NO. 29376
IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI`I,

Appellant,

v.

BOARD OF APPEALS OF THE COUNTY OF HAWAI`I, VALTA COOK, in his capacity as Chairperson of the Board of Appeals of the County of Hawai`i , and MARLENE E. CALVERT,
Appellees.

CIVIL NO. 07-1-0414

APPEAL FROM JUDGMENT FILED HEREIN ON AUGUST 29, 2008

THIRD CIRCUIT COURT

HONORABLE GREG NAKAMURA
Judge

APPELLEE MARLENE E. CALVERT'S ANSWERING BRIEF

STATEMENT OF RELATED CASES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND RULES

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APPELLEE MARLENE E. CALVERT'S ANSWERING BRIEF

I. INTRODUCTION

Appellee MARLENE E. CALVERT ("***Mrs. Calvert***"), by and through her attorneys Cades Schutte LLP, hereby submits her Answering Brief in response to Appellant Christopher J. Yuen's Opening Brief filed December 30, 2008.

II. STATEMENT OF THE CASE

A. Overview

At the center of this dispute is an application for a water variance (the "***Application***") submitted by Mrs. Calvert.

In the 1970s, Mrs. Calvert and her late husband, a California public school administrator, started a business developing a parcel of land in Ka'u, Hawai'i in order to fund their retirement together. Over the last 30 years, Mrs. Calvert and her late husband have worked diligently and sacrificed to succeed in their land development business—including mortgaging their house to obtain sufficient start-up capital.

The land was to be developed in three phases, the first two of which were completed in the 1980s. Because of the land's idyllic rural location, it has no access to county water supply and the first two phases relied on catchment systems to supply water to houses. Phases I and II have successfully used their catchment system in the two decades since they were completed.

Recently, development of Phase III began. In connection with development, Mrs. Calvert submitted a subdivision application and the Application for a water variance so that a similar catchment system could be built for Phase III. The Application for variance was received by the Planning Director, but he then failed to act in a timely fashion.

HRS § 91-13.5 was enacted in 1998 to address perceptions that Hawaii government and agencies were not responsive enough to requests from the business community, leading to unnecessary bureaucratic delays in business and development. Quite simply, HRS § 91-13.5 requires that agencies spell out their own timeframes for action on applications for approval. The law does not establish a timeframe and does not set any deadline—that is left up to the agency to determine. ***However, once the agency sets itself a deadline, HRS § 91-13.5 requires that the agency comply with the deadline it set for itself, or else the application is deemed approved.***

In this case, the Planning Director failed to act within the deadline established by his Department. Well after the deadline, he sought to deny the Application on arbitrary grounds. However, both the Board of Appeals of the County of Hawai'i ("***Board***") and the Circuit Court for the Third Circuit have held that pursuant to HRS § 91-13.5, Mrs. Calvert's Application is deemed approved. Thus, the Planning Director brings the instant appeal, causing further delays and seeking to deny Mrs. Calvert's Application.[1]

[1] The Application was filed in 2005, and four years later, Mrs. Calvert still is unable to go forward with Phase III of her development because the Planning Director has persistently appealed the Board's ruling and has not processed the subdivision application. This is precisely

B. The Kahuku Country Estates Subdivision

In 1978, Mrs. Calvert and her late husband Everett T. Calvert, a career educator who worked as the California State Deputy Superintendent of Schools, purchased 480 acres of land in the Ka'u District, Kahuku Ahupua'a, using money from refinancing their home to generate a down payment. Record on Appeal ("***R.***") at 398-401. It was their intent to subdivide the land and sell lots to fund their retirement. R. at 410. Their son, Eugene Calvert, joined the family enterprise and worked with his father to survey the property and prepare the land for a road. R. at 398-401. The Calvert family paved an asphalt road into their project and landscaped along the road by planting flowers and palm trees and watering them by hand. R. at 415. The Calverts planned to subdivide the land in phases. R. at 398-401.

Phases I and II of the Calverts' project—named Kahuku Country Estates—were completed in the 1980's. Each phase received from the Planning Department what was then known as a "water waiver." R. at 13, 41-43. The Kahuku Country Estates subdivision has enforced covenants, codes and restrictions that require maintenance of the asphalt road, minimum standards for catchment tank size and catchment roof area, and encourage agricultural use and prohibit deforestation of mature ohia trees. R. at 394, 429-31.

