NO. 29376

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I Plaintiff-Appellant, vs. 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, Defendants-Appellees.	CIVIL NO. 07-1-0414 APPEAL FROM JUDGMENT FILED HEREIN ON AUGUST 29, 2008 THIRD CIRCUIT COURT HONORABLE GREG NAKAMURA

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PLAINTIFF-APPELLANT CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I'S REPLY BRIEF

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Plaintiff-Appellant CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I (hereinafter "Director"), by and through his undersigned counsel, respectfully submits this Reply Brief in response to Defendants-Appellees Board of Appeals of the County of Hawai'i and Valta Cook, in his capacity as Chairperson of the Board of Appeals of the County of Hawai'i's (hereinafter "Appellees") Answering Brief filed February 9, 2009 (hereinafter "Reply Brief").

I. The Variance Request is Not "Required by Law to Be Obtained Prior to the Formation, Operation, or Expansion of a Commercial Enterprise" Because it is a Request to Allow the Landowner to Use Her Property in a Manner Forbidden by Ordinance.

Appellees argue that Defendant-Appellee Marlene E. Calvert's (hereinafter "Calvert") application for a variance from the water requirements of the County's Subdivision Code (hereinafter "Variance") was automatically approved pursuant to Hawai'i Revised Statutes

("HRS") § 91-13.5 because it is "required by law to be obtained prior to the formation, operation, or expansion of a commercial enterprise." Answering Brief ("AB") at 11. In support of their argument, Appellees rely on the fact that "Calvert would not be able to proceed with developing the property or 'expanding a commercial enterprise'" without the Variance "because of the prohibitive cost of installing a water system approved by the Department of Water Supply" which is required by the Subdivision Code. AB at 13. This argument, however, loses sight of the public policy of granting variances sparingly.

Unlike other types of land use approvals or permits, a variance "permits a landowner to use his property in a manner forbidden by ordinance or statute. . . ." *Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n*, 64 Haw. 265, 270-271, 639 P.2d 1097, 1102 (1982). As such, "[t]he general rule is that variances and exceptions are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. Otherwise, zoning regulations [and subdivision regulations] would be emasculated by exceptions until all plan and reason would disappear and zoning [and subdivisions] in effect would be destroyed." *McQuillin Mun Corp §* 25.162 (3rd Ed). Furthermore, "[a] variance should be strictly construed and granted only in cases of extreme hardship where the statutory requirements are present." *Id.*

In Hawai'i, "it is well established that 'mere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to . . . entitle him to a variance.'" *Brescia v. North Shore Ohana*, 115 Hawai'i 477, 497, 168 P.3d 929, 949 (2007) (quoting *City of Eastlake v. Forest City Enters, Inc.*, 426 U.S. 668, 674 n. 8, 96 S.Ct. 2358, 49 L.Ed. 2d 132 (1976)). "[T]he hardship required for a variance must not result from the applicant's own actions, such as the purchasing of property with the knowledge that the zoning

ordinances prevent him from using it in the way he desires." *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Hawai'i 217, 235, 953 P.2d 1315,1333 (1998) (quoting from the Final Report of the Charter Commission of the City and County of Honolulu 1971-1972 at 33). Furthermore, "[t]he fact that an applicant might make a greater profit by using his property in a manner prohibited by the ordinance is considered irrelevant, since almost any individual applicant could make that same showing." *Id.* (citation omitted).

Any applicant for the subdivision of land in the County of Hawai'i, regardless of whether the applicant is an individual or a business, is required by law to comply with the requirements of the Subdivision Code. On the other hand, an applicant for the subdivision of land is not required by law to apply for a variance from the requirements of the Subdivision Code because as long as the subdivider has met all requirements under the Subdivision Code, the subdivider will be granted final approval of her subdivision map. *See Hawai'i County Code* § 23-74. Whether to apply or not apply for a variance from the subdivision code is entirely up to the subdivider. However, because "a variance affords relief from the literal enforcement of a zoning [or subdivision] ordinance, it will be strictly construed to limit relief to the minimum variance which is sufficient to relieve the hardship." *McQuillin Mun Corp* § 25.162 (3rd Ed).

