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 OPENING BRIEF

APPENDICES "1" - "5"

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

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

Come now Plaintiff-Appellant CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I (hereinafter "Director"), by and through his undersigned counsel, respectfully submits his Opening Brief as follows:

I. STATEMENT OF THE CASE

A. Introduction

Appellant is the Planning Director of the County of Hawai'i.

Appellee BOARD OF APPEALS OF THE COUNTY OF HAWAI'I (hereinafter "Board") is an agency of the County of Hawai'i that has been delegated the authority to hear and determine appeals from final decisions of the Director pursuant to Chapter 91 of the Hawai'i Revised Statutes ("HRS") and Section 6-10.2 of the Hawai'i County Charter.

Appellee VALTA COOK is named herein in his official capacity as Chair of the Board of Appeals for the County of Hawai'i.

Appellee MARLENE E. CALVERT (hereinafter "Calvert") is an individual and the fee simple owner of TMKs: (3) 9-2-150:13 and 18 (hereinafter "the Property") located in Kahuku, Ka'ū, County and State of Hawai'i. *See* Supplemental in Pouch of the Index to Record on Appeal; Board of Appeals Secretary's Certificate; Certificate of Service filed December 31, 2007 (hereinafter "ROA") at 00884.

1. The Property

The Property consists of two parcels, each 21 acres in size, and is part of a larger subdivision, Kahuku Country Estates. *See id.* The Property is located in the state land use "agriculture" district and zoned Agricultural 3-acres (A-3a) by the County of Hawai'i ("County"). *See id.*

Calvert had previously applied for and received water waivers or variances for subdivision of four parcels into twenty-six (26) 3-acre lots in the same Kahuku Country Estates subdivision. *See* ROA at 00003. In 1982 she was granted one waiver by the County of Hawai'i's Department of Water Supply and another waiver in 1989 by the County of Hawai'i's Planning Department. *See* ROA at 00003, 00013, 00030-00043. The 1982 waiver of water requirements by the Department of Water Supply ("DWS") was recorded in an "Agreement" that provided that the owners acknowledge that County water was not available to service the subdivision and that it was unlikely that such water service would be provided by the County in the future. *See* ROA at 00020-00022. The 1989 Notice of Grant of Variance (hereinafter "Notice") was recorded with the Bureau of Conveyances on April 12, 1990. *See* ROA at 00040-00043. The Notice stated that a dedicable public water system was not available and that no portion of the property could be further subdivided without first having a water system meeting with the standards of the Department of Water Supply and that the County would not at any time bear the responsibility of supplying public water to the subdivision. *See id.*

2. The Variance Application

On June 9, 2005, Calvert submitted an Application For Variance (hereinafter "Variance Application") from the DWS requirements under Chapter 23 of the Hawai'i County Code ("Subdivision Code") to enable the subdivision of the Property, (two 21-acre lots) into fourteen (14) three-acre lots, with domestic water to be supplied by catchment tanks. *See* ROA at 00149-00159.

The Planning Department received Calvert's Variance Application on June 9, 2005, in the County of Hawai'i's Planning Department, Kona office. *See* ROA at 00149. The Planning Department received Calvert's Variance Application in the Hilo Office on June 16, 2005. *See id.* Sixty days from the date Calvert's Variance Application was filed in Kona was August 8, 2005. *See id.* Sixty days from the date Calvert's Variance Application was received in Hilo was August 15, 2005. *See id.*

Section 23-17 of the Subdivision Code provides that upon receipt and acceptance of a properly filed and completed application, the Department shall fix a date for the Director's consideration of the application. *See* ROA at 00205-00207. This section requires that within three working days after receiving such notice, the applicant shall serve notice of the application on owners of interests in properties within three-hundred feet of the perimeter boundary of the applicant's property. *See id.*

By letter dated August 11, 2005, the Director acknowledged receipt of Calvert's application. *See* ROA at 00205-00207. The August 11, 2005 letter stated that, "...the Planning Director will render a decision on the subject variance on or after September 5, 2005, but no later than October 4, 2005." *See id.* Calvert forwarded a Certificate of Mailing of a "Corrected Notification of Filing Application" dated August 22, 2005. *See* ROA at 00227-00231. The "Corrected Notification" stated that the Planning Director had "accepted" the application on

August 11, 2005. *See* ROA at 00230-00232. Sixty days from August 11, 2005 would be October 11, 2005.

On or about August 11, 2005, the Director forwarded a copy of Calvert's Variance Application and attachments to the appropriate agencies for review and comment. *See* ROA at 00217. By memorandum dated August 17, 2005, the State of Hawai'i Department of Health commented as follows: "Concerns on water quality for lead, copper, algae and microbiological and chemical contaminations in private water systems have identified the need for self monitoring. The Department of Health does not support the use of these private rain catchment systems for drinking purposes since the quality may not meet potable water standards." *See* ROA at 00218. By memorandum dated August 29, 2005, the County of Hawai'i Fire Department recommended that the catchment tank be located in an area accessible by fire apparatus with a fire service connection, since the catchment system will also be used for fire protection. *See* ROA at 00235. By memorandum dated September 6, 2005, the County of Hawai'i Department of Water Supply commented that its facility cannot support the proposed subdivision at this time and that no time schedule for doing so is set. *See* ROA at 00236.

The Director issued a denial letter dated September 29, 2005, which was mailed on October 5, 2005. *See* ROA 00237-00243. The denial letter stated in part:

> Section 23-84 of the Subdivision Code requires that all new subdivisions have a water system meeting with the minimum requirements of the Department of Water Supply. Variances can be granted, but under Section 23-15, no variance may be granted unless it is found that:
>
> (a) There are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the property owner or applicants of substantial property rights that would otherwise be available or to a degree which obviously interfere 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.

The intent and purpose of requiring a water system for and within the proposed subdivision is to assure that adequate water is available for human consumption and fire protection.

The proposed variance would not fulfill the intent of the Subdivision Code in that the water supply would be inadequate.

The State Department of Health has no specific rules or regulations relating to the utilization, construction, or inspection of private roof catchment water systems for potable or emergency uses.

The analysis of existing rainfall within the subject property utilizing maps at the Planning Department, Department of Public Works, and information provided by the applicants show that there is inadequate rainfall within the subject property and surrounding areas to support individual or separate private rainwater catchment systems for potable and emergency uses for the proposed subdivision.

After comparing the information submitted by the applicant, and reviewing a map-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212, PLATE 6, location of active rain gauges nearest the proposed subdivisions, and other data published by the Hawai'i State Climate Office ("HSCO"), it appears that both subdivisions are closest to active rain-gauge station "Manuka 2." The "2" rain gauge is situated approximately 3.2+/- miles north of both TMK property(s) or subdivisions. According to a recent 1996 publication, by the U.S. Geological Survey, MANUKA 2's elevation or altitude is 1,760 feet. The map PLATE 6 shows Manuka 2 between the "40" and "60" isohyet line(s). The analysis of the applicant's rainfall information for Opihihale 2 purports that both TMK property(s) receive an "average 41 inches per year." However, recent rainfall data published by the HSCO data for Manuka 2's show a mean average rainfall for years 1949-2000 as 42.81 inches. Furthermore, the annual "average" rainfall for Opihihale 2 or "24.1" during the last 7-years 1995 thru 2002 is 32.365 inches. Recent National Oceanic and Atmospheric Administration (hereinafter "NOAA") data indicates MANUKA 2 received only 20.50 inches of rainfall during 2002.

Therefore, current annual rainfall within both proposed subdivisions is probably less than the Opihihale 2 or Manuka 2 historic mean annual averages; because rainfall decreases as you go south along the same elevation in this area, (the subject property is at an elevation of 1,760 ft.). The comparison between the applicant's data and recent rainfall data demonstrates that rainfall within the property or surrounding areas is low for private individual water catchment systems.

> The alternative to a water system proposed by the applicants - - rain catchment by the individual lot owner - - would not meet the intent and purpose of the Subdivision Code; in this case, that a subdivision have adequate, clean, safe drinking water for human consumption, and a reliable supply of water for fire-fighting purposes. The rainfall is too low and too unreliable to support a catchment system. The Subdivision Code, by specifying the need for a water system, represents a policy decision that subdivisions should have on-site water and not rely on hauling in water. As for fire protection, a variance could include a condition that the lot owner have a second tank for fire-fighting purposes, and keep it filled. This condition would be impossible to monitor and if it were breached, the violation would likely be discovered at the worst possible moment, for example; when a fire truck actually tried to get water from the tank. The proposed 7-lot subdivisions could, therefore, be detrimental to the public welfare.
>
> Approval of the subject variance(s) from water requirements would not conform to the following goals, policies and standards of the Hawai'i County General Plan which state in part:
>
> > Water system improvements and extensions shall promote the County's desired land use development pattern.
> >
> > All water systems shall be designed and built to Department of Water Supply standards.
> >
> > The County shall encourage the development and maintenance of communities meeting the needs of its residents in balance with the physical and social environment.
>
> The proposed variance would only add more lots to an existing subdivision with substandard infrastructure. Your variance request to allow or develop a proposed 8-lot [*sic*] subdivision without providing a water supply pursuant to Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1) (2), or providing a water system meeting the minimum requirements of the Department of Water Supply (DWS) is **denied**. *See id.*

Calvert timely appealed the denial to the Board on October 28, 2005. *See* ROA at 00001-00133.

Section 23-18 of the Subdivision Code provides that the Director shall, within sixty days after the filing of a proper application, or within such longer period as may be agreed to by the applicant, deny the application or approve it, subject to conditions. *See* ROA at 00205. The section further provides that if the director fails to act within the sixty days, the application shall be considered as having been **denied**. *See id.* (emphasis added). Such denial may be appealed

pursuant to Section 23-5 of the Subdivision Code. *See* ROA at 00503. Rule 6-7 of the Planning Department Rules of Practice and Procedure has a similar provision providing for automatic denial of a variance if the director fails to act within sixty days. *See* ROA at 00505.

3. Appeal to the Board

The Board heard the case on March 10, 2006 and voted to reverse the Director's decision to deny the water variance. *See* ROA at 00453. It adopted Findings of Fact, Conclusions of Law, Decision and Order at its May 12, 2006 hearing and filed its decision on May 17, 2006. *See* ROA at 00494. The Board held that because the Director's decision was not rendered within sixty days, the variance application was automatically approved pursuant to HRS § 91-13.5. *See* ROA at 00504-506.

