, decisions, and action of government agencies – shall be conducted as openly as possible.

In the context of the County’s subdivision approval process, this disclosure requirement is especially significant, considering that in most States, subdivision applications are ordinarily processed by a board or committee that allows for at least one public hearing. Instead, here in Hawaii County the Planning Director is the sole decision maker in the subdivision approval process. If there is no on-going record of the Planning Director’s actions, there is no meaningful opportunity for public input concerning the matters being decided by the Planning Director. Essentially the subdivision process becomes a private dialogue between the Director of Planning and the developer.

Request for Declaratory Ruling:

Pursuant to the Hawaii 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. In other words, the following types of documents relating to any of the Parker Ranch developments within the Town Center Project must be made available to the public

- 1) records of communications, whether by letter, fax, email, or otherwise, between the agency and the subdivider/developer; unless the subject matter fits into the “unwarranted invasion of personal privacy” exception of the Act. HRS 92F-13(1) and,
- 2) records of interagency or intra-agency communications, except for those communications that are “predecisional and deliberative” and therefore exempt under the “deliberative process privilege” exception HRS 92F-13(3); and
- 3) records relating to the transfer of a parcel located within the Luala’i III project site from Parker Ranch to the State Department of Education.

ISSUE II
SUBDIVISION CONFORMITY WITH THE COUNTY'S GENERAL PLAN

PETITIONERS' CONTENTION: PURSUANT TO SUBDIVISION CODE SECTION 23-23 IN PROCESSING A DEVELOPER'S APPLICATION FOR A SUBDIVISION, THE PLANNING DIRECTOR MUST REQUIRE CONFORMITY WITH THE COUNTY'S GENERAL PLAN, IN PARTICULAR WHERE THERE IS A GENERAL PLAN TRANSPORTATION "COURSE OF ACTION" MANDATE AFFECTING THE SUBJECT PROPERTY; AND IT IS INAPPROPRIATE FOR THE PLANNING DIRECTOR TO INSTEAD ASSIST THE DEVELOPER IN ITS EFFORTS TO CIRCUMVENT THE GENERAL PLAN TRANSPORTATION MANDATE.

Context: In his current handling of a subdivision within Parker Ranch's Town Center Project, the Planning Director is not requiring conformity to a provision of the General Plan that is specific to that Town Center Property. Instead, in the context of the Luala'i III subdivision, the Planning Director has accommodated Parker Ranch/Kaomalo's avoidance of compliance with that General Plan mandate (requiring implementation of the Town Center Connector Road).

Discussion and Memorandum of Authorities:

Hawaii County's Subdivision Code Section 23-23 provides, in pertinent part:

Subdivisions shall conform to the County general plan and shall take into consideration preliminary plans made in anticipation thereof .

The Hawaii Supreme Court in Gatri v Blane 88 Haw.108, 113-115 (1998) overruled the lower court's holding that a community plan implementing the County General Plan did not have the force of law. In reversing the lower court, the Hawaii Supreme Court clarified that when conformity with a General Plan is required, the planning director does not have the discretion to ignore the Plan's specific mandates (as opposed to its broad hortatory statements). See also Save Sunset Beach Coalition v City and County of Honolulu 102 Haw 465, 481-482 (2003) reaffirming the importance of assessing conformity with County and City General Plans and implementing community plans when required in the processing of land use approvals.

The 2005 County General Plan section on Transportation sets forth a specific course of action relating to Parker Ranch's rezoned Town Center property, which provides:

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

Exhibit 46: 2005 County General Plan 13.2.5.6.2(g) County Ordinance 05-25.

One can conservatively assume that in the case of the Luala'i III subdivision approval process, that requiring compliance with this General Plan "Connector Road" mandate, at least means that when the terms of the Rezoning Ordinance 96-117 trigger action on construction of a portion of the Connector Road, that the Planning Director will enforce that ordinance provision, and not take any actions inconsistent with its

implementation. However, in the context of the Luala'i III subdivision application, the Planning Director clearly has not treat conformity with the County's General Plan as a mandatory consideration in the context of subdivision review. In October 20, 2005, during the period that Parker Ranch's Luala'i III subdivision application was pending, the Planning Director proposed Interim Amendments to the General Plan which included the proposal to delete the General Plan mandate regarding implementation of Parker Ranch's connector road, section 13.2.5.6.2 (g) of the 2005 General Plan. Exhibit 49 at page 3: October 20, 2005 General Plan Interim Amendments Planning Director Proposed Changes to General Plan Document pages 1-3.

The Planning Director's explanation of the proposed deletion of this Plan dictated Course of Action did not make any sense, especially given that Parker Ranch did not provide any supporting documentation. The Director's explanation was as follows:

Rationale: Do not lock in this course of action as the solution. There may be other possibilities. Currently, this road is a condition of Ordinance No. 02-25 (Parker 2020), so if the County wants to keep this requirement in place, the rezoning condition will assure it. If the County wants to change the requirement, the rezoning ordinance will still have to be amended. Exhibit 49 at page 3: October 20, 2005 General Plan Interim Amendments.

