USE 142

Harry Kim
Mayor

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May 1, 2007

Steven S.C. Lim, Esq.
CARLSMITH BALL LLP
121 Waianuenue Avenue
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Dear Mr. Lim:

SUBJECT: ALII GARDENS MARKETPLACE, USE PERMIT NO. 142

We have reviewed your April 11, 2007 letter concerning the time extension for Alii Gardens Phases II and III and must respectfully disagree. Under the provisions of the Zoning Code in existence at the time of the issuance of Use Permit No. 142, and under the current zoning code, a use permit could only be issued for certain listed uses. An "open air market" is not one of those uses, and was not one of those uses under the pre-1996 Code, nor can we fairly characterize Alii Gardens as one of the listed uses which can be done with a use permit.

The applicable regulations were not materially different in January 1996 when the Alii Gardens use permit was issued. At that time, sec. 25-45 provided that "any use not listed among the permitted uses in a district shall be deemed to be a prohibited use within that district, except as otherwise provided for." The current equivalent section is sec. 25-4-4. Sec. 25-6 provided that "all departments, officials, and public employees authorized to issue permits or licenses shall conform to the provisions of this chapter and shall issue no permits for uses, buildings, or other purposes where it would be in conflict with the purposes of this chapter. The corresponding section currently is sec. 25-2-2. The code at the time then had a section, 25-28, which provided that "a use permit shall be obtained from the planning commission for the following uses within designated County-zoned districts unless specifically permitted in a zoned district." The corresponding section is sec. 25-2-61. The code then listed certain uses which could be allowed with a use permit, in the various districts.

Our interpretation, under the current and former zoning codes, is that the power of the Planning Commission to issue use permits is limited to those listed uses which can be allowed with a use permit. Your interpretation, under the former code, would be that the Planning Commission could also issue use permits for any other use, provided that it was not specifically listed as a permitted use in any zoning district. (The current code, but not

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the former code has a provision allowing the council to authorize, by resolution, a use not allowed in any zoning district.)

The primary difficulty with accepting your argument is that the Zoning Code simply didn't say that "uses not listed as permitted in any zoning district may be also allowed by use permit". It has a list of uses that can be allowed in a district as permitted uses, and others that can be allowed with a use permit. It makes no sense to list specific uses that can be allowed with a use permit if potentially almost anything can be allowed under a use permit. Under normal principles of statutory construction, "expressio unis est exclusio alterius", the fact that certain uses are listed as allowed with a use permit would mean that uses other than those listed would not be allowed. The pre-1996 Zoning Code, by stating in sec. 25-45 that uses not listed were prohibited, "except as otherwise provided for" meant the other uses as specifically provided for in the use permit section. Also, the Zoning Code clearly contained a judgment that certain uses which might be allowed by use permit in some zoning districts are inappropriate in others, such as commercial excavation in RS and other zones. It would not be consistent with this to potentially allow almost anything in any zoning district by use permit.

I have spoken with past and present staff and deputy corporation counsels about the Alii Gardens situation. All agree that a use permit should only be issued for uses specified in the use permit section of the zoning code, under the pre-1996 code, and no one has been able to explain how the open-air market at Alii Gardens qualified for a use permit. It is true that the Planning Department processed an amendment to the permit in 2002 that was granted by the Planning Commission. We simply did not spot the issue with respect to the use at that time.

I am very sorry that this problem has come up and that the Planning Department initially advised your client in 1995 that a use permit could be granted for this use. I would have liked to have found a way to agree that the time extension requested for Phases II and III could legally be granted but we cannot adopt a mistaken reading of the Zoning Code to accommodate the desired result. As we stated in our February 19, 2007 email, we will continue to allow the operation of Alii Gardens first phase as approved and as it has been established, but we cannot support the proposed time extension for Phases II and III. Because this is not in dispute between your client and the Planning Department I will not explain the reasons further, except to re-confirm our willingness to provide further written assurance on this point.

Although your April 11, 2007 letter says that it is a request to continue the processing of the time extension request, if you do wish to continue, I request that you send a short

letter to that effect if you do want us to take this time extension to the Planning Commission. We will, however, unfortunately have to advise the Planning Commission that the time extension cannot legally be granted.

Sincerely,

CHRISTOPHER J. YUEN
Planning Director

CJY:pak
Wpwin60/Chris 07 – Lim – Alii Gardens Use Permit

cc: USE 142

USE 142

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April 11, 2007

Christopher Yuen
Planning Director
Hawaii County
Planning Department
Aupuni Center
101 Pauahi Street, Suite. 3
Hilo, Hawaii 96720

Re: Use Permit No.142
Ali'i Gardens Marketplace
Establishment of an Open-Air Market and Related Improvements
Request for 5-Year Time Extension for Phase II & Phase III
Tax Map Key: (3) 7-5-020:070

Dear Mr. Yuen:

As you are aware, we represent Ali'i Gardens Marketplace ("Ali'i Gardens") as it pertains to their Open Air Market in Kailua-Kona, Hawaii. Use Permit No. 142 ("Use Permit") for the Open Air Market was issued on January 4, 1996 (attached hereto as Exhibit A) for the above referenced property ("Subject Property").

It is our understanding that the Use Permit was originally applied for and granted because in the 1995 version of the Hawaii County Zoning Code ("Zoning Code")[1], "Open Air Markets" and "Farmers Markets"[2] were not listed as a permitted use in **any** zoning district, and neither term was defined within the Zoning Code. This was due to the fact that at that time, Farmers Markets were not as popular a use as they are today. It was in May 1996, that Ordinance No. 96-59 amended Chapter 25 of the Zoning Code to allow Farmers Markets in the Downtown Hilo Commercial District ("CDH"), General Commercial ("CG"), and Village Commercial ("CV") Districts[3].