4. June 14, 2006 Appeal to Circuit Court

On June 14, 2006, the Director timely appealed the Board's decision to the Circuit Court of the Third Circuit. The Director's Opening Brief was filed with the Court on September 22, 2006, which presented the legal issue of "[w]hether the Board of Appeals exceeded its statutory authority or was clearly erroneous in reversing the director's decision by finding that the variance application was automatically approved contrary to the clear dictates of the Hawai'i County Subdivision Code." *See* ROA at 00523-00545. Oral arguments were heard by the Court on January 5, 2007. *See* ROA at 00549. At the conclusion of oral arguments by all parties, the Court reversed the Board's decision and order approving Variance Application No. 05-056 and remanded the matter to the Board for further action consistent with the Court's decision and order. *See* ROA at 00561.

On January 30, 2007, Judge Nakamura signed the Director's Findings of Fact, Conclusions of Law, and Decision and Order. *See* ROA at 00549-00561. The court concluded that the statutory authority for the County Subdivision Code is HRS Section 46-1.5(13). *See*

ROA at 00559-00560. Subsequently, judgment was entered on February 21, 2007 as follows:

> Pursuant to the Findings of Fact, Conclusions of Law, and Decision and Order Reversing and Remanding the County of Hawaii Board of Appeals' Decision and Order Dated May 17, 2006, approving Variance Application No. 05-056, filed with this Court on January 30, 2007, judgment is hereby entered reversing the decision of Appellee BOARD OF APPEALS OF THE COUNTY OF HAWAII and remanding the matter to Appellee BOARD OF APPEALS OF THE COUNTY OF HAWAII for further proceedings consistent with the Decision and Order.

See ROA at 00757-00758.

5. Appeal on Remand to the Board

On September 14, 2007, the Board heard the following the three issues on remand:

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 Hawai'i 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 [sic] the substantive merits of the case.

See ROA at 00706. Although these same issues were before the Board during the original hearing, the Board determined that the variance application was automatically approved pursuant to HRS § 91-13.5 because it was required under HRS Section 46-4 without rendering a decision on the other issues. *See* ROA at 00494-00506; 00549-00561.

After the close of the hearing on remand, the Board granted the appeal on the grounds that the Planning Director's decision was late and therefore automatically approved, as this was an application required for the expansion of a commercial enterprise as specified in HRS Section 91-13.5(g), and in the alternative, that the decision denying the variance was arbitrary and

capricious in that it failed to consider other relevant factors including the size of the catchment system, storage capacity and monthly rainfall data. *See* ROA at 00808-00809, 00812.

6. December 18, 2007 Appeal to Circuit Court

On December 18, 2007, the Director timely filed a Notice of Appeal to the Circuit Court of the Third Circuit from the Board's decision in BOA No. 05-000014, MARLENE E. CALVERT, Appellant, v. CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I, Appellee, filed on November 19, 2007, pursuant to HRS § 91-14, Rule 8-17 of the Hawai'i County Board of Appeals Rules of Practice and Procedure, and Rule 72 of the Hawai'i Rules of Civil Procedure. *See* Index to Record on Appeal filed November 24, 2008 (hereinafter "IROA") at 2-47. The following issues were raised in the appeal to the circuit court:

> 1. Whether the Board of Appeals exceeded its statutory authority or was or was clearly erroneous in granting the appeal on the ground that: the Planning Director's decision was late and therefore automatically approved, as this was an application required for the expansion of a commercial enterprise as specified in HRS § 91-13.5(g) contrary to the clear dictates of the Hawai'i County Subdivision Code.
>
> 2. Whether the Board of Appeals' decision was affected by an error of law and in violation of the statutory provisions contained in HRS § 91-10 in that the Board of Appeals unlawfully shifted the burden of proof to the Planning Director when it rendered its decision and order.
>
> 3. Whether the Board of Appeals' decision granting the appeal was arbitrary or capricious or an abuse of discretion or clearly erroneous by granting the appeal on the ground that: the decision denying the variance was arbitrary and capricious in that it failed to consider other relevant factors including the size of the catchment system, storage capacity and monthly rainfall data.

See IROA at 75-108.

Following a hearing on May 2, 2008, the circuit court affirmed the Board's decision on the ground that "the Planning Director's denial of the Calvert Variance Application was issued after the 60-day period for action on the application had expired and that, as a result, the application was automatically granted pursuant to HRS § 91-13.5." *See* IROA at 252-266. In

particular, the circuit court determined that "the mixed findings of fact and conclusions of law or conclusions of law that support the view the Calvert Variance Application was an 'application for a business or development-related permit, license, or approval' as defined under HRS § 91-13.5(g) were not clearly erroneous nor did they constitute errors of law" . . . "because the Calvert Variance Application was a '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.'" *See id.*

On July 31, 2008, the circuit court entered its Findings of Fact, Conclusions of Law and Decision and Order affirming the Board's Decision and Order filed November 19, 2007. *See id.* Final judgment in favor of the Appellees and against the Director was entered on August 29, 2008. *See* IROA at 271-272.

7. Appeal to the Intermediate Court of Appeals

On September 25, 2008, the Director timely filed a Notice of Appeal of the circuit court's decision to this Court. *See* IROA at 275-279.

II. STATEMENT OF POINTS OF ERROR

A. The Director raises the following points of error:

1. The trial court erred when it held in Conclusions of Law Nos. 2 and 5 that the Calvert Variance Application was required by law to be obtained before the formation, operation, or expansion of a commercial enterprise under HRS § 91-13.5. *See* IROA at 252-266.

> Conclusion of Law No. 2 states:
>
> The Variance Application at issue in this appeal is a county application for approval required by law to be obtained before the formation, operation or expansion of a commercial enterprise under HRS § 91-13.5.

See IROA at 252-266.

Conclusion of Law No. 5 states:

> The next question is whether the application for a variance constituted an 'application for a business or development-related permit, license, or approval' for the purpose of HRS § 91-13.5 (2005). The Court determines that the mixed findings of fact and conclusions of law or conclusions of law that support he view the Calvert Variance Application was an 'application for a business or development-related permit, license, or approval' as defined under HRS § 91-13.5(g) were not clearly erroneous nor did they constitute errors of law. This is because the Calvert Variance Application was a '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.'

See IROA at 252-266.

2. The trial court erred when it held in Conclusions of Law Nos. 8 and 9 that the Calvert Variance Application was automatically granted pursuant to HRS § 91-13.5.

Conclusion of Law No. 8 states:

> The decision is affirmed on the ground that the Planning Director's denial of the Calvert Variance Application was issued after the 60-day period for action on the application had expired and that, as a result, the application was automatically granted pursuant to HRS § 91-13.5.

See IROA at 252-266.

Conclusion of Law No. 9 states:

> Because of this Court's conclusion that the Variance Application was approved as a matter of law on August 8, 2005, the Court does not reach the other issues considered by the Board of Appeals in its Decision and Order filed November 19, 2007.

See IROA at 252-266.

3. The trial court erred when it held in Conclusion of Law No. 10 that the Board of Appeals' Decision and Order is affirmed.

Conclusion of Law No. 10 states:

> Based on the foregoing, the Board of Appeals' Decision and Order is affirmed.

See IROA at 252-266.

III. STANDARD OF REVIEW

A. Standard of Review for the Intermediate Court of Appeals

"Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal." *Colony Surf, Ltd. v. Director of the Department of Planning and Permitting*, 116 Hawai'i 510, 514, 174 P.3d 349, 353 (2007) (citing *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City and County of Honolulu*, 114 Hawai'i 184, 193, 159 P.3d 143, 153 (2007)). The standard of review in a secondary appeal is "whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) (1993) to the agency's decision." *See id.*

B. Standard of Review for the Circuit Court

HRS § 91-14(g) enumerates the standards of review applicable to an agency appeal and provides:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g).

"Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." *Citizens Against Reckless Dev. V. Zoning Bd. of Appeals of City and County of Honolulu*, 114 Hawai'i 184, 193, 159 P.3d 143, 152 (2007) (citations omitted).

IV. ARGUMENT

A. HRS § 91-13.5, the Automatic Approval Law, Does Not Apply to a Variance From the County Subdivision Code

As discussed below, HRS § 91-13.5 does not apply to the processing of an application for a variance from the County of Hawai'i's Subdivision Code because a variance is not a county application or approval "required by law prior to the formation, operation, or expansion of a commercial or industrial enterprise" as defined in HRS § 91-13.5(g) or required under the statutes enumerated in HRS § 91-13.5(g).

1. An Application for a Variance from the County Subdivision Code is not a County Application Required by Law Prior to the Formation, Operation, or Expansion of a Commercial or Industrial Enterprise.

An application for a variance is not the type of application covered under the automatic approval provision of HRS § 91-13.5 because a variance is not "required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise." *See* HRS § 91-13.5(g)(Supp. 2007). A variance, unlike other types of land use approvals or permits, "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).

Under Section 23-84 of the Subdivision Code, all new subdivisions are required to have a water system meeting with the minimum requirements of the County's DWS. *See* Hawai'i

County Code 1983 (2005 edition, as amended) § 23-84. The standard for water systems in the County General Plan is that "[p]ublic and private water systems shall meet the requirements of the Department of Water Supply and the Subdivision Control Code." County of Hawai'i General Plan February 2005 (Amended December 2006 by Ord. No. 06-153) § 11.2.3(a). Because a variance is an exception to what is otherwise required by Section 23-84 of the Subdivision Code, a variance can never be granted unless specific requirements are met under Section 23-15 of the Subdivision Code. *See* Hawai'i County Code 1983 (2005 edition, as amended) § 23-15.