There was no documentation provided in support of this proposed amendment. Exhibit 49: October 20, 2005 General Interim Plan Amendments, page 3. The Planning Director could have advised Parker Ranch that he is responsible to ensure compliance with the General Plan and is therefore not in position to seek to delete the applicable provision of the General Plan as a Director Initiated Interim Amendment Certainly the Planning Director could have advised Parker Ranch/Kaomalo, that as a member of the public, it could pursue a General Plan Amendment pursuant to General Plan "Interim Amendment Procedures 16.2 (3). Were Parker Ranch/Kaomalo to have sought an Interim Amendment under section 16.2(3) of the General Plan's Interim Amendment Procedure, then the following information submission would be required and available to the public:

A statement of the reasons for granting the proposed change, supported by a written documented assessment of the relationship of the proposed change with pertinent elements of the General Plan; and

Maps, graphs, plot plan, and other supportive information. Exhibit 50: 2005 County of Hawaii General Plan "Interim Amendment Procedures" Section 16.2(3)(iv) and (v).

None of that supporting documentation listed in section 16.2(3)(iv) and (v) of the General Plan Interim Amendment Procedures was, in this case, required to be provided and none was submitted by Parker Ranch/Kaomalo. Exhibit 51: March 30, 2006 letter from the Planning Director to the Planning Commission regarding the General Plan

Interim Amendments (in which the Planning Director states that he has not received any such supporting documentation from Parker Ranch).

In response to public objections, the Planning Director did eventually defer consideration proposed Interim Exhibit 51: March 30, 2006 letter from the Planning Director to the Planning Commission.

Likewise, the Planning Department's review of the Luaala'i III subdivision application is inconsistent with requiring conformity of this subdivision with the General Plan's "Connector Road" mandate, which mandate embodies the requirement in Rezoning Ordinance 96-117(M)(1)(b). In fact, based on the Planning Department's handling of the Luaala'i III subdivision, one would assume that the proposed Interim Amendment to delete the "Connector Road" mandate had been accomplished. Rather than insisting on compliance with the General Plan course of action, the Planning Director has:

- -at the request of this Developer, indicated a willing to delete the corresponding road construction condition in the Luaala'i III Tentative Subdivision Approval.(See Exhibit 31: Series of Emails between the Planning Department (or Engineering Division) and Parker Ranch/Kaonalo's and its consultant; Affidavit of Margaret Wille (Items 4 and 5 relating to conversations with Parker Ranch's Riley Smith and Planner Arai);
- at the request of this Developer, approved the April 4, 2006 Grading Permit for Luaala'i III and allowed the Engineering Division to approve the Luaala'i III grading plans excluding any planned earthwork for the Connector Road; Exhibit 33: detail of Luaala'i III Grading Plans "Location Map"; Exhibit 36: Department of Public Works Grading Permit #91572 signed by the Planning Department; and
- -at the request of this Developer, authorized the Engineering Division to approve subdivision grading and construction plans omitting the road construction that the General Plan mandate seeks to implement. See Exhibit 43: Email from the Planning Department to the Engineering Division.

Moreover, the Planning Director has carried out the above actions to accommodate this developer in a manner that avoids public scrutiny of the Department's actions.

Request for Declaratory Ruling: 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 Luaala'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 Luaala'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 Luaala'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.

ISSUE III
THE SCOPE OF THE PLANNING DIRECTOR'S AUTHORITY
TO WAIVE A CONDITION IN A REZONING ORDINANCE

PETITIONER'S CONTENTION: IN THE CONTEXT OF PROCESSING AN APPLICATION FOR A SUBDIVISION THAT IS LOCATED WITHIN A PROPERTY SUBJECT TO A REZONING ORDINANCE, ABSENT EXPRESS AUTHORIZATION, THE PLANNING DIRECTOR DOES NOT HAVE THE AUTHORITY TO WAIVE A REZONING ORDINANCE CONDITION; TO CHANGE A REZONING ORDINANCE CONDITION IS A LEGISLATIVE FUNCTION REQUIRING AMENDMENT OF THE ORDINANCE PURSUANT TO THE HAWAII COUNTY ZONING CODE, EXCEPT IN THOSE LIMITED CIRCUMSTANCES WHERE THE LEGISLATIVE BODY, HERE THE COUNTY COUNCIL, HAS EXPRESSLY AUTHORIZED THE PLANNING DIRECTOR TO MODIFY THAT REZONING CONDITION, WHICH HAS NOT HAPPENED IN THIS CASE; OR, WHERE THE PROPOSED CHANGE IS "NONSIGNIFICANT", WHICH WOULD NOT APPLY WITH REGARD TO AN ORDINANCE CONDITION REGARDING ROAD CONSTRUCTION.