C. Planning For the Development of Phase III of Kahuku Country Estates and the Application For a Water Variance

Everett Calvert died in 1985. R. at 415. Mrs. Calvert is of retirement age. In 2005, Mrs. Calvert began making preparations to develop Phase III of Kahuku Country Estates. The third phase is essentially identical to the first and second phases. Phase III would involve the subdivision of two lots, designated as Tax Map Key ("***TMK***") (3) 9-2-150:13 and 18

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the kind of anti-business attitude that the legislature sought to combat in enacting HRS § 91-13.5.

(collectively, the "***Property***"). R. at 45-47. The plan is to obtain a water variance, then subdivide the two 21-acre lots into 3-acre parcels, and then to market those 3-acre lots to the public. R. at 392, 399, 410, 884 (FoF 14). The purpose of the development of Phase III is to generate revenue. R. at 886 (FoF 27).

The Property is located immediately makai of the Kahuku Country Estates subdivision. R. at 496. Lot 5, TMK (3) 9-2-150:18, is located at the south end of Jasmine Drive, two blocks makai of the 78 mile marker on the makai side of Mamalahoa Highway. Lot 6, TMK (3) 9-2-150:13, is located adjacent to and immediately south of Lot 5 and is bordered on its makai side by Macadamia Avenue. R. at 154. Each lot consists of 21 acres. The property is classified as "Agriculture" by the State Land Use Commission and is zoned A-3a by the County of Hawaii, for a minimum lot size of three acres. R. at 2, 496. The Property is located in Kipuka Pueo, an area where lava flows spared the forest, leaving older growth forest intact. The tree canopy attracts rainfall to the area, and the area receives more rainfall than surrounding areas. The property is lush and green without irrigation. See photographs, R. at 128-29, 402, 403.

In June 2005, Mrs. Calvert submitted an application to the Planning Department for a variance from section 23-84 of the Subdivision Code seeking to complete Phase III of the subdivision using catchment water, as she had done with the prior two phases of the Kahuku Country Estates subdivision. R. at 45-93. The Application and proposed subdivision requested approval for seven 3-acre agricultural lots in each of the two 21-acre parcels. Id. The Application analyzed how Mrs. Calvert satisfied the three criteria for a variance stated in HCC § 23-15.[2] R. at 46-48.

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[2] HCC § 23-15 provides that no variance may be granted unless it is found that:

(a) There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or

The Application was filed in the Kona Planning Department office on June 8, 2005, and marked as received in the Hilo Planning Department office on June 16, 2005. R. at 45. Rule 6-7(a) of the County of Hawai'i Planning Department Rules of Practice and Procedure ("***Plan. Dept. Rule***") states that the Planning Director shall approve or deny a variance application within 60 days after filing...,"[3] unless a longer period is agreed to by the applicant. No longer period was ever agreed to by Mrs. Calvert. R. at 886 (FoF 37). Sixty days from June 8, 2005, was Monday, August 8, 2005. The Planning Department noted on its own copy of the Application that action was required by August 15, 2005, presumably counting 60 days from June 16, 2005. R. at 149. The Planning Director did not acknowledge receipt of the Application until August 11, 2005. R. at 205-08. When the Planning Department did acknowledge receipt, it represented to Mrs. Calvert (by letter dated August 11, 2005) that "the Planning Director will render a

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applicants of substantial property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of development of that property; and

(b) There are no other reasonable alternatives that would resolve the difficulty; and

(c) The variance will be consistent with the general purpose of the district, the intent and purpose of this chapter, and the County general plan and will not be materially detrimental to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties.

[3] The Appellant's Opening Brief appears to suggest that the Director's "acceptance" of the variance application is somehow relevant to the issues. Appellant points out that that "the Planning Director had "accepted the application on August 11, 2005 and (cites omitted). Sixty days from August 11, 2005 would be October 11, 2005." Opening Brief p. 4. First, both Planning Department Rule 6-7(a) and subdivision code Section 23-18, the ordinance and rules setting the agency's time frame, refer to the "filing" of the application and do not mention "approval". Second, if the Planning Director could unilaterally extend the deadline for the decision by simply not "approving" the application for 60 days (June 8, 2005 to August 11, 2005) it would make the time required under Section 6-7(a) and 28-16 meaningless and would allow the Director unfettered discretion to delay action. This is exactly what HRS § 91-13.5 is intended to avoid. Third, there were no changes requested or made in the application between June 8, 2005 and August 11, 2005 that would justify new calculation of the relevant time period.

decision on the subject variance on or after September 5, 2005, but no later than October 4, 2005." R. at 106.