Although there is no Hawai'i case law as to the applicability of automatic approval to variances from the County Subdivision Code, this Court recently expressed doubt, without deciding, that automatic approval under HRS § 91-13.5 applies to inaction on a liquor license. *See 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). Looking to the plain language of HRS § 91-13.5, this Court explained that "[a] liquor license is issued pursuant to HRS chapter 281," which is not one of the sections listed in HRS § 91-13.5(g) to which automatic approval applies. *Id.*, 116 Hawai'i at 543, 174 P.3d at 382. This Court further 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.*

Likewise, the statutory authority for counties' subdivision approvals (and variances thereto) is HRS § 46-1.5(13), which is not one of the statutory sections referenced in HRS § 91-13.5. Furthermore, since properties are commonly subdivided without a variance from the

Subdivision Code, it is equally doubtful that a variance is the type of county application 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. In other words, any business or individual wishing to subdivide land in the County of Hawai'i is required by law to provide a water system meeting the minimum requirements of DWS pursuant to Section 23-84 of the Subdivision Code, but there are no laws requiring a business or individual to apply for a variance from the Subdivision Code to avoid having to comply with the requirements of the Subdivision Code. Accordingly, it unlikely that the legislature intended to apply automatic approval to a legal mechanism that permits a landowner to use his property in a manner forbidden by ordinance or statute.

2. An Application for a Variance from the County Subdivision Code is not a County Application Required Under the Statutes Enumerated in HRS Section 91-13.5(g)

As mentioned *supra*, the circuit court previously concluded that the statutory authority for the County Subdivision Code is HRS § 46-1.5(13). HRS § 46-1.5(13) provides a general grant of power to the counties to enact ordinances deemed necessary to protect health, life, and property. *See id.* Subdivision codes deal primarily with infrastructure requirements, such as roads, water supply, sewage disposal and lights, when land is subdivided into different lot configurations and sizes. *See* Hawai'i County Code, Chapter 23 (as amended). Although the current version of the County Subdivision Code does not have an express statement of purpose, one of its predecessors stated the general purposes of a subdivision code well: "In order to provide for adequate light, air, fire protection, traffic safety and to insure the proper sanitation and drainage of lands within the County of Hawai'i. . . ." Section 3, Ord. 58 (1947). Based on the foregoing, it is not surprising that HRS § 46-1.5(13) is not one of the sections listed in HRS § 91-13.5(g) to which automatic approval applies. It is also interesting to note that HRS § 46-6,

entitled "Parks and playgrounds for subdivisions," and HRS § 46-6.5, which covers public access in subdivisions, are also not listed in HRS § 91-13.5(g) to which automatic approval applies.

On the other hand, the statutory authority for the County Zoning Code is HRS § 46-4, which is one of the sections listed in HRS § 91-13.5(g) to which automatic approval applies. Unlike the health and safety issues addressed in the Subdivision Code, zoning covers the allowed uses of land in various zoning districts, setbacks of buildings, heights of buildings, and maximum and minimum lot sizes. *See*, Hawai'i County Code, Chapter 25 (as amended). Thus, the fact that the legislature chose to specifically include HRS § 46-4 (Zoning) as one of the sections listed in HRS § 91-13.5(g) to which automatic approval applies and chose specifically to exclude HRS §§ 46-1.5(13), 46-6, and 46-6.5, all of which involve subdivisions, is further evidence that subdivisions (and variances thereto), were not intended to be covered by automatic approval in HRS § 91-13.5(g).

B. Applying HRS § 91-13.5 to a Variance From the Water Requirements of the County's Subdivision Code Would Produce an Absurd Result

When interpreting statutes, "statutory construction dictates that an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result." *Konno v. County of Hawai'i*, 85 Hawai'i 61, 71, 937 P.2d 397, 407 (1997) (citations omitted). Interpreting HRS § 91-13.5 as requiring automatic approval of a variance from the water requirements of the County Subdivision Code due to a late decision by the Planning Department would lead to the absurd result of creating even more substandard subdivisions in Hawai'i County.

For instance, in the present case, such an interpretation will lead to the absurd result of adding even more lots to an already existing subdivision with substandard infrastructure, which is inconsistent with the intent of the County Subdivision Code and the goals, policies and

standards of the County General Plan. *See* ROA 00237-00243. Rather than the Variance Application being granted or denied by the chief planning officer of the county, the water variance will be deemed automatically approved without regard to whether the variance meets the grounds for variances in Section 23-5 of the Subdivision Code or whether it is consistent with the goals, policies and standards of the Hawai'i County General Plan. It is difficult to imagine that the legislature intended this type of absurd result.

V. CONCLUSION

A. Although a business or individual is required to comply with the Subdivision Code when subdividing land in Hawai'i County, there is no law requiring a business or individual to apply for or obtain a variance from the Subdivision Code prior to the formation, operation, or expansion of a commercial or industrial enterprise. In addition, the statutory authority for the County Subdivision Code is HRS § 46-1.5(13), which is not one of the statutes enumerated in HRS § 91-13.5(g) to which automatic approval requires. Therefore, the legislature could not have intended a variance from the water requirements of the Subdivision Code to be subject to the automatic approval requirements of HRS § 91-13.5.

B. Relief Sought.

1. As for Point of Error No. 1, the Director respectfully requests this Court to find that the trial court's Conclusions of Law Nos. 2 and 5 were in error and that the Calvert Variance Application was not required by law to be obtained prior to the formation operation, or expansion of a commercial enterprise under HRS § 91-13.5.

2. As for Point of Error No. 2, the Director respectfully requests this Court to find that the trial court's Conclusions of Law Nos. 8 and 9 were in error and that the Calvert Variance Application was not automatically granted pursuant to HRS § 91-13.5.

3. As for Point of Error No. 3, the Director respectfully requests this Court to find that the trial court's Conclusion of Law No. 10 was in error and that the Board of Appeals' Decision and Order is reversed.

4. For the reason discussed *supra*, this Court should find that variances to the County Subdivision Code are not subject to the automatic approval requirements of HRS § 91-13.5.

5. That this Court grant the Director such other relief as it may deem just and proper.

Dated: Hilo, Hawai'i, December 30, 2008.

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

By _____
AMY G. SELF
Deputy Corporation Counsel
His Attorney

FILED

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MARLENE CALVERT

2008 AUG 29 AM 9:25

L. [illegible], CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI`I

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 (Agency Appeal) NOTICE OF ENTRY OF JUDGMENT

NOTICE OF ENTRY OF JUDGMENT

Pursuant to the provisions of the Hawaii Rules of Civil Procedure, Rule 77(d), NOTICE IS HEREBY GIVEN of the entry of the JUDGMENT in favor of the Appellees, BOARD OF APPEALS OF THE COUNTY OF HAWAI`I, VALTA COOK, in his capacity as

APPENDIX "1"

Chairperson of the Board of Appeals of the County of Hawai`i, and MARLENE CALVERT in the above-entitled agency appeal.

DATED: Hilo, Hawai`i, August 29, 2008.

DIANE M. KUNIMOTO

Clerk of the Above-Entitled Court

Copies mailed to:

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2008 AUG 29 AM 9:24

L. CH[illegible]ERK
THIRD CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

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 (Agency Appeal) JUDGMENT

JUDGMENT

Pursuant to the Findings of Fact, Conclusions of Law, and Decision and Order Affirming the Board of Appeals of the County of Hawaii's Decision and Order Filed November 19, 2007, judgment is hereby entered in favor of the Appellees, BOARD OF APPEALS OF THE

I hereby certify that this is a full, true and correct copy of the original on file in this office.

L. Chinen

Clerk, Third Circuit Court, State of Hawaii

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

DATED: Hilo, Hawai`i, August 29, 2008.

ALL OTHER CLAIMS, COUNTERCLAIMS OR CROSS CLAIMS ARE DISMISSED, WITHOUT PREJUDICE.

GREG K. NAKA...

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

AMY G. SELF
Deputy Corporation Counsel
Attorney for Appellant CHRISTOPHER J. YUEN,
PLANNING DIRECTOR, COUNTY OF HAWAI`I

BROOKS L. BANCROFT
Deputy Corporation Counsel
Attorney for Appellee BOARD OF APPEALS

JUDGMENT
Christopher J. Yuen, Planning Director, County of Hawaii v. Board of Appeals of the County of Hawaii, Valta Cook, et al.; Civil No. 07-1-0414, Third Circuit Court, State of Hawaii.

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

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 CALVERT,

Appellees.

CIVIL NO. 07-1-0414
(Agency Appeal)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER AFFIRMING THE BOARD OF APPEALS OF THE COUNTY OF HAWAII'S DECISION AND ORDER FILED NOVEMBER 19, 2007

Oral Argument:
Date: May 2, 2008
Time: 9:00 a.m.
Judge: Honorable Greg Nakamura

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER AFFIRMING THE BOARD OF APPEALS OF THE COUNTY OF HAWAII'S DECISION AND ORDER FILED NOVEMBER 19, 2007

The above-captioned matter having come on for hearing before the Honorable Greg K. Nakamura, Judgment of the above-entitled Court on May 2, 2008, with Appellant CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI`I represented by Deputy Corporation Counsel Amy G. Self, Appellee BOARD OF APPEALS OF THE COUNTY OF HAWAI`I represented by Deputy Corporation Counsel Brooks L. Bancroft, and Appellee

APPENDIX "2"

MARLENE CALVERT represented by Roy A. Vitousek III. The Court having considered the record, memoranda, exhibits and oral argument of the parties, and being fully informed of the premises, hereby makes and enters the following Findings of Fact, Conclusions of Law, and Decision and Order Affirming the Board of Appeals' Decision and Order filed November 19, 2007.

FINDINGS OF FACT

1. This is an appeal filed by Appellant CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I (hereinafter the "Planning Director" or "Appellant") from a decision of Appellee BOARD OF APPEALS OF THE COUNTY OF HAWAI'I (hereinafter the "Board") filed November 19, 2007, reversing the Planning Director's denial of Appellee MARLENE CALVERT's (hereinafter "Mrs. Calvert") Variance Application.

2. "Mrs. Calvert and her late husband, Everett T. Calvert, a career educator, purchased 480 acres of land in Ka'u in 1978. They purchased the land by refinancing their own home to generate a down payment. They asked their son, Gene Calvert, to join in their enterprise (hereinafter "the Calverts").

3. Mrs. Calvert is the fee simple owner of real property identified as TMK numbers (3) 9-2-150:13 and 18 located in the District of Ka'u. Each lot is 21 acres.

4. The property is located in the Ka'u District, Kahuku, immediately makai, or seaward, of Phases 1 and 2 of the Kahuku Country Estates Subdivision. Lot 5, or TMK (3) 9-2-150:18, is located at the south end of Jasmine Drive, two blocks makai of the 78 mile marker off of Mamalahoa Highway. Lot 6, or 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 Ave.