Context:

One of the conditions in Rezoning Ordinance 96-117(M)(1)(b), governing Parker Ranch's Town Center Project, requires the construction of the relevant phase or phases of the Town Center Connector Road "in conjunction with development in the immediately surrounding areas. . ." The Parker Ranch/Kaomalo's Luala'i III Subdivision is comprised of three lots that abut a substantial portion of the Connector Road corridor from Mamalahoa Highway to Lindsey Road, all within the Town Center Project along all of Phase 3 of the Connector Road corridor, and along a major portion of Phase 1 of the Connector Road corridor. The March 22, 2005 Tentative Approval letter for the Parker Ranch/Kaomalo Luala'i III Subdivision required compliance with the conditions in that Rezoning Ordinance 96-117 including condition (M)(1)(b), to wit: "construct that part of the connector road abutting the proposed subdivision in a manner meeting with the approval of the Department of Public Works". That Tentative Approval letter also provided that the improvements, including roadway improvements, must be completed within three years of the date of this Tentative Approval, with the possibility of one extension for "no more than two (2) years may be granted by the director (of planning) upon timely request of the subdivider". Parker Ranch/Kaomalo however seeks to avoid this road construction obligation in conjunction with its Luala'i III development, and is requesting that the March 22, 2005 Tentative Approval Letter "Connector Road" condition #5d be deleted. The Planning Director is, by way of "private emails", accommodating Parker Ranch/Kaomalo's request, by allowing the subdivision approval process to proceed in a manner consistent with granting a waiver of that Tentative Approval condition #5d. As yet, there is no formal (meaning public) "final decision" granting this waiver of the Connector Road obligation for the Luala'i III subdivision.

Discussion and Memorandum of Authorities:

The appropriate way to seek a modification of a condition in a Rezoning Ordinance is pursuant to the change of zone amendment procedures in the County's Zoning Code. Zoning Code section 25-2-44(b) "Conditions on change of zone" provides:

Changes or alterations of conditions of any change of zone ordinance

shall be processed in the same manner as a zone change, unless the council authorizes the changes or alterations to be made by the director. . . .

The director may administratively grant any nonsignificant zoning change. A nonsignificant zoning change must comply with the designations for the property set forth in the general plan and any development plan adopted by ordinance . .

When a change to any rezoning condition is initiated by a property owner or other person the required procedures include: notice to surrounding property owners, review by the Planning Director, review by the Planning Commission which must hold at least one public hearing, and thereafter review by the County Council. Zoning Code § 25-2-42. Otherwise, only when the Planning Director is expressly authorized to waive or modify a rezoning condition does the Director have the ability to do so.

Pursuant to the terms of the above-cited Zoning Code section 25-2-42(b), the Planning Director has the delegated authority to modify the application of minor conditions in a rezoning ordinance, that is a “nonsignificant” zoning change. In order to be classified as “nonsignificant”, a proposed change must comply with the General Plan and affect only a small area of the development. Zoning Code §25-2-45. Required road construction specifically mandated in the County’s General Plan, such as is the case with the Parker Ranch Connector Road, would not fit into that exception. The significance of a road construction ordinance requirement is also underscored by the overall purpose of the State and county subdivision ordinances: “to prevent the subdividing of large areas into smaller areas for the purpose of sale, lease or rent, without providing for ‘adequate light, air, fire protection, traffic safety and to insure the proper sanitation and drainage of lands’.” Whitlow v Jennings 40 Haw 523, 528 (1954)(emphasis added) (interior citations omitted)

Rezoning Ordinance 96-117 governing all of the Town Center rezoned property, also did not expressly grant to the Planning Director the authority to alter the terms of the Connector Road construction requirements. In contrast, for example, Rezoning Ordinance 96-117 does allow for other specific requirements to be waived by the Planning Director, for example with respect to sidewalks, curbs, and gutters. Exhibit 7 at page 77: Rezoning Ordinance 96-117(M)(1)(g).

Pursuant to the Hawaii County Charter section 6-4-2(f) the Planning Director has the authority to “Render decisions on proposed subdivision plans pursuant to law.” (emphasis added). Clearly section 6-4-2(f) of the County Charter can not be interpreted as meaning that the Planning Director has the authority to render decisions on proposed subdivision plans pursuant to law *or as he otherwise deems appropriate.*

Not until the 2004 Luala’i Phase III subdivision, has the Planning Department required that any of the Connector Road be constructed. The project site for the Luala’i III residential development is comprised of all of TMK Lots 57, 59, and 60, which includes the Connector Road corridor from Mamalahoa Highway to Lindsey Road. This

portion of the Connector Road includes all of phase 3 of the Connector Road (Mamalahoā to Kaomalōa Street), and almost half of phase 1 of the road (Kaomalōa Street to Pukalani Road). Exhibit 23: Luālā’i III Preliminary Plan Map; Exhibit 24: detail of the “vicinity map” on the Luālā’i III Preliminary Plan Map. At this point, how could Parker Ranch/Kaomalōa not expect to be required to construct a substantial portion of this road?

Parker Ranch/Kaomalōa was put on notice that this obligation of the Rezoning Ordinance is required in the context of the Luālā’i III development. The March 22, 2005 Luālā’i III Tentative Approval letter clearly stated:

Condition 5. Comply with all applicable conditions of Change of Zone Ordinance 02-25, which includes, but are not limited to, the following:

.....

d) Condition M(1)(b) – **construct that portion of the connector road abutting the proposed subdivision in a manner meeting with the approval of the Department of Public Works.** (emphasis added) Exhibit 29 at page 3, “Tentative Approval” Letter for Luālā’i at Parker Ranch-Phase 3, dated March 22, 2005, from Christopher Yuen, Planning Director to Consultant Sidney M. Fuke.