The Planning Director's letter setting forth his decision on the Application ("***Decision Letter***") was dated September 29, 2005, but was not placed in the mail and served on Mrs. Calvert until October 5, 2005, as shown by the Department's date stamp on the bottom of the letter and the postmark on the envelope. R. at 119-26. Mrs. Calvert received the Decision Letter on or about October 6, 2005. R. at 119. ***The Director's decision was 58 days late.***

D. Procedural History

Mrs. Calvert timely appealed the Planning Director's action to the Board on October 28, 2005. R. at 1-94. The appeal argued that by operation of HRS § 91-13.5, the Application was automatically approved as of October 4, 2005. Mrs. Calvert also argued that the denial of her Application was arbitrary, capricious, and an unwarranted exercise of discretion inasmuch as the Planning Director denied the Application on the ground of insufficient rainfall based on an unpublished and undisclosed standard of minimum rainfall. Id. Mrs. Calvert also argued that the Planning Director's unpublished sixty-inch (60") rainfall standard is based on isohyet lines that are approximations, at best, and not sufficiently supported by data to be meaningful as a regulatory tool. R. at 273-75.

The appeal came on for hearing before the Board on March 10, 2006. The Board voted to reverse the Planning Director's denial based on the finding that the Application had been automatically approved by operation of HRS § 91-13.5. R. at 406, 506. The Board issued its Findings of Fact and Conclusions of Law and Decision and Order (collectively, the "***First Board Decision***") on May 17, 2006. R. at 494-506. The First Board Decision concluded that the

Application was automatically approved as of August 8, 2005 by operation of HRS § 91-13.5[4] and that the Planning Director's denial of the Application was therefore in violation of law. R. at 505 (CoLs 12, 13). The Board also found that the use of any existing rainfall map in establishing specific standards in terms of numbers of inches of rain per year for regulatory purposes was arbitrary. R. at 502. The Board's Findings of Fact and Conclusions of Law did not make it clear whether the Board's conclusions were based on the first or second grounds stated in HRS § 91-13.5(e) in determining whether the application in question was an "application for a business or a development-related permit or approval". The First Board order stated that "the list

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[4] HRS § 91-13.5 currently provides, in pertinent part:

> (a) Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval; provided that the application is not subject to state administered permit programs delegated, authorized, or approved under federal law.
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> ***
>
> (c) All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved; provided that a delay in granting or denying an application caused by the lack of quorum at a regular meeting of the issuing agency shall not result in approval under this subsection; provided further that any subsequent lack of quorum at a regular meeting of the issuing agency that delays the same matter shall not give cause for further extension, unless an extension is agreed to by all parties.
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> ***
>
> (g) For purposes of this section, "application for a business or development-related permit, license, or approval" means [1] any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for [2] any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.

of statutes cross-referenced by this section includes permit or approvals required under HRS § 46-4, the State law that gives counties their broad zoning powers" (D&O p. 12, CL-5). The Board did not make findings or reach conclusions as to whether or not the appellees' variance application was a "request for approval required by law to be obtained prior to the formation, operation or expansion of a commercial or industrial enterprise." 91-13.5(a).

The Planning Director appealed the Board Decision to the Circuit Court of the Third Circuit, State of Hawai'i. The Court assumed based on the Board's order that the Board's decision was that the appellees' application was a request for a form of approval required under HRS § 46-4. The Court found that the variance application was not a request for approval required under HRS § 46-4. Thus, the Court held that the Application was not within the second class of approvals governed by HRS § 91-13.5(e). The Court reversed the Board's decision that the Application was automatically approved pursuant to HRS § 91-13.5. R. at 558 (CoL 4). The Court remanded the matter to the Board for further proceedings consistent with the Court's Decision. R. at 560 (CoL 5).

The Board held a status conference on March 22, 2007, at which it agreed to hold further proceedings to consider issues remaining after remand. R. at 564. After conducting a hearing on May 11, 2007 to determine what issues remained for decision and a pre-hearing conference on June 18, 2007, the Board requested briefing on three issues. R. at 690-703, 706-07. The three issues the Board determined it would address were:

1. Is the variance request a business related permit within the meaning of Section 91-13.5 Hawaii Revised Statutes?

2. Does Section 23-18 of the Hawaii County Code providing for an automatic denial apply? If so what are the implications for the Board's consideration of the substantive issues? This topic includes due process and notice requirements as well as tolling issues.