5. The property is in the state land use "agriculture" district and zoned A-3a by the County of Hawaii.

6. The Calverts are the developers of the Kahuku Country Estates Subdivision.

7. The existing Kahuku Country Estates Subdivision consists of two (2) phases of development. Each previous phase consisted of subdividing two 21-acre parcels into seven (7) three (3)-acre parcels and selling the subdivided parcels to the public.

8. Phase 1 was completed in 1982 and Phase 2 was completed in 1989. In both Phase 1 and Phase 2 of the Kahuku Country Estates Subdivision, the Calverts applied to the County of Hawaii for "water waivers" in support of the subdivision applications. The Department of Water Supply approved the "water waiver" for Phase I and the Planning Department approved the "water waiver" for Phase 2. The Planning Department granted Final Subdivision Approval for both phases.

9. The Calverts have successfully sold all lots in Phases 1 and 2 of the Kahuku Country Estates Subdivision. Some lot owners have purchased more than one lot to provide for an area of buffer between houses or to save a lot for a family member.

10. Mrs. Calvert currently proposes to subdivide the two 21-acre parcels into seven (7) 3-acre lots, for a total of fourteen (14) 3-acre lots, with covenants discouraging deforestation and requiring minimum size catchment tank size and catchment area.

11. The proposed subdivision would be the third phase of development of the Kahuku Country Estates Subdivision.

12. Mrs. Calvert testified that if the instant application for a Variance is approved and if the two 21-acre parcels are subdivided into 3-acre lots, she plans to sell the parcels for market

value, which is currently in the $100,000 for 3 acres, but is changing, so that the prices would be whatever the market value is at the time of final subdivision and sale.

13. The development of the Kahuku Country Estates Subdivision is a commercial enterprise. The Calverts are developing subdivided parcels and selling them to the public, which is an activity conducted with the purpose of generating revenue. The Calverts' plan to develop the third phase of the Kahuku Country Estates Subdivision constitutes the operation or expansion of a commercial enterprise.

14. On June 9, 2005, Mrs. Calvert filed her application for a variance from water supply requirements of Section 23-83 of the Hawai`i County Subdivision Code to enable the subdivision of fourteen (14) three-acre agricultural lots on the Property, with domestic water to be supplied by catchment tanks.

15. The Planning Department received Mrs. Calvert's application on June 9, 2005, in the Kona Planning Department Office. The Planning Department received Mrs. Calvert's Variance Application in Hilo on June 16, 2005.

16. Planning Department Rule 6-7 and Subdivision Code Section 23-18 state that,

> [t]he director shall, within sixty days after the filing of a proper application or within a longer period as may be agreed to by the applicant, deny the application or approve it subject to conditions.

17. Sixty days from the date the Variance Application was filed in Kona was August 8, 2005. Sixty days from the date Mrs. Calvert's application was filed in Hilo was August 15, 2005.

18. Staff at the County Planning Department marked on the Variance Application that the action date was "8/15/05."

19. Mrs. Calvert was never contacted by the Planning Department regarding an extension of time to review her Variance Application and Mrs. Calvert never requested or received any extension of time to review her Variance Application.

20. By letter dated August 11, 2005, the Planning Director acknowledged receipt of the Variance Application. This letter was not a decision letter. It did not remark on the adequacy of rainfall in the area or the Department's policies relative to rainfall and variance applications. The Planning Director's August 11, 2005, letter stated, "the Planning Director will render a decision on the subject variance on or after September 5, 2005, but no later than October 4, 2005."

21. At no time did the Planning Director or Planning Department determine or advise the Calverts that the application was incomplete or improper.

22. The Planning Director did not issue a decision letter until October 5, 2005. The Planning Director's denial letter, dated September 29, 2005 (the "Decision"), was not mailed until October 5, 2005.

23. Mrs. Calvert filed a timely appeal from the Planning Director's Decision to the Board on October 28, 2005 (the "Appeal").

24. The Appeal was set for hearing before the Board on March 10, 2006. Deputy Corporation Counsel Amy G. Self appeared on behalf of the Planning Department. Roy A. Vitousek III, Esq., appeared on behalf of Mrs. Calvert. Mrs. Calvert and Gene Calvert appeared and testified before the Board at the hearing.

25. In the March 10, 2006, hearing on Mrs. Calvert's application, Mr. Yuen did not appear as a witness or representative of the Planning Department. No other witness was offered by the County.

26. The Board issued its Findings of Fact, Conclusions of Law, and Decision and Order on May 17, 2006, and stated in its Decision and Order:

> . . . the Board hereby orders and reverses the Planning Director's decision to deny the Calvert water Variance Application, VAR 05-056, and hereby approves the water variance for all 14 proposed 3-acre lots.
>
> Pursuant to Hawaii Revised Statutes 91-13.5, the Board hereby finds that the Calvert water variance application was deemed automatically approved as of August 8, 2005. The Director's decision letter dated September 29, 2005, and served October 5, 2005, was a violation of applicable state law.

27. On June 14, 2006, the Planning Director filed a Notice of Appeal to the Third Circuit Court, Civil No. 06-1-0184, from the Board's May 12, 2006, Decision on the grounds that the Board's Decision exceeded its statutory authority by finding that the Variance Application was automatically approved contrary to the clear dictates of the Hawaii County Subdivision Code and that the Board's Decision was clearly erroneous as Hawaii Revised Statutes ("HRS") § 91-13.5 does not apply to the County Subdivision Code.

28. On January 30, 2007, the Third Circuit Court filed its Findings of Fact, Conclusions of Law, and Decision and Order Reversing and Remanding the County of Hawai`i Board of Appeals' Decision and Order Dated May 17, 2006, in Civil No. 06-1-0184 (hereinafter "Circuit Court Decision").

29. The Circuit Court concluded that the Variance Application was not an "application for a business or development-related permit, license or approval" within the meaning of HRS § 91-13.5, insofar as the Variance Application was not an application for a form of approval required under HRS § 46-4 or § 46-5. However, the Circuit Court found that the Board of Appeals did not decide the issue of whether the Variance Application fit within the definition of an "application for a business or development-related permit, license or approval"

as a "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." Therefore, the Circuit Court reversed the Board's May 17, 2006, Decision and Order and remanded the matter to the Board for further action consistent with the Circuit Court's Decision.

30. On February 21, 2007, the Third Circuit Court filed its Judgment in Civil No. 06-1-0184 (the "Judgment"). The matter was remanded to the Board of Appeals.

31. By letter dated June 19, 2007, the Board determined that the three issues on remand before the Board 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.

The date for concurrent briefs was set for August 17, 2007. The date for concurrent responsive briefs was set for August 31, 2007, and a hearing was set for September 14, 2007.

32. A court-ordered remand hearing was held on September 14, 2007. Roy A. Vitousek III, Esq., appeared on behalf of Appellant Marlene E. Calvert. Deputy Corporation Counsel Amy G. Self appeared on behalf of Appellee Christopher J. Yuen, Planning Director, County of Hawai`i. Deputy Corporation Counsel Brooks L. Bancroft appeared as counsel for the Board.

33. At this hearing, the Board considered the arguments of the parties but did not take additional evidence.

34. Hawaii Revised Statutes Section 91-13.5 Regarding Automatic Approval

(a) HRS § 91-13.5 regarding automatic approval for business or development-related permits requires the issuing agency to establish rules setting time limits within which decisions on such permits will be made by the agency.

(b) HRS § 91-13.5(g) defines "application for a business or development-related permit, license or approval":

> (g) 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, or 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.

The list of statutes cross-referenced by this section includes permits or approvals required under HRS § 46-4, the state law that gives counties their broad zoning power.

(c) HRS § 91-13.5 states that if the issuing agency fails to issue a decision on those business or development-related permits (as defined by the statute) within the established time limit, that those permit applications are to be considered automatically approved by operation of law.

(d) The purpose of HRS § 91-13.5 is to hold government agencies accountable to the deadlines they set so that the public can know with some level of certainty when they can expect to hear from an agency about their application. Act 164, S.B. No. 2204 (1998) (enacted).

(e) The Planning Department has rules that set forth time frames within which the Planning Director shall act on an application for a water variance. Planning Department Rule 6-7 and Subdivision Code Section 23-18 state that, "the director shall, within sixty days after the filing of a proper application or within a longer period as may be agreed by the applicant, deny the application or approve it subject to conditions."

(f) The Planning Director is required to render a decision on a variance application within sixty (60) days.

(g) The Planning Director did not render a decision in the Calvert application until October 5, 2005. The decision was fifty-eight (58) days late.

(h) If the subject Variance Application fits the definition of an "application for a business or development-related permit, license, or approval" under HRS § 91-13.5(g), then HRS § 91-13.5(c) will require that Mrs. Calvert's application be deemed to be approved.

(i) There are two separate definitions of what constitutes "an application for a business or development-related permit" in HRS § 91-13.5(g). The first definition is "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." The second definition in HRS § 91-13.5(g) is "an application for . . . any permit, license, certificate, or any form of approval required under sections 46-4 . . . ."

(j) The Circuit Court previously ruled that the subject Variance Application does not meet the second definition set out in HRS § 91-13.5(g). However, the Circuit Court previously did not rule on whether the subject Variance Application meets the first definition set out in HRS § 91-13.5(g).

(k) Mrs. Calvert's application to subdivide two 21-acre tracts of land into 14 separate 3-acre parcels with the intent of selling the 3-acre parcels to the public is part of a commercial enterprise.

(l) It is not economically feasible for Mrs. Calvert to develop a water system which meets County standards as a prerequisite to subdividing two 21-acre tracts into 14 separate parcels.

(m) Mrs. Calvert has already engaged in commercial activity by developing the first two phases of the Kahuku Country Estates Subdivision.

(n) Mrs. Calvert's current application for a water variance is to expand the commercial enterprise known as the Kahuku Country Estates Subdivision by developing another phase of the subdivision.

(o) Mrs. Calvert will not be legally permitted to expand the commercial enterprise known as the Kahuku Country Estates Subdivision unless the water variance is approved by the Planning Department.

(p) An application for a water variance is a county application for an approval required by law before Mrs. Calvert can expand the commercial enterprise known as the Kahuku Country Estates Subdivision.

(q) Mrs. Calvert's application for a water variance being reviewed by the Board is an application for an approval required by law before Mrs. Calvert can expand a commercial enterprise.