There is a question whether the Luālā’i III development triggers the requirement to construct all of road phase 3 (Mamalahoā Highway intersection to the Kaomalōa Street intersection) and all of Phase 1 (Kaomalōa Street to Pukalani Road) that portion of road Phase 1 (along the project site from Kaomalōa Street to Lindsey Road, Pursuant to the terms of the Rezoning Ordinance 96-117(M)(1)(b), all of Road Phases 1 and 3 are triggered by the Luālā’i III subdivision. The Ordinance as drafted triggers this road in phases, not in bits and pieces—even big pieces. The Tentative Approval letter instead requires construction of that portion of the road along the subdivision, in other words,—along all of lots 57, 59 and 60. As was explained by Planner Arai in his February 22, 2006 email to Consultant Muranaka: “So the ordinance does require construction of this section of the collector road adjacent to the Luālā’i –Phase III project site, as well as related intersection improvements at its connection with the Mamalahoa Highway. Exhibit 31 at page 6-7: Email of Planner Arai to Parker Ranch/Kaomalōa consultant. In this case the language of the Ordinance, requiring construction of both road phases 1 and 3 should be controlling. Parker Ranch/Kaomalōa certainly had a copy of Rezoning Ordinance (M)(1)(b). This is not a situation where the Developer can argue that under the principles of equitable estoppel, it should only be required to construct that portion of the road abutting the subdivision project site. Parker Ranch/Kaomalōa’s had knowledge that the Rezoning Ordinance language controls. Because Parker Ranch has repeatedly avoided full disclosure of the extent of its Town Center developments (including transfers to other parties for development), it has avoided assessment of whether the road trigger thresholds have been reached. See County of Kauai v Pacific Standard Life Insurance Co. 65 Haw. 318, 325-332 (1982) (discussing the principles of equitable estoppel in the context of land development; Life of the Land v City Council 61 Haw. 390 (1980) (discussing the good faith requirement of equitable estoppel).

In his March 20, 2006 letter to the Planning Director, Parker Ranch's Riley Smith takes the position that the "adjacent development" road trigger only applies to development within the Town Center Project if and when there is residential development on both sides of the road corridor. Exhibit 42: March 20, 2006 letter from Riley Smith to the Planning Director). It is difficult to imagine that the Planning Department would give any consideration to this far-fetched interpretation -one which would require this additional condition of development "on both sides" of the road corridor to occur in order for the "adjacent development" trigger to apply. No; if that is what the County Council meant to say that is what the County Council would have said.

The question whether the first 300 unit threshold of the unit/count road trigger has been reached should not be ignored. However given that Parker Ranch/Kaomalo has the ability to orchestrate its development so as to stay below that 300 unit threshold simply by reducing the number of units proposed in the Lua-la'i Phase IV development.

The situation is clear: Whereas in 1996, when Parker Ranch wanted to reduce its Connector Road obligation, it did so by requesting an amendment to that Ordinance, which required review by the County Council and a public hearing. At this time the Planning Director, rather than the County Council has been asked to waive Condition 5(d) of the Lua-la'i III March 22, 2005 Tentative Approval letter that implements a requirement in the Rezoning Ordinance. At this point the Connector Road obligation under Rezoning Ordinance 96-117(M)(1)(b) and (c) should be strictly enforced. It is wrong for a Developer that has managed to outmaneuver the County, including by way of nondisclosure of its development activities as required in detailed annual self monitoring reports pursuant to Rezoning Ordinance 96-117(K), to then be allowed the benefit of any vagueness in the scope of its Connector Road obligation. This principle was cogently stated by Planner Arai in his February 22, 2006 email to Parker Ranch/Kaomalo:

Someone has to brief us on the phasing of development within the Parker 2020 project so that we can better respond to questions like this [regarding the scope of its Connector Road obligation in the context of the Lua-la'i III development]. The Parker Land Trust should have a detailed scheduling program of infrastructure installation and phased development that would satisfy the timing requirements of the change of zone ordinance. Since that information was not disclosed to us, we are interpreting these requirements and simply triggering these required roadway improvements at its earliest point demanded by the ordinance.

Exhibit 31 at pages 6-7 (series of emails between the Planning Department and the Engineering Division and Parker Ranch/Kaomalo and its consultant).

The fact that the Planning Director has yet to write a formal decision to waive the "adjacent development" timing trigger for the Lua-la'i III development does not mean this issue is premature considering that the Lua-la'i III grading permit has been approved and the Planning Director is allowing the Lua-la'i III development to proceed with submission and approval of its construction plans).

The Hawaii Supreme Court has repeatedly stressed that the timing of compliance determinations by each agency must be made before action on the development is allowed to proceed. See e.g. Hui Alaloa v Planning Commission of Maui 68 Haw. 135, 136 – 138 (Haw. Sup. Ct. 1985). As pointed out 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 be meaningful public assessment and not later when one can expect the agency to issue a post hoc rationalization to support actions already taken.