3. Finally, if needed, the Board considering the substantive merits of the case.

R. at 706. After briefing on the issues, R. at 712-88, and a hearing, R. at 791-811, the Board issued Findings of Fact, Conclusions of Law, and Decision and Order adopted at its November 9, 2007 meeting ("***Second Board Decision***"), R. at 882-899.

The Board found ***as a matter of fact*** that the proposed plan to develop Phase III of the Kahuku Country Estates subdivision constitutes the operation or expansion of a commercial enterprise. R. at 886, 896 (FoF 28, CoL 14). Because the Application is for a development related approval required by law before Mrs. Calvert can expand a commercial enterprise, it meets the definition of an "application for a business or development-related permit, license, or approval" within the meaning of HRS § 91-13.5. R. at 896 (CoLs 20, 21). Thus, "[b]y action of law under HRS § 91-13.5, Mrs. Calvert's Variance application was deemed to be approved when the Planning Director failed to make a decision to grant or deny the application within 60 days of receiving the application." R. at 896 (CoL 24). The Board accordingly rejected the Planning Director's argument that the Application was automatically denied pursuant to Hawaii County Code ("***HCC***") § 23-18. R. at 897 (CoLs 25-26). The Board went on to consider the substantive merits of the Planning Director's Decision and concluded that the Application met the criteria for a variance as stated in HCC § 23-15. The Board found that the Planning Director's Decision denying the Application "did not consider all relevant criteria in assessing whether a catchment system on the property would provide an adequate supply of water." R. at 897 (CoLs 28, 29). The Board concluded that the "Planning Director's Decision denying the Variance application was arbitrary, capricious, and marked by an abuse of discretion or clearly unwarranted exercise of discretion." R. at 897 (CoL. 33).

The Planning Director again appealed the Board Decision to the Circuit Court of the Third Circuit, State of Hawai'i. On July 31, 2008, the Court entered its Findings of Fact,

Conclusions of Law, and Decision and Order affirming the Board's Decision and Order filed November 19, 2007. The Court held that the Planning Director was an "agency" and therefore subject to HRS § 91-13.5. The Court also affirmed the Board's ruling that the Calvert Variance Application was an "application for a business or development-related permit, license, or approval" as defined by HRS § 91-13.5(g). Mrs. Calvert's plan was held to be a commercial enterprise, and the Variance Application was held to be a part of that. Therefore, pursuant to HRS § 91-13.5, the application was deemed approved when the Planning Director failed to act within the prescribed 60-day period for action and the purported denial had no effect. Because this ruling resolved the mater, the Court did not address the remaining issues submitted.

The Planning Director challenges the Circuit Court's ruling by way of the instant appeal.

E. Jurisdiction

This Court has jurisdiction to hear agency appeals pursuant to HRS § 91-14, HRS § 603-21.8, Hawaii County Board of Appeals Rules of Practice and Procedure ("***Board Rules***"), Rule 8-17, and Hawaii Rules of Civil Procedure ("***HRCP***"), Rule 72.

III. STANDARD OF REVIEW

This Court reviews an agency's findings of fact under the clearly erroneous standard. An agency's findings of fact "are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record." In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 489, 174 P.3d 320, 328 (2007); Curtis v. Bd. of App., County of Haw., 90 Hawai'i 384, 393, 978 P.2d 822, 381 (1999). A finding of fact is clearly erroneous only when the Court, after reviewing the entire record, is left with a definite and firm conviction that a mistake has been made. See Aio v. Hamada, 66 Haw. 401, 406, 664 P.2d 727,

731 (1983). Thus, the Court should affirm the Board's findings of fact unless it has a definite and firm conviction that the findings are erroneous.

The Board's conclusions of law are reviewed by this Court *de novo.* An agency's conclusions of law "are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of [the] agency, or affected by other error of law." Curtis, 90 Hawai'i at 393, 978 P.2d at 831; Hardin v. Akiba, 84 Hawai'i 305, 310, 933 P.2d 1339, 1344 (1997); see also Ka Pa'akai O Ka'aina v. Land Use Comm'n, State of Haw., 94 Hawai'i 31, 40, 7 P.3d 1068, 1077 (2000)(" This court's review is further qualified by the principle that decisions of administrative bodies acting within their sphere of expertise are accorded a presumption of validity.").