The Applicant consulted with the Hawaii County Planning Department ("Planning Department") to determine what type of action would be appropriate for the establishment of an

[1] Hawaii County Zoning Code, Chapter 25, (effective in 1995) attached as Exhibit B.
[2] Farmers Markets are defined under the Hawaii County Zoning Code ("Zoning Code") as Open Air Markets.
[3] Ordinance No. 96-59 attached as Exhibit C.

Open Air Market in a then Unplanned zoning district. The Planning Department determined that a Use Permit would be the most appropriate entitlement application to implement for Ali'i Gardens. As a result, Ali'i Gardens applied for and was granted the Use Permit by the Hawaii County Planning Commission ("Planning Commission") on December 14, 1995, which allowed for the establishment of an Open Air Marketplace on the Subject Property.

We understand pursuant to your recent email dated February 19, 2007, that you agreed the Planning Department would allow the continuation of the existing Open Air Market under "principles of estoppel and basic fairness," however you stated that the Planning Department will not give a favorable recommendation for a proposed time extension for Phase II and III if Ali'i Gardens should go before the Planning Commission for the same. We respectfully disagree.

In the current Zoning Code, a Farmers Market is a permitted use in several of the zoning districts including, Neighborhood Commercial ("CN"), CG, CV, and Industrial-Commercial Mixed Use (MCX) Districts. In the current Zoning Code, use permits also have an "other" provision in place which allows persons to apply for a use permit if the use that is proposed is not a permitted use in **any** other zoning district[4]. However, in 1995, Farmers Markets were not listed as a permitted use in any zoning classification, and although it was not listed as one of the uses that "a use permit **shall** be obtained...for[5]", there was nothing in the 1995 version of the Zoning Code which excluded a use not specifically listed within the use permit section. It simply provided for uses that a use permit SHALL be obtained for.

It is apparent that the use permit process has been placed in the Zoning Code to allow for uses which are not permitted in any other zoning district. In 1995 that was the case for Farmers Markets. This sentiment was echoed in a letter dated January 4, 1996 from the Planning Commission to Ali'i Gardens which stated:

> **"The establishment of an open-air marketplace on a parcel located within the State Land Use Urban District and the County's Unplanned zoned district may be permitted through the Use Permit review process. The Use Permit process provides an avenue to review and analyze a proposed project on a case-by-case basis relative to infrastructure and impacts on surrounding properties and existing uses as well as the General Plan goals and policies."**

Until the recent communication from the Planning Department regarding this matter, there has never been any discussion regarding an issue with the legality of the Use Permit, and

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[4] Zoning Code (2007 version) Section 25-2-61(a)(12): "The following uses shall be permitted within designated County zoning districts only if a use permit is obtained for the use from the commission...Other unusual and reasonable uses which are not specifically permitted in any zoning district with the approval of the director and the concurrence of the council by resolution."

[5] Zoning Code Section (1995 version) 25-28(a): "A use permit shall be obtained from the planning commission for the following uses within the designated County-zoned districts unless specifically permitted in a zoned district".

this is after applying for and being granted an amendment in 2002 to the Use Permit[6], and filing annual progress reports to the Planning Department pertaining to the Use Permit. In fact, in a letter dated June 8, 2004 the Planning Department acknowledged that Ali'i Gardens had represented to the Planning Commission that the project would be developed in three phases[7]. At that time and at no time prior, did the Planning Department ever state there was an issue with the Use Permit.

Use Permit No. 142 was issued and granted to Ali'i Gardens for the project which includes all phases of development necessary to complete the same. The fact that the current Zoning Code now only allows for Farmers Markets in specific zoning districts should have no bearing in this matter. At the time Ali'i Gardens went before the Planning Commission with their Use Permit Application (USE 95-9), Farmers Markets were not even defined in the Zoning Code, and applying for a use permit was the only option they had. We would argue the same principles of estoppel and basic fairness in allowing Ali'i Gardens to complete their Project including all three phases of development for which they were originally granted the Use Permit in 1995.

Furthermore, in the current Zoning Code, Section 25-2-61(b) states:

> "**Any use** which received an approval as a conditionally permitted use prior to September 25, 1984, or **which received prior approval through the use permit process, is considered a legal use of the of the affected parcel and may be expanded or enlarged without obtaining another use permit, provided such expansion, enlargement or addition is in full compliance with this chapter and the applicable district regulations."**

Ali'i Gardens was granted the Use Permit and therefore the Open Air Market should be considered a legal use of the Subject Property. Ali'i Gardens is not asking for the Use to be expanded or enlarged, they are simply asking for a time extension to complete all phases of development for the existing Use Permit.

This will request that you send us a formal confirmation as to whether the Planning Department considers the uses authorized by Use Permit No. 142 to constitute the "legal use" on the Subject Property, and whether the Planning Department will honor the Use Permit as to all phases of the development for Ali'i Gardens, including the requested time extension.

While we reserve the right of our client to argue all applicable legal issues, this will also confirm in writing our formal request for a 5-year time extension to complete the remaining

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[6] The amendment to Use Permit No. 142 was granted in 2002 when the Planning Commission approved the addition of 20 umbrellas or tents for a period of 5 years which expires on May 6, 2007.

[7] Phase I of Ali'i Gardens would accommodate 24 vendors, Phase II would accommodate additional 14 vendors, 120 parking stalls, Phase III would accommodate 80 vendors and 200 parking stalls.

phases of Ali'i Gardens Marketplace project. The current time period for construction expires on May 6, 2007.

Should you have any questions, please feel free to contact Steve Lim or Jennifer Zelko.

Sincerely,

CARLSMITH BALL LLP

Steven S.C. Lim

4843-9888-5377.1