(r) The application for a water variance at issue is an "application for a business or development-related permit, license, or approval" as defined in *HRS § 91-13.5*.

(s) In HCC § 23-18, the Planning Director established a 60-day time period beginning on the date an application is filed in which to make a decision to approve or deny the variance application.

(t) The Planning Director did not issue a decision to grant or deny the subject variance application within 60 days of receiving the application.

(u) By 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.

35. Because the Board concluded that the Variance Application was automatically approved, the Board rejected the Planning Director's argument that the application was automatically denied pursuant to HCC § 23-18. HRS § 91-13.5 covers the same subject area as HCC § 23-18. If the two provisions are inconsistent, the State statute preempts the County Code.

36. The Board also found that Mrs. Calvert's Variance Application meets the criteria stated in HCC § 23-15 for issuance of a variance and 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.

CONCLUSIONS OF LAW

1. The Planning Director is an agency for purposes of HRS § 91-13.5.

2. The Variance Application at issue in this appeal is a county application for approval required by law to be obtained before the formation, operation or expansion of a commercial enterprise under HRS § 91-13.5.

3. The primary dispute in this case is whether HRS § 91-13.5 (2005) applies so as to automatically grant a variance from the water supply requirements under the Subdivision Code of the County of Hawai'i Code (the "Subdivision Code").

HRS § 91-13.5 (2005) states that:

> (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.
>
> * * *
>
> (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.
>
> * * *
>
> (g) 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 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 any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 3421, 342J, 342L, and 342P.

4. In determining whether HRS § 91-13.5(a) applies, the first question is whether the Planning Director's determination in this case constitutes an action by an "agency." Under HRS

§ 91-1(1), an "'agency' means each state or county board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." Rule 2 of the County of Hawai'i Planning Department Rules of Practice and Procedure ("Planning Department Rules") gives the Planning Director the power to make rules. Therefore, the Planning Director is an "agency" for the purpose of HRS § 91-13.5 (2005).

5. The next question is whether the application for a variance constituted an "application for a business or development-related permit, license, or approval" for the purpose of HRS § 91-13.5 (2005). The Court determines that the mixed findings of fact and conclusions of law or conclusions of law that support the view the Calvert Variance Application was an "application for a business or development-related permit, license, or approval" as defined under HRS § 91-13.5(g) were not clearly erroneous nor did they constitute errors of law. This is because the Calvert Variance Application was a "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."

6. Mrs. Calvert's plan is to subdivide two 21-acre parcels into 14 separate 3-acre parcels and sell the parcels for profit. The plan to subdivide and sell subdivided lots is a commercial enterprise. The Variance Application is part of that plan.

7. Moreover, in most contexts, subdivision of land is a commercial enterprise. This is recognized in the Subdivision Control Code of the Hawai'i County Code itself. The Subdivision Code states that "subdivided land":

> means improved or unimproved land or lands divided into two or more lots, parcels, sites, or other divisions of land **for the purpose**, whether immediate or future, **of sale, lease, rental,** transfer of title to or interest in, any or all such parcels, includes re-subdivision, * * *.

Hawaii County Code, § 23-3(31) (emphasis added).

8. The decision is affirmed on the ground that the Planning Director's denial of the Calvert Variance Application was issued after the 60-day period for action on the application had expired and that, as a result, the application was automatically granted pursuant to HRS § 91-13.5.

9. Because of this Court's conclusion that the Variance Application was approved as a matter of law on August 8, 2005, the Court does not reach the other issues considered by the Board of Appeals in its Decision and Order filed November 19, 2007.

10. Based on the foregoing, the Board of Appeals' Decision and Order is affirmed.

11. To the extent herein that any of the Conclusions of Law constitute Findings of Fact, or Findings of Fact constitute Conclusions of Law, they shall be considered and construed as such.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellee BOARD OF APPEALS OF THE COUNTY OF HAWAI'I's Decision and Order filed November 19, 2007, is hereby affirmed.

DATED: Hilo, Hawai`i, July 31, 2008.

GREG K. NAKAMURA

JUDGE OF THE ABOVE-ENTITLED COURT

SEAL

APPROVED AS TO FORM:

AMY G. SELF
Deputy Corporation Counsel
Attorney for Appellant CHRISTOPHER J. YUEN,
PLANNING DIRECTOR, COUNTY OF HAWAI'I

JUL 8 2008

BROOKS L. BANCROFT
Deputy Corporation Counsel
Attorney for Appellee BOARD OF APPEALS

Findings of Fact, Conclusions of Law, and Decision and Order Affirming the Board of Appeals of the County of Hawaii's Decision and Order Filed November 19, 2007; Christopher J. Yuen, Planning Director, County of Hawaii v. Board of Appeals of the County of Hawaii, Valta Cook, et al.; Civil No. 07-1-0414, Third Circuit Court, State of Hawaii.

§46-1.5 General powers and limitation of the counties. *[Repeal and reenactment on June 30, 1996 by L 1993, c 168, §5 deleted by L 1996, c 19, §2.]* Subject to general law, each county shall have the following powers and shall be subject to the following liabilities and limitations:

(1) Each county shall have the power to frame and adopt a charter for its own self-government that shall establish the county executive, administrative, and legislative structure and organization, including but not limited to the method of appointment or election of officials, their duties, responsibilities, and compensation, and the terms of their office;

(2) Each county shall have the power to provide for and regulate the marking and lighting of all buildings and other structures that may be obstructions or hazards to aerial navigation, so far as may be necessary or proper for the protection and safeguarding of life, health, and property;

(3) Each county shall have the power to enforce all claims on behalf of the county and approve all lawful claims against the county, but shall be prohibited from entering into, granting, or making in any manner any contract, authorization, allowance payment, or liability contrary to the provisions of any county charter or general law;

(4) Each county shall have the power to make contracts and to do all things necessary and proper to carry into execution all powers vested in the county or any county officer;

(5) Each county shall have the power to:

(A) Maintain channels, whether natural or artificial, including their exits to the ocean, in suitable condition to carry off storm waters;

(B) Remove from the channels, and from the shores and beaches, any debris that is likely to create an unsanitary condition or become a public nuisance; provided that, to the extent any of the foregoing work is a private responsibility, the responsibility may be enforced by the county in lieu of the work being done at public expense;

(C) Construct, acquire by gift, purchase, or by the exercise of eminent domain, reconstruct, improve, better, extend, and maintain projects or undertakings for the control of and protection against floods and flood waters, including the power to drain and rehabilitate lands already flooded; and

(D) Enact zoning ordinances providing that lands deemed subject to seasonable, periodic, or occasional flooding shall not be used for residence or other purposes in a manner as to endanger the health or safety of the occupants thereof, as required by the Federal Flood Insurance Act of 1956 (chapter 1025,

APPENDIX "3"

Public Law 1016);

(6) Each county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so;

(7) Each county shall have the power to exercise regulatory powers over business activity as are assigned to them by chapter 445 or other general law;

(8) Each county shall have the power to fix the fees and charges for all official services not otherwise provided for;

(9) Each county shall have the power to provide by ordinance assessments for the improvement or maintenance of districts within the county;

(10) Except as otherwise provided, no county shall have the power to give or loan credit to, or in aid of, any person or corporation, directly or indirectly, except for a public purpose;

(11) Where not within the jurisdiction of the public utilities commission, each county shall have the power to regulate by ordinance the operation of motor vehicle common carriers transporting passengers within the county and adopt and amend rules the county deems necessary for the public convenience and necessity;

(12) Each county shall have the power to enact and enforce ordinances necessary to prevent or summarily remove public nuisances and to compel the clearing or removal of any public nuisance, refuse, and uncultivated undergrowth from streets, sidewalks, public places, and unoccupied lots. In connection with these powers, each county may impose and enforce liens upon the property for the cost to the county of removing and completing the necessary work where the property owners fail, after reasonable notice, to comply with the ordinances. The authority provided by this paragraph shall not be self-executing, but shall become fully effective within a county only upon the enactment or adoption by the county of appropriate and particular laws, ordinances, or rules defining "public nuisances" with respect to each county's respective circumstances. The counties shall provide the property owner with the opportunity to contest the summary action and to recover the owner's property;

(13) Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State;

(14) Each county shall have the power to:

(A) Make and enforce within the limits of the county all necessary ordinances covering all:
(i) Local police matters;
(ii) Matters of sanitation;
(iii) Matters of inspection of buildings;
(iv) Matters of condemnation of unsafe structures, plumbing, sewers, dairies, milk, fish, and morgues; and
(v) Matters of the collection and disposition of rubbish and garbage;
(B) Provide exemptions for homeless facilities and any other program for the homeless authorized by chapter 356D, for all matters under this paragraph;
(C) Appoint county physicians and sanitary and other inspectors as necessary to carry into effect ordinances made under this paragraph, who shall have the same power as given by law to agents of the department of health, subject only to limitations placed on them by the terms and conditions of their appointments; and
(D) Fix a penalty for the violation of any ordinance, which penalty may be a misdemeanor, petty misdemeanor, or violation as defined by general law;

(15) Each county shall have the power to provide public pounds; to regulate the impounding of stray animals and fowl, and their disposition; and to provide for the appointment, powers, duties, and fees of animal control officers;

(16) Each county shall have the power to purchase and otherwise acquire, lease, and hold real and personal property within the defined boundaries of the county and to dispose of the real and personal property as the interests of the inhabitants of the county may require, except that:
(A) Any property held for school purposes may not be disposed of without the consent of the superintendent of education;
(B) No property bordering the ocean shall be sold or otherwise disposed of; and
(C) All proceeds from the sale of park lands shall be expended only for the acquisition of property for park or recreational purposes;

(17) Each county shall have the power to provide by charter for the prosecution of all offenses and to prosecute for offenses against the laws of the State under the authority of the attorney general of the State;

(18) Each county shall have the power to make appropriations in amounts deemed appropriate from any moneys in the treasury, for the purpose of:
(A) Community promotion and public celebrations;
(B) The entertainment of distinguished persons as may from time to time visit the county;

ordinances or rules after reasonable notice and requests to correct or cease the violation have been made upon the violator. Any administratively imposed civil fine shall not be collected until after an opportunity for a hearing under chapter 91. Any appeal shall be filed within thirty days from the date of the final written decision. These proceedings shall not be a prerequisite for any civil fine or injunctive relief ordered by the circuit court;