"A COL [conclusion of law] that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 489, 174 P.3d 320, 328 (2007); Curtis, 90 Hawai'i at 393, 978 P.2d at 831; *citing to* Price v. Zoning Bd. of App. of the City of Honolulu, 77 Haw. 168, 172, 883 P.2d 629, 633 (1994). "When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field." In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 489, 174 P.3d 320, 328 (2007)

Under the narrow standard of review provided in HRS § 91-14, an the Board's decision should be reversed only if it is in violation of constitutional or statutory provisions, affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or arbitrary and capricious. See HRS §§ 91-14(g)(1), (2), (4)-(6) (1996).

The court's review is also qualified by the legal presumption that an agency decision always carries a presumption of validity and the appellant has the "heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Director Dep't. of Labor & Industrial Relations v. Kiewit Pac. Co., 104 Hawai'i 22, 27, 84 P.3d 530, 535 (App. 2004) (citing Chock v. Bitterman, 5 Haw. App. 59, 64, 678 P.2d 794, 797 (1984), and Keanini v. Akiba, 93 Hawai'i 75, 79, 996 P.2d 280, 284 (App. 2000)).

IV. STATEMENT OF QUESTIONS PRESENTED

1. Did the Court err when it held in Conclusions of Law Nos. 2 and 5 that Mrs. Calvert's water variance, needed before proceeding with her plan to develop Phase III of Kahuku Country Estates, was a "business-related permit, license, or approval" that must be obtained prior to the formation, operation or expansion of a commercial enterprise within the meaning of HRS § 91-13.5?

2. Did the Court err when it held in Conclusions of Law Nos. 8 and 9 that the Application was deemed approved as a matter of law on August 8, 2005 and that there was no need to reach the other issues considered by the Board of Appeals in its Decision and Order field November 19, 2007?

3. Did the Court err when it ruled in Conclusion of Law No. 10 that the Board of Appeals' Decision and Order was affirmed?

V. ARGUMENT

A. The Application Is Governed by the Automatic Approval Provision of HRS § 91-13.5 Because the Variance Requested in the Application Is a "Business or Development-Related Permit or Approval"

HRS § 91-13.5 was enacted to protect businesses from being prejudiced by the failure of governmental agencies to act in a timely manner with respect to certain types of applications. Hawai'i had developed a reputation for being unfriendly to business. At the direction of the Governor's Economic Revitalization Task Force, the legislature enacted HRS § 91-13.5 to "take constructive steps to improve Hawaii's business climate" and to resolve the problem of the "lengthy and indeterminate time required for business and development-related approvals." Act of 1998, No. 164, §§ 1, 2, 19th Leg., Reg. Sess. (1998), reprinted in Haw. Sess. Laws. 613. To

reduce the perception of Hawaii as a business-unfriendly state, the legislature required agencies considering business-related applications to set their own time frames for making decisions, and provided that if the agency failed to meet its own deadline, the application is deemed approved.

Here, the Planning Department set a time frame of 60 days to make a decision on variance applications. See Plan. Dept. Rule 6-7(a). The Department admits that it failed to meet this deadline. See R. at 205-08 (acknowledging receipt of Application after 60-day deadline already expired); R. at 106 (stating that a decision on the Application will be made within a timeframe after 60-day deadline had already expired). The Department purported to act 58 days after the expiration of the 60-day period. See R. at 119.

The threshold question before this Court is whether the Application was automatically approved by operation of HRS § 91-13.5(c), which provides:

> All such issuing agencies shall take action to grant or deny any ***application for a business or development-related permit, license or approval*** within the established maximum period of time, or the application shall be deemed approved.

(Emphasis added). The definition of "application for a business or development-related permit, license, or approval" describes two classes of approvals. The definition states:

> any state or county application, petition, permit, license, certificate, or any other form of a request [1] for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or [2] for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.

HRS § 91-13.5(e).[5] Since the Planning Department failed to grant or deny the Application within its self-imposed deadline of 60 days from the filing of the Application, see Plan. Dept.