For the Planning Department to “keep private” decisions relating to the Luala‘i III development is also inappropriate. Maintaining a public record of the Planning Director’s ongoing decision making process allows affected parties and the general public to determine whether the Planning Department is fulfilling its obligations. This principal is the same as a Court’s need for the agency or board to maintain a sufficient record of its findings and conclusions so that the Court can determine if the agency or board has fulfilled its obligation. See e.g. Ka pa‘Akai o Ka‘Aina et. al. v Land Use Commission, State of Hawaii 94 Haw. 31, 45-47 (2000).

To wait until Parker Ranch/Kaomalo submits its final subdivision plan, and there is a “final plan approval” of this subdivision before making public its position, is contrary to the public interest and to the property interests of those with a legal interest in the matter. Once that “final plan decision” is made by the Director, for all practical purposes the burden of showing compliance with the regulations shifts from the developer/subdivider to a party willing to appeal the case who must then overcome the presumptions favoring the agency’s determination. There is also no opportunity after the Director approves the Final Plan for input from the general public or from affected persons despite having been “carved out of the loop” prior to that “final decision” . See Town v Land Use Com’n 55 Haw. 538, 544 (1974) in which the Court discussed the legal interest of those who reside proximate to a development, noting that where agency procedures are not followed, including time deadlines, the agency’s disregard of the rules impacts the legal rights of those interested persons and not just the legal rights of the developer: “The interested [adjacent resident] should not be placed in a state of limbo at the discretion of the [developer] applicant or the [administering agency]”.

In the context of the Luala‘i III subdivision, if the Planning Director is allowed to “rewrite” the Rezoning Ordinance Connector Road obligation, so as to accommodate Parker Ranch/Kaomalo, it could be a political decision with grave consequences. If Parker Ranch/Kaomalo is permitted to circumvent its Connector Road obligation in the context of the Luala‘i III development, the possible outcome could be as follows:

- 1) the Planning Director rewrites the terms of the Connector Road ordinance condition based on the “unit/count” timing formula or some other convoluted formula, but which does not require compliance with this road obligation in the context of Luala‘i III.

2. Parker Ranch would be able to avoid application of the unit/count trigger, meaning the first 300 “unit/count” threshold, even if to do so requires reducing the number of lots proposed in the Luala’i Phase IV subdivision that is located on a part of the Luala’i III subdivision; and

3. Parker Ranch would be allowed to complete its enormous Luala’i at Parker Ranch residential subdivision development without having constructed one foot of the Connector Road. (Quite a feat!); and

4. To avoid triggering a unit/count threshold, any further residential subdivision expansion within the Town Center Project could be deferred. Instead Parker Ranch would be able focus on commercial development within the Town Center project which does not trigger the Connector Road obligation other than possibly the Lindsey Road Extension.

Given that the stated deadline for submitting the Final Luala’i III plan was March 22, 2006, the Planning Director’s non-enforcement policy with regard to the Rezoning Ordinance 96-117 conditions has been going on for months. He is affirmatively entertaining and accommodating a developer’s request to waive a road timing trigger that is dictated by a rezoning ordinance and supported by a General Plan provision embodying that road mandate. Under these circumstances, the Planning Director does not have the authority under Hawaii laws to grant such a waiver (regardless of how that action is otherwise described). To power to grant such a waiver is instead within the domain of the legislative branch. IN contrast to the private negotiations that have been going on between the Planning Director and Parker Ranch/Kaomalo , the legislative process would require a public hearing and review and approval by the County Council.

Judicial disapproval is the rule with respect to agency administrators in the executive branch going beyond the scope of their authority. As was stated in the landmark case of Yick Wo et al v. Hopkins 118 U.S. 356, 369-370 (1886)(emphasis added):

When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . .[W]hile sovereign powers are delegated to agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power.

As made clear by the Court in Leslie v Board of Appeals of County of Hawai’i et. al. 109 Haw. 384, 394-395 (2006), the planning director does not have the discretion to disregard applicable regulations because the Director does not appreciate the benefit of those regulatory requirements. And see Kelly v 1250 Oceanside Partners et.al. 111 Haw. ____,

140 P. 985, Lexis 413, 68-69 (July 28, 2006) in which the Court admonished the County for non-enforcement of the applicable land use regulations.

Request for Declaratory Ruling: 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 Luaala’i III subdivision. The Planning Director must not take any further action on any of the Luaala’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 Director must stop accommodating this developer’s avoidance of its Connector Road obligation and immediately require revision of the Luaala’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 Luaala’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).

AFFIDAVITS

Petitioner Jan R. Herron-Whitehead.....42-44

Petitioner Laverne Till45-46

Margaret Wille47-49

County of Hawaii) ss
State of Hawaii)

AFFIDAVIT OF JAN R. HERRON-WHITEHEAD

I, Jan R. Herron-Whitehead, being duly sworn, deposes:

1. I am a resident of the County of Hawaii, State of Hawaii, and reside at 64-768 Ainahua Alanui Street in Pu‘u Kapu Farmlots, lot 21, TMK 3-6-4-08-041, which is leased to my husband Samuel Whitehead, by Department of Hawaiian Home Lands, Waimea, Hawaii.

