



**OFFICE OF COUNSEL
NAVAL FACILITIES ENGINEERING COMMAND PACIFIC
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In reply refer to:
09C/RR
8 November 2010

Department of the Corporation Counsel
530 So. King Street, Room 110
Honolulu, Hawaii 96813

Sent by mail and email to
dkitaoka@honolulu.gov

Attention: Don S. Kitaoka, Deputy Corporation Counsel

Dear Don:

This letter is in reference to Notice of Violation 2010/NOV-10-013 (EX) TMK 9-4-003-006 dated October 4, 2010, regarding the real property at 94-990 Pakela Street (Waikele Gulch). I am informed that the NOV was served upon Ford Island Ventures, LLC, ("FIV") and that a copy was mailed to Claude Jones at Naval Facilities Engineering Command Pacific. As a preliminary matter, I am unable to concede that mailing the NOV to Mr. Jones constitutes effective service upon the United States; however, as indicated below, it does not appear necessary to resolve the matter of service, since the City and County do not have the requisite jurisdiction to enforce, by NOV or otherwise, regulation of land uses on federal land.

I also note Attorney Ed Case's letter of October 29, 2010 to you, in which he states, "As a preliminary matter, please note that TMKs 9-4-002-012 and 9-4-005-009 do not appear to be current tax map parcels TMK 9-4-003-006 does appear to be current and we assume is the parcel to which the NOV is directed." I presume the parcel numbers can be confirmed or corrected as a matter unrelated to the NOV.

I appreciate the courtesy that you and Mr. Case have shown as we discussed this matter over the past weeks and shared our respective views on the state of the applicable case law. After careful consideration of all parties' contentions, my own research, and consultation with Headquarters counsel, I am authorized to advise that it is the position of the Navy that zoning restrictions or other local land use regulations may not be imposed on the federal land in question, so long as it remains federal property.

The subject land has been owned by the federal government at least since the Hawaiian Statehood Act, and it has never been ceded to the State. You have suggested that, by outleasing the property, the United States has somehow waived its sovereign immunity from regulation by local government. Waivers of federal sovereign immunity cannot be inadvertent; they can only be done intentionally by Congress. With regard to the Waikele lease, there can be no question that Congress did not intend to waive sovereign immunity since it was entered into for the express

purpose of furthering a federal interest. Congress enacted special legislation for the specific purpose of enabling the development of Ford Island. 10 U.S.C. 2814, "Special authority for development of Ford Island, Hawaii" provided,

"...(T)he Secretary of the Navy may exercise any authority or combination of authorities in this section for the purpose of developing or facilitating the development of Ford Island, Hawaii, to the extent that the Secretary determines the development is compatible with the mission of the Navy." (Emphasis added.)

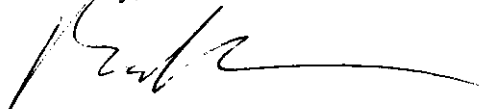
The statute gave the Secretary broad power to use Navy real property anywhere in Hawaii as part of the plan for such development, including the express authority to convey or lease such property "...to any public or private person or entity any real property or personal property under the jurisdiction of the Secretary in the State of Hawaii that the Secretary determines

"(A) is not needed for current operations of the Navy and all of the other armed forces; and
"(B) will promote the purpose of this section."

You have a copy of the relevant provisions of the Interim Ground Lease dated June 30, 2003 (as amended), by which the land was leased to Fluor Hawaii, LLC, FIV's predecessor in interest. Since the lease of the Waikele Gulch property was entered into pursuant to the plan of development set forth in the Ford Island Master Development Agreement, in furtherance of the above statutory authority, there can be no question that the property is not subject to land use regulation by local government, and the NOV is of no force or effect and should be withdrawn.

Please advise the City and County's intentions in this matter at your early convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "R. G. Ress", written over a horizontal line.

R. G. Ress
Counsel

Copies to:
Counsel, NAVFAC
Counsel, Navy Region Hawaii
Ed Case, Esq.