[5] HRS § 91-13.5 has since been amended and renumbered. However, to be consistent with citations to the statute in the Board Decision and Court Decision, this brief will refer to subsections of the statute according to its numbering prior to amendment.

Rules 6-7(a), the Application was automatically granted if it fell within one of the two classes of an "application for a business or development-related permit, license, or approval." Mrs. Calvert does not assert that the Application falls within the second class of enumerated sections and chapters, as explained in greater detail below.

The First Board Decision previously determined that the Application was an "application for a business or development-related permit, license, or approval," but did not specify whether it believed that the water variance requested in the Application fell within one class of approvals or the other, or both. The Circuit Court reversed the First Board Decision based on the assumption that the Board categorized the requested variance as belonging to the second class of approvals, *i.e.*, a "permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P." HRS § 91-13.5(e). As such, the Circuit Court remanded the case to the Board to decide if the requested variance fell within the first class of approvals, *i.e.*, an "approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise . . . ." Id.

1. The Board correctly concluded that the variance requested in the Application is an "approval required by law to be obtained prior to the expansion of a commercial or industrial enterprise"

The water variance Mrs. Calvert requested in the Application falls within the first class of approvals in HRS § 91-13.5(e). The requested variance is a business or development-related approval, as it concerns a "commercial enterprise." As the Board correctly found, as a matter of fact, that the development of Phase III of Kahuku Country Estates is a commercial enterprise, just as Phases I and II were. Just as with the first two phases, approval of a variance is required for Mrs. Calvert to subdivide the Property into 3-acre lots that can be sold individually to the public for the purpose of generating income for Mrs. Calvert. R. at 414. Mrs. Calvert is not

seeking to subdivide the Property for personal use. R. at 415. She does not plan on living on the subdivided lots. Rather, her intent in subdividing the Property is to generate income. R. at 416. Such an enterprise is clearly commercial in nature. R. at 449. This conclusion was well-stated by Board member Gimpel at the March 10, 2006 hearing:

> GIMPEL: What is commercial? Commercial is something that is done for profit. When you operate a farm for example and you sell the products that's a commercial enterprise. If you have a big piece of property and you subdivide in order to sell the lots for a profit that I would maintain is a commercial enterprise without further definition in the Statute.

R. at 449. The reasoning articulated above is clear, compelling, and undisputed. Not even the Planning Director disputes that Phase III is commercial in nature.

2. Whether a variance application is an "application for a business or development-related permit, license, or approval" turns on whether the variance is "required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise" rather than whether § 91-13.5 specifically mentions HRS § 46-1.5(13)

The Planning Director suggests that HRS § 91-13.5 does not apply to approvals under county subdivision codes because the statute specifically mentions a number of HRS provisions, but does not mention HRS § 46-1.5(13), which is the statutory authority for county subdivision codes. The Planning Director's argument is misplaced. As stated above, the definition of "application for a business or development-related permit, license, or approval" encompasses two classes of approvals. The second class of approvals consists of "permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P." HRS § 91-13.5(e). These are the specific HRS provisions to which the Planning Director refers. However, the second class of approvals is not at issue in this appeal. Thus, whether or not HRS § 46-1.5(13) is listed among the sections mentioned in the second class of approvals is of no significance.

This appeal concerns the first class of approvals, namely "approval[s] required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise . . . ." The definition of this class of approvals is tied not to specific HRS provisions, but instead, to the nature and function of the approval. Therefore, if a variance application "is required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise," then it meets the definition of an "application for a business or development-related permit, license, or approval" notwithstanding that HRS § 91-13.5 does not specifically mention HRS § 46-1.5(13).

3. A variance that is indispensable to moving forward with a commercial enterprise is a business-related approval notwithstanding that a variance is an exception to the general rule

The Planning Director argues that the water variance is not a business-related approval because it is not "required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise." At the March 10, 2006 hearing, counsel for the Planning Director argued that the variance is not "required" because it is an exception to the general rule that he has discretion to grant or deny. R. at 442, 448-49. In other words, as the argument goes, HRS § 91-13.5 does not apply to water variances because the landowner could forego the variance and install a water system that satisfies the Subdivision Code.

The Planning Director's argument lacks common sense. Mrs. Calvert applied for a water variance because it is prohibitively expensive to install a conventional water system that meets the requirements of the Subdivision Code for a 14-lot subdivision. There is no service available from the Department of Water Supply. Without the variance, the development of Phase III would be virtually impossible. Therefore, the variance is as much a required approval as any other permit or license one must obtain to implement a business plan.