2. My mailing address is P.O. Box 1538 Kamuela, Hawaii 96743.

3. I am 53 years old and have lived in the County of Hawaii since 1976. Two of my three children were born in the County of Hawaii.

4. My husband Samuel Whitehead is part Hawaiian and was born here, as were his mother and her ancestors.

5. Over the years, I have been an owner of several businesses in Waimea, including a restaurant and night club on Kawaihae Road, Waimea Hawaii.

6. I am a member of the Screen Actors Guild and have been involved with the Kahilu Theatre since it opened, including working with Richard Smart. He was the founder of

the Kahilu Theatre, and, as is well known, was the owner of Parker Ranch until his death in 1992.

7. Since the late 1970s, I have held various volunteer positions at Waimea schools, including at Hawaii Preparatory School, Parker School, Kamuela Montessori School, Waimea Country School, and Kanu O Ka 'Aina Century Charter School, and the Waimea Public Elementary School.

8. My current jobs include working as a caregiver in Waikoloa on the Kohala Coast and and with Encore Talents which frequently has engagements at the resort hotels along the Kohala Coast, in West Hawaii.

9. To travel to these Kohala Coast jobs from my home on the east side of Waimea, I drive through the center of Waimea where all traffic must pass through the Mamalahoa Highway – Kawaihae Road intersection. From that point I travel on either Mamalahoa Highway or Kawaihae Road to reach these jobs on the South Kohala Coast.

10. The Mamalahoa Highway – Kawaihae Road intersection in Waimea town is regularly congested with traffic at the Mamalahoa Highway –Lindsey Road intersection, which impedes and adversely affects my work in terms of frequent prolonged delays caused by this traffic congestion, and reduces the time I have to spend with my family.

11. This traffic congestion in the center of Waimea also adversely affects the expenses of my jobs because of the added cost of gasoline and wear to my vehicle sitting in Waimea traffic.

12. This regular traffic congestion in Waimea also harms my day-to-day life, because I go through the Mamalahoa Highway – Kawaihae Road intersection to reach the post office, bank, and do shopping.

13. In the 1980s and 1990s, I attended community meetings at which representatives of Parker Ranch explained the Parker Ranch 2020 Plan for the rezoning of the center of Waimea to the community, and which plan included an alternative road though the Parker Ranch development around the traffic congestion at the Mamalahoa Highway – Kawaihae Road intersection.

14. On April 20, 2006 I was in a traffic accident in Waimea near Pukalani Road in which the car I was driving south on Mamalahoa Highway was struck in the right rear side by a vehicle that was attempting to cross though the traffic to head in the opposite direction. This was a traumatic accident, particularly because my passengers were my nineteen year old daughter and her five day old infant as well as an elderly woman who lives in the senior housing complex on Kamamalu Street in Waimea. I believe the afternoon traffic congestion on Mamalahoa Highway contributed to this accident.

15. If Parker Ranch's Town Center Road were completed in full (or at least the portion from Pukalani Road to Mamalahoa Highway by the rodeo grounds, this would enable me to avoid the highly congested area of the Mamalahoa Highway – Lindsey Road intersection in the center of Waimea town on my way to work in Waikoloa and at other locations on the South Kohala Coast.

16. I am sure that if Parker Ranch constructed its Town Center Connector Road (even if only the section from Pukalani Road to Mamalahoa Highway by the rodeo grounds south of town), this parallel access road around the Mamalahoa Highway –Lindsey Road intersection, would greatly relieve traffic congestion in Waimea, and would therefore relieve the harm and stress caused me by the current daily traffic gridlock in the center of town, and would make Waimea a safer place for me and my family to live.

17. At the June 1st, 2006 Waimea Community Association meeting held in Waimea, which I attended, the traffic consultants of Parsons Brinkerhoff, stated their opinion that a roadway looping south around the center of town (such as the proposed Parker Ranch Town Center Connector Road) would relieve traffic congestion in Waimea by providing an alternate way around town other than though the Mamalahoa Highway–Kawaihae Road intersection.

I declare that the forgoing is true and correct to the best of my knowledge under penalty of perjury.

STATE OF HAWAII ss
COUNTY OF HAWAII

Subscribed and sworn to before me this ____ day of October, 2006.