(B) Each county by ordinance may provide for the addition of any unpaid civil fines, ordered by any court of competent jurisdiction, to any taxes, fees, or charges, with the exception of fees or charges for water for residential use and sewer charges, collected by the county. Each county by ordinance may also provide for the addition of any unpaid administratively imposed civil fines, which remain due after all judicial review rights under section 91-14 are exhausted, to any taxes, fees, or charges, with the exception of water for residential use and sewer charges, collected by the county. The ordinance shall specify the administrative procedures for the addition of the unpaid civil fines to the eligible taxes, fees, or charges and may require hearings or other proceedings. After addition of the unpaid civil fines to the taxes, fees, or charges, the unpaid civil fines shall not become a part of any taxes, fees, or charges. The county by ordinance may condition the issuance or renewal of a license, approval, or permit for which a fee or charge is assessed, except for water for residential use and sewer charges, on payment of the unpaid civil fines. Upon recordation of a notice of unpaid civil fines in the bureau of conveyances, the amount of the civil fines, including any increase in the amount of the fine which the county may assess, shall constitute a lien upon all real property or rights to real property belonging to any person liable for the unpaid civil fines. The lien in favor of the county shall be subordinate to any lien in favor of any person recorded or registered prior to the recordation of the notice of unpaid civil fines and senior to any lien recorded or registered after the recordation of the notice. The lien shall continue until the unpaid civil fines are paid in full or until a certificate of release or partial release of the lien, prepared by the county at the owner's expense, is recorded. The notice of unpaid civil fines shall state the amount of the fine as of the date of the notice and maximum permissible daily increase of the fine. The county shall not be

required to include a social security number, state general excise taxpayer identification number, or federal employer identification number on the notice. Recordation of the notice in the bureau of conveyances shall be deemed, at such time, for all purposes and without any further action, to procure a lien on land registered in land court under chapter 501. After the unpaid civil fines are added to the taxes, fees, or charges as specified by county ordinance, the unpaid civil fines shall be deemed immediately due, owing, and delinquent and may be collected in any lawful manner. The procedure for collection of unpaid civil fines authorized in this paragraph shall be in addition to any other procedures for collection available to the State and county by law or rules of the courts;

(C) Each county may impose civil fines upon any person who places graffiti on any real or personal property owned, managed, or maintained by the county. The fine may be up to $1,000 or may be equal to the actual cost of having the damaged property repaired or replaced. The parent or guardian having custody of a minor who places graffiti on any real or personal property owned, managed, or maintained by the county shall be jointly and severally liable with the minor for any civil fines imposed hereunder. Any such fine may be administratively imposed after an opportunity for a hearing under chapter 91, but such a proceeding shall not be a prerequisite for any civil fine ordered by any court. As used in this subparagraph, "graffiti" means any unauthorized drawing, inscription, figure, or mark of any type intentionally created by paint, ink, chalk, dye, or similar substances;

(D) At the completion of an appeal in which the county's enforcement action is affirmed and upon correction of the violation if requested by the violator, the case shall be reviewed by the county agency that imposed the civil fines to determine the appropriateness of the amount of the civil fines that accrued while the appeal proceedings were pending. In its review of the amount of the accrued fines, the county agency may consider:

(i) The nature and egregiousness of the violation;

(ii) The duration of the violation;

(iii) The number of recurring and other similar violations;

(iv) Any effort taken by the violator to correct the violation;

(v) The degree of involvement in causing or continuing the violation;

(vi) Reasons for any delay in the completion of the

appeal; and

(vii) Other extenuating circumstances.

The civil fine that is imposed by administrative order after this review is completed and the violation is corrected shall be subject to judicial review, notwithstanding any provisions for administrative review in county charters;

(E) After completion of a review of the amount of accrued civil fine by the county agency that imposed the fine, the amount of the civil fine determined appropriate, including both the initial civil fine and any accrued daily civil fine, shall immediately become due and collectible following reasonable notice to the violator. If no review of the accrued civil fine is requested, the amount of the civil fine, not to exceed the total accrual of civil fine prior to correcting the violation, shall immediately become due and collectible following reasonable notice to the violator, at the completion of all appeal proceedings;

(F) If no county agency exists to conduct appeal proceedings for a particular civil fine action taken by the county, then one shall be established by ordinance before the county shall impose the civil fine;

(25) Any law to the contrary notwithstanding, any county mayor may exempt by executive order donors, provider agencies, homeless facilities, and any other program for the homeless under chapter 356D from real property taxes, water and sewer development fees, rates collected for water supplied to consumers and for use of sewers, and any other county taxes, charges, or fees; provided that any county may enact ordinances to regulate and grant the exemptions granted by this paragraph;

(26) Any county may establish a captive insurance company pursuant to article 19, chapter 431; and

(27) Each county shall have the power to enact and enforce ordinances regulating towing operations. [L 1988, c 263, §2; am L 1989, c 338, §1; am L 1990, c 135, §1; am L 1991, c 212, §2; am L 1993, c 168, §§1, 5; am L 1994, c 171, §§3, 4; am L 1995, c 236, §1; am L 1996, c 19, §§1, 2; am L 1997, c 350, §17; am L 1998, c 212, §3; am L 2001, c 194, §1; am L 2003, c 84, §2; am L 2005, c 163, §1; am L 2007, c 249, §6]

Cross References

Alternative dispute resolution board of advisors, see §613-3.
Construction projects; recycled glass requirements, see §103D-407.
Glass container recovery, see §§342G-81 to 87.
Glassphalt use, see §264-8.5.

§46-4 County zoning. (a) This section and any ordinance, rule, or regulation adopted in accordance with this section shall apply to lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.

Zoning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner. Zoning in the counties of Hawaii, Maui, and Kauai means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district to carry out the purposes of this section. In establishing or regulating the districts, full consideration shall be given to all available data as to soil classification and physical use capabilities of the land to allow and encourage the most beneficial use of the land consonant with good zoning practices. The zoning power granted herein shall be exercised by ordinance which may relate to:

(1) The areas within which agriculture, forestry, industry, trade, and business may be conducted;
(2) The areas in which residential uses may be regulated or prohibited;
(3) The areas bordering natural watercourses, channels, and streams, in which trades or industries, filling or dumping, erection of structures, and the location of buildings may be prohibited or restricted;
(4) The areas in which particular uses may be subjected to special restrictions;
(5) The location of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered;
(6) The location, height, bulk, number of stories, and size of buildings and other structures;
(7) The location of roads, schools, and recreation areas;
(8) Building setback lines and future street lines;
(9) The density and distribution of population;
(10) The percentage of a lot that may be occupied, size of yards, courts, and other open spaces;
(11) Minimum and maximum lot sizes; and
(12) Other regulations the boards or city council find necessary and proper to permit and encourage the orderly development of land resources within their jurisdictions.

The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

Any civil fine or penalty provided by ordinance under this

section may be imposed by the district court, or by the zoning agency after an opportunity for a hearing pursuant to chapter 91. The proceeding shall not be a prerequisite for any injunctive relief ordered by the circuit court.

Nothing in this section shall invalidate any zoning ordinance or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole. This section shall not be construed to limit or repeal any powers of any county to achieve these ends through zoning and building regulations, except insofar as forest and water reserve zones are concerned and as provided in subsections (c) and (d).

Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses. Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262.

(b) Any final order of a zoning agency established under this section may be appealed to the circuit court of the circuit in which the land in question is found. The appeal shall be in accordance with the Hawaii rules of civil procedure.

(c) Each county may adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted.

(d) Neither this section nor any other law, county ordinance, or rule shall prohibit group living in facilities with eight or fewer residents and that are licensed by the State as provided for under section 321-15.6, or in an intermediate care facility/mental retardation-community for persons, including mentally ill, elder, disabled, developmentally disabled, or totally disabled persons, who are not related to the home operator or facility staff; provided that those group living facilities meet all applicable county requirements not inconsistent with the intent of this subsection and including building height, setback, maximum lot coverage, parking, and floor area requirements.

(e) No permit shall be issued by a county agency for the operation of a halfway house, a clean and sober home, or a drug

rehabilitation home unless a public informational meeting is first held in the affected community. The State shall provide notification and access to relevant information, as required, under chapter 846E.

A clean and sober home shall be considered a residential use of property and shall be a permitted or conditional use in residentially designated zones, including but not limited to zones for single-family dwellings.

(f) For purposes of this section:

"Clean and sober home" means a house that is operated pursuant to a program designed to provide a stable environment of clean and sober living conditions to sustain recovery and that is shared by unrelated adult persons who:

(1) Are recovering from substance abuse;
(2) Share household expenses; and
(3) Do not require twenty-four-hour supervision, rehabilitation, or therapeutic services or care in the home or on the premises;

provided that the home shall meet all applicable laws, codes, and rules of the counties and State.

"Developmentally disabled person" means a person suffering from developmental disabilities as defined under section 333F-1.

"Disabled person" means a person with a disability as defined under section 515-2.

"Drug rehabilitation home" means:

(1) A residential treatment facility that provides a therapeutic residential program for care, diagnosis, treatment, or rehabilitation for socially or emotionally distressed persons, mentally ill persons, persons suffering from substance abuse, and developmentally disabled persons; or
(2) A supervised living arrangement that provides mental health services, substance abuse services, or supportive services for individuals or families who do not need the structure of a special treatment facility and are transitioning to independent living;

provided that drug rehabilitation homes shall not include halfway houses or clean and sober homes.

"Elder" means an elder as defined under section 356D-1.

"Halfway house" means a group living facility for people who:

(1) Have been released or are under supervised release from a correctional facility;
(2) Have been released from a mental health treatment facility; or
(3) Are receiving substance abuse or sex offender treatment; and

are housed to participate in programs that help them readjust to living in the community.

"Intermediate care facility/mental retardation-community" means an identifiable unit providing residence and care for eight or fewer mentally retarded individuals. Its primary purpose is the provision

of health, social, and rehabilitation services to the mentally retarded through an individually designed active treatment program for each resident. No person who is predominantly confined to bed shall be admitted as a resident of such a facility.

"Mental health treatment facility" means a psychiatric facility or special treatment facility as defined under section 334-1.

"Mentally ill person" has the same meaning as defined under section 334-1.

"Totally disabled person" means a "person totally disabled" as defined under section 235-1.

"Treatment program" means a "substance abuse program" or "treatment program", as those terms are defined under section 353G-2.