In the case at hand, Calvert is required by law, as is any other individual or business, to comply with the requirements of the Subdivision Code when subdividing land into lots for individual sale. As part of the subdivision process, Calvert is not required by the Subdivision Code or any other law to apply for a variance from the water requirements of the Subdivision Code. Calvert chose to apply for a variance from the water requirements of the Subdivision Code to avoid "the prohibitive cost of installing a water system approved by the Department of Water Supply." AB at 13. Although such cost obviously interferes with Calvert's personal plans

and desires to subdivide her property so that she can sell the individual lots, the fact remains that Calvert was not required under state or county law to apply for a variance to expand her business of subdividing land. Thus, contrary to Appellees' argument, HRS § 91-13.5 does not apply to a variance because a variance is an exception to the law and is certainly not required by law to be obtained prior to expanding a business.

II. It is Obvious From the Plain Language of HRS § 91-13.5 that the Variance is Not Subject to Automatic Approval.

As mentioned in Appellees' Answering Brief, when interpreting a statute, the Hawai'i Supreme Court stated the following in *Peterson v. Hawai'i Elec. Light Co., Inc.*, 85 Hawai'i 322, 944 P.2d 1265 (1997):

> The fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool." *Id.* at 327-28, 944 P.2d 1270-71, *superseded on other grounds by* HRS § 269-15.5 (Supp.1999) (block quotation format, brackets, citations, and quotation marks omitted).

Rather than focusing on the plain language of HRS § 91-13.5(g) itself, Appellees jump down to the very last step for statutory interpretation to focus on the legislative history of the statute and conclude that automatic approval in this case is supported by such legislative history. By doing so, Appellees ignore the plain and unambiguous language of HRS § 91-13.5(g), which provides:

> For purposes of this section, "application for a business or development-related permit, license, or approval" means 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. . . .

Id. (emphasis added).

One of the definitions of the verb "require" as provided in Random House Webster's College Dictionary, which is especially appropriate here, is: "to impose an obligation; demand: to do as the law requires." Random House Webster's College Dictionary 1122 (2nd Revised and Updated Random House Edition 2000). When applying this definition to the word, "required," as used in HRS 91-13.5(g), it is clear that the legislature did not intend to apply automatic approval to a variance from the Subdivision Code because there is no language in the Subdivision Code or any other law that imposes an obligation or demand on a subdivider to apply for a variance from the requirements of the Subdivision Code. A subdivider of land can apply for a variance, but is not required to do so.

If, on the other hand, Appellees' argument is followed, it would mean that a variance from the Subdivision Code would have to be obtained before any commercial or industrial enterprise could be formed, operated or expanded. Appellees' argument simply defies logic because (1) individuals and commercial enterprises alike obtain subdivision approval without obtaining variances and (2) commercial or industrial enterprises can obviously be formed, operated and expanded without a variance from the Subdivision Code. This is analogous to the situation mentioned in *E & J Lounge Operating Company, Inc. v. Liquor Commission of the City and County of Honolulu,* 116 Hawai'i 528, 174 P.3d 367 (Haw. App. 2007), in which this Court explained that "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.*

Similarly, a variance from the Subdivision Code is not the type of approval that the legislature intended to be subject to the automatic approval requirements of HRS § 91-13.5. Otherwise, the legislature would not have included the words, "required by law," in the definition contained in HRS § 91-13.5(g). Thus, because the statutory language of HRS § 91-13.5(g) is clear and unambiguous, it is the duty of this Court to give effect to its plain and obvious meaning without the use of legislative history as an interpretive tool.

Dated: Hilo, Hawai'i, February 23, 2009.

CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I,
Plaintiff-Appellant

By _____
AMY G. SELF
Deputy Corporation Counsel
His Attorney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2009, two (2) copies of the foregoing document was served upon the following in the manner indicated below:

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