Signed: _____

Date: _____

Name: _____
Notary Public
State of Hawaii
My commission expires: _____

County of Hawaii) ss
State of Hawaii)

AFFIDAVIT OF LAVERNE TILL

I, LAVERNE TILL, being duly sworn, deposes:

1. I am a resident of the County of Hawaii, State of Hawaii, and reside at 67-5165 Kamamalu Road, Waimea Elderly Housing, Apartment 4A, Kamuela, County of Hawaii, My mailing address is P.O. Box 2765 Kamuela, Hawaii 96743.
2. I am 79 years old, and was born on October 4, 1926.
3. I have lived in the County of Hawaii for approximately 25 years and have lived in Waimea Elderly Housing for approximately 4 years.
4. I have a job doing childcare for a family that lives on Lehua Street off Kawaihae Road located between Waimea and Kawaihae, Hawaii, on Tuesdays and Thursday.
5. My child care job for this family entails picking up children at their school off Mana Road on the East side of Waimea, at about 2:30 in the afternoon. I then drive them through Waimea and the single intersection of Mamalahoa Highway –Lindsey Road intersection to their home on Lehua Street, off Kawaihae Road. I usually leave this childcare job around 4:30 pm. and driveback to my home on Kamamalu Street.
6. On my return home from this childcare job, the traffic on Kawaihae Road through the center of Waimea and its single intersection to Kamamalu Street is regularly congested and I am regularly stuck in this traffic congestion often for a considerable length of time.
7. Especially during the late afternoon, when I am returning from my job, having to drive through the traffic congestion to get through this single intersection in Waimea is physically and mentally stressful and harmful.
8. My daughter lives in the Waiaka area of Kamuela, off Kawaihae Road. To visit her I must also pass through the single intersection choke point at the Mamalahoa Highway – Kawaihae Road intersection.
9. Because of the frequent traffic gridlock on all roads leading to this one intersection in Waimea, I am unable to visit my daughter as often as I would like to, and must arrange my visiting schedule to avoid the regular traffic gridlock in the afternoons.
10. I know many others, including my daughter, who suffer the same harm and stress because they must travel through Waimea traffic congestion because there is only one route through town.
11. This regular traffic congestion in Waimea also harms my day-to-day life, because I drive into the center of Waimea town to reach the post office and do shopping.

12. There is currently no other route around the Mamalahoa Highway Lindsey Road intersection through the center of Waimea Town.

12. If the Town Center Road were completed all the way from Mamalahoa Highway by the rodeo grounds to the proposed intersection on Kamamalu Street, which is next to my home, or even if just the section to Pukalani Road were completed, the availability of this second route through town would substantially relieve the traffic gridlock at the Mamalahoa Highway –Lindsey Road intersection, which would substantially relieve the harm this traffic gridlock at the Mamalahoa Highway-Lindsey Road intersection regularly causes me.

I declare the foregoing is true and correct to the best of my knowledge under penalty of perjury.

Laverne Till

STATE OF HAWAII ss
COUNTY OF HAWAII

On this 4th day of August, 2006, before me personally appeared Laverne Till, who resides in the County of Hawaii, to me known (or proved to me on the basis of satisfactory evidence) to be the person described in and who executed the foregoing instrument, and acknowledged to me that she executed the same as her free act and deed.

Signed: _____

Date: _____

Name: _____
Notary Public
State of Hawaii
My commission expires: _____

County of Hawaii) ss
State of Hawaii)

AFFIDAVIT OF MARGARET WILLE

Margaret Wille, being duly sworn, deposes:

1. I am a resident of the County of Hawaii, State of Hawaii, and reside on Lihipali Road, Waimea, in the County of Hawaii. My mailing address is 65-1316 Lihipali Road Kamuela, Hawaii 967643.
2. I am 59 years old.
3. I was admitted to practice law in the State of Hawaii on June 23, 2006, License #8522. For much of the 1980's and 1990's I practiced law in the State of Maine, including in the area of land use and real estate.
4. For several years during the 1980's I was a member of the Town of Harpswell, Maine Planning Board which Board reviewed all subdivision applications in the Town. For several years, I was also a member of the Town's Comprehensive Plan Committee.
5. Since 2004, I have been a member of the Waimea Community Development Planning Committee, and am the co-chair of the Conservation Subcommittee.
6. On or about March 10, 2006, Riley Smith, Vice President of Land and Management, Parker Ranch Inc, and I met at the Parker Ranch headquarters in Waimea, Hawaii. At that time he told me of a recent meeting with Planner Daryn Arai at the Hilo Hawaii County Planning Department Office and said that the Planning Department was going to remove the Luala'i III (subdivision) Tentative Plan condition regarding construction of the Connector Road.
7. On or about March 10, 2006, after meeting with Parker Ranch's Representative Riley Smith, I telephoned the Hilo Hawaii Department of Planning and spoke with Planner Daryn Arai. I asked him whether the proposal to remove the connector road obligation from the Luala'i III Subdivision Tentative Approval letter was "a done deal". Planner Arai replied that he thought the Director "had it on his desk" but that he was not sure if it was finalized. I also asked Planner Arai to review again the approval condition in Ordinance 02-25 requiring construction of each phase of the Connector Road "in conjunction with development in the immediately surrounding areas." Over the phone we together read through this provision in the Rezoning Ordinance 02-25 (96-117). Planner Arai said that Parker Ranch believes that this trigger only kicks in when there is development on both sides of the Connector Road. I responded that this was adding language to the ordinance and did not make sense. I also asked Planner Arai why there was not any information in the Subdivision file about these negotiations to change the conditions in the Tentative Approval letter. Planner Arai said that the Department's final decision would be placed in the Luala'i III subdivision file. I responded that after the Director issues his final decision the public no longer has any meaningful opportunity for public input because after Director's final decision, then only those with "standing" can challenge the Department's determination through an expensive appeal process. Planner Arai said he would bring my concerns to the Director's attention.
8. In March 2006, I also met with Bruce McClure the Director of the County's Public Works Department at the county office of Public Works in Hilo, Hawaii. I asked him