(g) Neither this section nor any other law, county ordinance, or rule shall prohibit the use of land for employee housing and community buildings in plantation community subdivisions as defined in section 205-4.5(a)(12); in addition, no zoning ordinance shall provide for elimination, amortization, or phasing out of plantation community subdivisions as a nonconforming use. [L 1957, c 234, pt of §6 and §9; am L Sp 1959 2d, c 1, §§26, 38; am L 1965, c 140; Supp, §138-42; HRS §46-4; am L 1980, c 203, §1; am L 1981, c 229, §2; am L 1982, c 54, §5; am L 1985, c 272, §3; am L 1986, c 177, §1; am L 1987, c 109, §2, c 193, §1, and c 283, §4; am L 1988, c 141, §§5, 6 and c 252, §1; am L 1989, c 313, §1; am L 1990, c 67, §3; am L 1997, c 350, §15; am L 2004, c 212, §2; am L 2005, c 139, §3; am L 2006, c 237, §2; am L 2007, c 249, §7]

Cross References

Zoning within land use districts, see §§205-5, 6.
See also county charters.

Rules of Court

Appeal to circuit court, see HRCP rule 72.

Attorney General Opinions

Counties have the power to prescribe lot sizes within an agricultural district established by the state land use commission. Att. Gen. Op. 62-33.

Preempts conflicting county fire and building codes. Att. Gen. Op. 84-7.

Immunity of state land from county planning and zoning laws extends to private nonprofit lessee undertaking park project in public interest. Att. Gen. Op. 86-3.

Law Journals and Reviews

Kaiser Hawaii Kai Development Company v. City and County of Honolulu: Zoning by Initiative in Hawaii. 12 UH L. Rev. 181.

§46-6 Parks and playgrounds for subdivisions. (a) Except as hereinafter provided, each county shall adopt ordinances to require a subdivider, as a condition to approval of a subdivision to provide land in perpetuity or to dedicate land for park and playground purposes, for the use of purchasers or occupants of lots or units in subdivisions. The ordinances may prescribe the instances when land shall be provided in perpetuity or dedicated, the area, location, grade, and other state of the sites so required to be provided or dedicated. In addition thereto, such ordinances may prescribe penalties or other remedies for violation of such ordinances.

(b) In lieu of providing land in perpetuity or dedicating land, the ordinances may permit a subdivider pursuant to terms and conditions set forth therein to:

(1) Pay to the county a sum of money deemed adequate by the county to purchase the park land the subdivider would otherwise have had to provide or dedicate; or

(2) Combine the payment of money with land to be provided or dedicated, the value of such combination to be as deemed adequate by the county to purchase the total amount of land the subdivider would otherwise have had to provide or dedicate.

The method of determining such full or partial payment shall be prescribed by the ordinances. The ordinances shall also provide that such money shall be used for the purpose of providing parks and playgrounds for the use of purchasers or occupants of lots or units in the subdivision. Each county may establish by ordinance a time limit within which it must spend the park dedication fees it has collected.

(c) Pursuant to terms, conditions, and limitations specified by the ordinances, a subdivider shall receive credit:

(1) For privately-owned and maintained parks and playgrounds;

(2) For lands dedicated or provided for park and playground purposes prior to the effective date of the ordinances.

(d) Upon the provision of land in perpetuity or the dedication of land by the subdivider as may be required under this section, the county concerned shall thereafter assume the cost of improvements and their maintenance, and the subdivider shall accordingly be relieved from such costs.

(e) The ordinances adopted pursuant to this section may provide, where special circumstances, conditions, and needs within the respective counties so warrant, for such exemptions and exclusions as the councils of the respective counties may deem necessary or appropriate and may also prescribe the extent to and the circumstances under which the requirements therein shall or shall not be applicable to subdivisions.

(f) For purposes of this section certain terms used herein shall be defined as follows:

(1) "Approval" means the final approval granted to a proposed subdivision where the actual division of land into smaller parcels is sought, provided that where construction of a

building or buildings is proposed without further subdividing an existing parcel of land, the term "approval" shall refer to the issuance of the building permit.

(2) "Dwelling unit" means a room or rooms connected together, constituting an independent housekeeping unit for a family and containing a single kitchen.

(3) "Lodging unit" means a room or rooms connected together, constituting an independent housekeeping unit for a family which does not contain any kitchen.

(4) "Parks and playgrounds" mean areas used for active or passive recreational pursuits.

(5) "Subdivider" means any person who divides land as specified under the definition of subdivision or who constructs a building or group of buildings containing or divided into three or more dwelling units or lodging units.

(6) "Subdivision" means the division of improved or unimproved land into two or more lots, parcels, sites, or other divisions of land and for the purpose, whether immediate or future, of sale, lease, rental, transfer of title to, or interest in, any or all such lots, parcels, sites, or division of land. The term includes resubdivision, and when appropriate to the context, shall relate to the land subdivided. The term also includes a building or group of buildings, other than a hotel, containing or divided into three or more dwelling units or lodging units.

(7) "Privately owned parks and playgrounds" mean parks or playgrounds and their facilities which are not provided in perpetuity or dedicated but which are owned and maintained by or on behalf of the ultimate users of the subdivision pursuant to recorded restrictive covenants. Where the privately owned park is a part of the lot or lots on which a building or group of buildings containing or divided into three or more dwelling units or lodging units is constructed, it shall not be required that the private park or playground meet county subdivision standards nor shall the area of the private park or playground be deducted from the area of the lot or lots for purposes of zoning or building requirements. [L 1967, c 294, §1; HRS §46-6; am L 1970, c 140, §1; am L 1977, c 208, §1; am L 1979, c 105, §5 and c 199, §1; gen ch 1985]

[§46-6.5] Public access. (a) Each county shall adopt ordinances which shall require a subdivider or developer, as a condition precedent to final approval of a subdivision, in cases where public access is not already provided, to dedicate land for public access by right-of-way or easement for pedestrian travel from a public highway or public streets to the land below the high-water mark on any coastal shoreline, and to dedicate land for public access by right of way from a public highway to areas in the mountains where there are existing facilities for hiking, hunting, fruit-picking, ti-leaf sliding, and other recreational purposes, and where there are existing mountain trails.

(b) These ordinances shall be adopted within one year of May 22, 1973.

(c) Upon the dedication of land for a right-of-way, as required by this section and acceptance by the county, the county concerned shall thereafter assume the cost of improvements for and the maintenance of the right-of-way, and the subdivider shall accordingly be relieved from such costs.

(d) For the purposes of this section, "subdivision" means any land which is divided or is proposed to be divided for the purpose of disposition into six or more lots, parcels, units, or interests and also includes any land whether contiguous or not, if six or more lots are offered as part of a common promotional plan of advertising and sale.

(e) The right-of-way shall be clearly designated on the final map of the subdivision or development.

(f) This section shall apply to the plan of any subdivision or development which has not been approved by the respective counties prior to July 1, 1973. [L 1973, c 143, §2]

Revision Note

"May 22, 1973" substituted for "the effective date of this Act".

Law Journals and Reviews

Beach Access: A Public Right? 23 HBJ 65.

"If a Policeman Must Know the Constitution, Then Why Not a Planner?" A Constitutional Challenge of the Hawai`i Public Access Statute. 23 UH L. Rev. 409.

§91-13.5 Maximum time period for business or development-related permits, licenses, or approvals; automatic approval; extensions. (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.

(b) All such issuing agencies shall clearly articulate informational requirements for applications and review applications for completeness in a timely manner.

(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.

(d) Notwithstanding any other law to the contrary, any agency that reviews and comments upon an application for a business or development-related permit, license, or approval for a housing project developed under section 201H-38 shall respond within forty-five days of receipt of the application, or the application shall be deemed acceptable as submitted to the agency.

(e) The maximum period of time established pursuant to this section shall be extended in the event of a national disaster, state emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements.

(f) This section shall not apply to:

(1) Any proceedings of the public utilities commission; or

(2) Any county or county agency that is exempted by county ordinance from this section.

(g) 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, or 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. [L 1998, c 164, §3; am L 2005, c 68, §1; am L 2006, c 217, §3 and c 280, §2; am L 2007, c 249, §43]

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(b) *[2004 amendment repealed June 30, 2010. L 2006, c 94, §1.]* Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court, except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602. In such cases, the appeal shall be treated in the same manner as an appeal from the circuit court to the intermediate appellate court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper.

The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or
(2) In excess of the statutory authority or jurisdiction of the agency; or
(3) Made upon unlawful procedure; or
(4) Affected by other error of law; or
(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order. [L 1961, c 103, §14; Supp, §6C-14; HRS §91-14; am L 1973, c 31, §5; am L 1974, c 145, §1; am L 1979, c 111, §9; am L 1980, c 130, §2; am L 1983, c 160, §1; am L 1986, c 274, §1; am L 1993, c 115, §1; am L 2004, c 202, §8]

Note

L 2004, c 202, §82 provides:

"SECTION 82. Appeals pending in the supreme court as of the effective date of this Act [July 1, 2006] may be transferred to the intermediate appellate court or retained at the supreme court as the chief justice, in the chief justice's sole discretion, directs."

Rules of Court

Appeal to circuit court, see HRCP rule 72; appeal to appellate courts, see Hawaii Rules of Appellate Procedure.

Attorney General Opinions

Cost of record transmitted to the reviewing court is borne by the agency. Att. Gen. Op. 64-4.

THE HAWAIʻI COUNTY CODE

1983
(REPUBLISHED JUNE 2005)

A CODIFICATION OF THE GENERAL ORDINANCES
OF THE COUNTY OF HAWAIʻI
STATE OF HAWAIʻI

Volume Two

APPENDIX "4"

Section 23-15. Grounds for variances.

No variance will 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 applicant 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.

(1982, Ord. No. 763, sec. 2.)

Section 23-16. Applications for variances.

Application for a variance shall be on a form prescribed for this purpose by the director and shall be accompanied by:

(a) A filing fee of $100;

(b) A description of the property in sufficient detail to determine the precise location of the property involved;

(c) A plot plan of the property, drawn to scale, with all proposed structures shown thereon;

(d) A list of the names and addresses of all owners and all others with property interests in property within three hundred feet of the perimeter boundary of the applicant's property; and

(e) Any other plans or information required by the director.