Alternatively, the Planning Director suggests that a variance is not absolutely necessary to the commercial activity of real estate development because one could purchase and develop property that does not require a variance. The argument misses the point. The relevant question is whether the requested approval (the water variance) is required by law to be obtained prior to the formation, operation, or expansion of the commercial or industrial enterprise ***proposed by the applicant***. The Planning Director may not rewrite Mrs. Calvert's business plan. It is absurd to suggest that the requested variance is not "required by law" because, as a general matter, real estate development could be accomplished on land that already has an available water source. Mrs. Calvert's proposed commercial enterprise relates specifically to this Property, which ***does*** require a variance. Two phases of Kahuku Country Estates have already been developed; at issue is the development of the third phase of the subdivision. Developing another piece of property is not part of Mrs. Calvert's business plan. The Planning Director should not be allowed to circumvent the application of § 93-13.5(e) by altering the factual scenario.

The Planning Director's citation to E&J Lounge Operating Co. v. Liquor Comm'n of City & County of Honolulu, 116 Hawai'i 528, 174 P.3d 367 (App. 2007), is inapposite. Initially, the Planning Director failed to bring to the Court's attention that the Hawaii Supreme Court vacated this decision, and specifically held that "that the ICA erred in determining that the Commission was not obligated to comply with HRS chapter 91 in considering Petitioner's application for a liquor license." E&J Lounge Operating Co., Inc. v. Liquor Comm'n of City and County of Honolulu, 118 Hawai'i 320, 349, 189 P.3d 432, 461 (2008). The Court further held that the "Commission's failure to comply with HRS § 91-11 is not a 'failure to act' such as would trigger the automatic approval provision of HRS § 91-13.5." Id., 118 Hawai'i at 350, 189

P.3d at 462. Therefore, the dicta cited by the Planning Director was expressly overruled, and the Supreme Court held that there was no failure to act. Therefore, HRS § 91-13.5 was inapplicable.

Further, apart from the fact that the now vacated portion of the case cited by the Planning Director (footnote 29) is pure dicta, the Court's observations in that case simply do not apply here. The approval at issue in that case was a liquor license. The court noted:

> Additionally, since many restaurants and commercial or industrial enterprises operate without a liquor license, it is not clear whether a liquor license is the type of license "required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise" that the legislature intended to be subject to the automatic approval requirements of HRS § 91-13.5.

Id. at 543 n.29, 174 P.2d at 382 n.29.

The necessity of a liquor license to the operation of a restaurant is not like the requirement of a water variance to the expansion of Phase III of Kahuku Country Estates. While a liquor license might increase the amount of revenue a restaurant generates, it is not an absolute necessity for opening or operating a restaurant. In contrast, obtaining a water variance is not simply about increasing revenue; it is indispensable to the subdivision of the property which would allow the expansion of the Kahuku Country Estates subdivision to Phase III. Without the water variance, Phase III cannot proceed at all.

4. The discretionary nature of a requested approval does not disqualify it from being "required" for the "formation, operation, or expansion of a commercial or industrial enterprise"

The Planning Director is mistaken in arguing that the variance is not "required" because it is discretionary. All permits and approvals are "discretionary" in the sense that the Planning Director uses the term. There are few, if any, permits or approvals that an agency is mandated by law to grant; an agency typically has discretion to grant or deny a permit.[6] That does not

[6] An agency must not abuse its discretion, of course. See HRS § 91-14(g)(6).

make the permit or approval any less "required." The same is true of the water variance requested by Mrs. Calvert. Mrs. Calvert cannot develop Phase III of Kahuku Country Estates using a rainwater catchment system as proposed unless she obtains the water variance. Thus, the variance is "required by law to be obtained prior to the . . . expansion of a commercial . . . enterprise." HRS § 91-13.5(e).

5. For the purposes of HRS § 91-13.5, there is no distinction between an approval or permit, and a variance as the Planning Director suggests

The Planning Director appears to draw a distinction between an approval or permit and a variance, the implication being that HRS § 91-13.5 should not apply to a variance. The Planning Director argues that a variance is unlike other types of land use approvals or permits because it permits a landowner to use his property in a manner forbidden by ordinance or statute.