why he told members of the Waimea community that the County's "Lalamilo" Connector Road would not be constructed soon with the County's ten million dollar bond fund for that road. Director McClure responded that he sees construction of the County's "Lalamilo" Connector Road as dependent upon completion of Parker Ranch Connector, that it doesn't make sense to start the County's section until the Parker Ranch section is under construction.

9. In March 2006, upon inspection of the Luala'i III Subdivision file (2004-0221) in the Hilo, Hawaii Department of Planning Office, and upon inspection of that file most recently on September 15, 2006, I reviewed the Luala'i Phase III Subdivision Application form and accompanying documents and found that Parker Ranch/Kaomalo LLC did not submit a list of proposed improvements with a time frame for completion of those improvements, and there was also no letter or other document explaining the scope of this proposed subdivision. (In December of 2004 when this Subdivision application was submitted to the Planning Department, the Subdivision Code §23-66(7) required submission of a list of improvements that the subdivider intends make along with a time frame for completion of those improvements.)

10. In late March 2006, and several times between that date and September 15, 2006, I inspected the Luala'i III subdivision file in the Hilo Hawaii County Planning Department Office to see if there had been a request for an extension of time in which to file the Final Plan for this subdivision, and there was none. At the same time I also looked to see if there was any documentation approving of an extension of time in which to file the Final Plan for Luala'i III subdivision. I did not find any document in the Luala'i III subdivision file (2004-0221) granting an extension of time in which to file the Luala'i III Final Plan. On September 15, 2006, I also examined the Planning Department's Subdivision Log for this Subdivision and found that the last entry was the approval of the Tentative Plan on March 22, 2006.

11. In late March 2006, and several times between that date and September 15, 2006, I inspected the Luala'i III Subdivision file and the file for Rezoning Ordinance 02-25 (and 96-117) in the Hilo Hawaii County Planning Department Office to determine whether the Annual status report for the Waimea Town Center Project had been submitted. Upon inspection of these files, I did not find any annual progress reports for the years 2004, 2005 and 2006 detailing the status of development in each area of the Town Center Project and reviewing compliance with each condition in Rezoning Ordinance 02-25. I did find a letter dated March 20, 2006, in which Parker Ranch explained its position regarding the Connector Road obligation and the road timing triggers.

12. On or about July 1, 2006, I inspected the Luala'i III Subdivision file (2004-0221) at the Hilo, Hawaii Planning Department. At that time I found the series of emails contained in Exhibit 31 in the subdivision file. When I asked about the emails, I was told by Planning Department staff person, Jonathan Holmes, that I should not have been given these communications. He explained to me that documents (such as these) are attached on the left side of the subdivision file folder are removed before members of the public are given the file.

13. On or about July 7, 2006, I found the April 25, 2006 email (from the Planning Department authorizing the Engineering Department to approve Luala'i III Construction plans that omit any requirement to construct any portion of the Connector Road) in the Luala'i III Subdivision file at the Kailua-Kona Engineering Division of the Public Works. As of September 15, 2006, this email was not made available to me when I inspected the file for the Luala'i III subdivision file (SUB 2004-0221)

14. On or about July 1, 2006, I found a copy of the June 2000 "Waimea Development Agreement" for a property exchange between the State (Department of Education) and Parker Ranch Land Trust to fulfill the Rezoning Ordinance 02-25 Condition F (school facilities condition) in the file for Rezoning Ordinance 96-117 (02-25), located in the Planning Department in Hilo Hawaii. At that time, and again on September 15, 2006, I did not find any other information in that file about the subsequent implementation of this property exchange.

15. In September 2006 I spoke with a member of the staff at the Kailua-Kona Hawaii Engineering Division of the Public Works Department concerning the review procedures for subdivision grading and construction plans. The staff person explained to me that this review is often a lengthy process in which the subdivider's proposed set of plans are passed back and forth a number of times between the subdivider's engineering consultant and the Engineering Division, as well as other departments, with "red-lining" changes (made in red pencil) as requested by the Engineering Division (or other department), and that this process continues by one or more resubmissions as the requested revisions are made by the Subdivider's consultant.

I declare that the foregoing is true and correct to the best of my knowledge under penalty of perjury.

STATE OF HAWAII) ss
COUNTY OF HAWAII)

On this ___ day of October, 2006, before me personally appeared Margaret Wille, who resides in the County of Hawaii, to me known (or proved to me on the basis of satisfactory evidence) to be the person described herein, and she swore to me that the foregoing is true to the best of her knowledge under penalty of perjury.

Signed: _____

Name: _____
Notary Public
State of Hawaii
My commission expires: _____