The Planning Director's tortured attempt to draw a distinction is without merit. By definition, a variance, a permit, and a land use approval all require the applicant to meet some legal requirement before undertaking a proposed action. In other words, the action proposed by the applicant may not be taken unless the variance, permit, or land use approval is granted. Where the action proposed is a business activity within the purview of HRS § 91-13.5, the automatic approval provisions of that statute apply regardless of whether the legal requirements that the applicant must meet are couched in terms of a variance, permit, or land use approval. The Planning Director is making a distinction without a difference.

B. The Planning Director's Argument that Granting the Water Variance Produces an Absurd Result is Disingenuous

The Planning Director argues that giving HRS § 91-13.5 the meaning obviously intended by the legislature would "lead to the absurd result of adding even more lots to an already existing subdivision with substandard infrastructure...." Opening Brief at 16. This argument is completely misplaced.

Initially, by opportunistically arguing that the subdivision is "substandard," the Planning Director is applying a "standard" that was not in place at the time the Application was submitted and purportedly rejected. Further, this "standard" was rejected as arbitrary by the Board of Appeals. R. at 502.

Second, HRS § 91-13.5 requires agencies to establish their own time frames to process and make decisions on applications for approvals. HRS § 91-13.5 does not even state an outside time limit. It is up to each agency to decide for itself how much time it needs to make an appropriate decision and requires agencies to publish this time frame so applicants will know what to expect. This is the predictability required by the legislature in enacting HRS § 91-13.5.

The agency, here the Planning Department, can check the application for conformance "with the intent of the County Subdivision Code and the goals, policies, and standards of the General Plan" (Opening Brief at 17) within the time frame it sets for itself. However, if the Planning Department fails to meet its own published time frames, HRS § 91-13.5 says that the application is deemed to be approved. The Planning Department had every opportunity to comply with its own rules and avoid what it now argues is an absurd result. Mrs. Calvert should not be penalized for the Planning Department's failure to act within its self-imposed deadlines.

VI. CONCLUSION AND PROPOSED REMEDIES

The Planning Director has attempted throughout this long and tortured process to portray Mrs. Calvert as someone trying to subvert the system, obtain something she is not entitled to, and seeking a result that will undermine the orderly land use planning in the County of Hawai'i. In fact, Mrs. Calvert is a career educator who in her retirement desires to complete her family's vision of developing an idyllic tract of land. She has followed all the procedures to apply for a water variance, just as she had done with the other two subdivisions that have been in existence for two decades. The Planning Director, who could not be bothered to act on Mrs. Calvert's

application within his department's self-imposed 60 day deadline, has spent the subsequent three years doing everything in his power to prevent development of the third phase, despite two rulings by the Board and two rulings by the Circuit Court holding that Mrs. Calvert's Application is deemed granted.

The Planning Director's efforts to thwart Mrs. Calvert's development plans should come to an end. The Planning Director's denial of the Application was untimely under HRS § 91-13.5 and was in violation of applicable State law with respect to both the rulemaking and automatic approval provisions of HRS chapter 91. The Board did not err in finding that the Application had been automatically approved by operation of HRS § 91-13.5.

Based on the foregoing, Mrs. Calvert respectfully requests that this Court affirm the Circuit Court for the Third Circuit's ruling to affirm the Board of Appeals' Decision to reverse the Planning Director's October 5, 2005, denial of the Application, award Mrs. Calvert reasonable attorneys' fees and costs in defending this appeal, and grant other remedies as the Court sees fit.

DATED: Kailua-Kona, Hawai'i, March 11, 2009.

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NO. 29376
IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI`I,  Appellant,  v.  BOARD OF APPEALS OF THE COUNTY OF HAWAI`I, VALTA COOK, in his capacity as Chairperson of the Board of Appeals of the County of Hawai`i , and MARLENE E. CALVERT, Appellees.	CIVIL NO. 07-1-0414 APPEAL FROM JUDGMENT FILED HEREIN ON AUGUST 29, 2008 THIRD CIRCUIT COURT HONORABLE GREG NAKAMURA Judge

STATEMENT OF RELATED CASES

Appellee MARLENE E. CALVERT is unaware of any related cases pending before the Circuit Court or on appeal.

DATED: Kailua-Kona, Hawai'i, March 11, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing document was duly served upon the following individual(s) by depositing the same in the United States mail, postage prepaid, addressed as follows:

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