(1982, Ord. No. 763, sec. 3.)

Section 23-17. Procedures for variances.

(a) Notice to Owners of Property Interests. Upon receipt and acceptance of a properly filed and completed application, the department shall fix a date for the director's consideration of the application. Within three working days after receiving notice of such date, the applicant shall serve notice of the application on owners of interests in properties within three hundred feet of the perimeter boundary of the applicant's property and to owners of interests in other properties which the director may find to be directly affected by the variance sought. Such notice shall state:

(1) The name of the applicant;

(2) The precise location of the property involved;

(3) The nature of the use sought and the proposed accompanying structures, if any;

(4) The date on which the director will consider the application; and

(5) That such date is the deadline for the director's actual receipt of written comments on the application.

Prior to the deadline for written comment, the applicant shall submit to the director proof of service or of good faith efforts to serve notice of the application on the designated property owners. Such proof may consist of certified mail, receipts, affidavits, or the like.

(b) Notice by Publication. At least ten calendar days prior to the date of the director's consideration of the application, the director shall publish, in a newspaper of general circulation, notice of the application and the date by which written comments must be in the actual receipt of the director.

(c) Notice by Posting of Signs. Within ten days of filing the application for a variance, the applicant shall post a sign on the subject property notifying the public of the nature of the variance, the proposed number of lots, the size of the property, the tax map key or keys of the property and that they may contact the planning department for additional information. The sign shall give the address and telephone number of the planning department.

(1) The sign shall remain posted until final approval, or until the application has been rejected or withdrawn. The applicant shall remove the sign promptly after such action.

(2) Notwithstanding any other provisions of law, the sign shall be not less than nine square feet and not more than twelve square feet in area, with letters not less than one inch high. No pictures, drawings, or promotional materials shall be permitted on the sign. The sign shall be posted at or near the property boundary adjacent to a public road bordering the property and shall be readable from said public road. If more than one public road borders the property the applicant shall post the sign to be visible from the more heavily traveled public road. The sign shall, in all other respects, be in compliance with chapter 3, Hawai'i County Code 1983 (2005 edition).

(3) The applicant shall file an affidavit with the planning department not more than five days after posting the sign stating that a sign has been posted in compliance with this section, and that the applicant and its agents will not remove the sign until the application has been approved, rejected or withdrawn. The affidavit shall be accompanied by a photograph of the sign in place.

(1982, Ord. No. 763, sec. 4; Am. 2005, Ord. No. 05-135, sec. 3.)

Section 23-18. Actions on variances.

The director shall, within sixty days after the filing of a proper application or within a longer period as may be agreed to by the applicant, deny the application or approve it subject to conditions. The conditions imposed by the director shall bear a reasonable relationship to the variance granted. All actions shall contain a statement of the factual findings supporting the decision.

If the director fails to act within the prescribed period, the application shall be considered as having been denied. Such denial is appealable pursuant to section 23-20* of this division.

(1982, Ord. No. 763, sec. 5.)

* **Editor's Note:** Section 23-20 has been reserved. General provisions regarding appeals are set forth in section 23-5.

Section 23-19. Reserved.

(1982, Ord. No. 763, sec. 6; Am. 1999, Ord. No. 99-111, sec 3.)

Section 23-20. Reserved.

(1982, Ord. No. 763, sec. 7; Am. 1984, Ord. No. 84-5, sec. 1; Am. 1999, Ord. No. 99-111, sec 4.)

Section 23-21. Reserved.

(1982, Ord. No. 763, sec. 8; Am. 1984, Ord. No. 84-5, sec. 2; Am. 1999, Ord. No. 99-111, sec. 5.)

Intentionally left blank.

(1) If the subdivider fails to complete:
   (A) The required improvements within the time specified; and
   (B) Any additional conditions imposed for the granting of an extension to complete the required improvements and additional conditions with the extended time period;
(2) If the subdivider fails to timely complete or abandons the subdivision prior to final approval; or
(3) If the agreement is terminated for any of the grounds stated in the agreement; the department of public works and when appropriate, the department of water supply may complete the improvements and recover the full cost and expense thereof from the subdivider.

(1975 C.C., c. 9, art. 2, sec. 7.03; Am. 2001, Ord. No. 01-108, sec. 1.)

Section 23-83. Bond.

(a) The agreement as specified in section 23-82 shall be secured by a good and sufficient surety bond (other than personal surety), certified check or other security acceptable to the director and approved by the corporation counsel, in the sum equal to the cost of all the work required to be done by the subdivider as estimated by the director of public works and the manager, if the subdivision is within the scope of the department of water supply requirements. The surety bond shall be payable to the County and when appropriate to the department of water supply. The bond shall be conditioned upon the faithful performance of any and all work required to be done by the subdivider.
(b) The security shall be filed with the director and deposited with the County treasurer as a realization in whole or part for the completion of work, or correction of any defective or improper work called for in the original plan.

(1975 C.C., c. 9, art. 2, sec. 7.04; Am. 2001, Ord. No. 01-108, sec. 1.)

Division 2. Improvements Required.

Section 23-84. Water supply.

A subdivision to be laid out after December 21, 1966 shall be provided with water as follows:
(1) A water system meeting the minimum requirements of the County department of water supply; and
(2) Water mains and fire hydrants installed to and within the subdivision in accordance with the rules and regulations of the department of water supply, adopted in conformity with article VIII of the Charter.

(1975 C.C., c. 9, art. 2, sec. 5.01.)

Section 23-85. Sewage disposal systems.

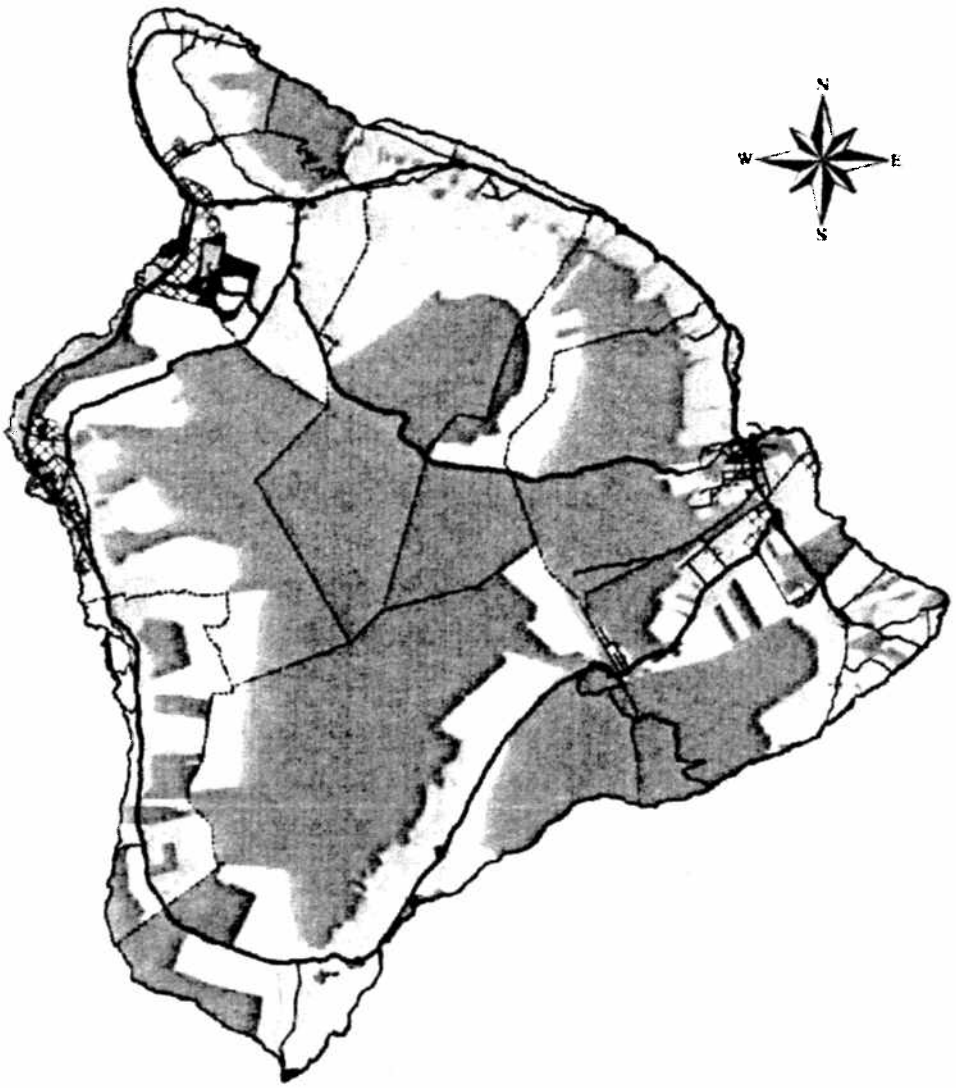
(a) In a subdivision to be laid out after December 21, 1966 sewer lines shall be installed where the subdivision is within three hundred lineal feet of the existing sewer system. These lines shall conform to the minimum requirements of the department of public works.
(b) In subdivisions where sewer connections cannot be made to an existing sewer system under the requirements of this chapter, the subdivider shall meet the minimum requirements of the State health department relating to sewage disposal.

(1975 C.C., c. 9, art. 2, sec. 5.02.)

Section 23-86. Requirements for dedicable streets.

(a) The subdivider shall grade, drain, and surface all streets constructed after December 21, 1966 as shown on his plat, except reserved dedication for future street purposes, so as to provide access for vehicular traffic to each lot of the subdivision.
(b) A street shall be constructed in accordance with the specifications in this section and those on file with the department of public works. A street shall be installed under the supervision of the director of public works and to permanent grades approved by him.

COUNTY OF HAWAII
GENERAL PLAN



FEBRUARY 2005
(As Amended)

APPENDIX "5"

(n) Develop and adopt a water master plan that will consider water yield, present and future demand, alternative sources of water, guidelines and policies for the issuing of water commitments.

(o) Expand programs to provide for agricultural irrigation water.

11.2.3 Standard

(a) Public and private water systems shall meet the requirements of the Department of Water Supply and the Subdivision Control Code.

11.2.4 Districts

The following is an analysis by district for water systems. The brief analysis of each district is intended to bring into focus the relationship of the district to the County as a whole.

11.2.4.1 PUNA

11.2.4.1.1 Profile

Currently, there are four major water systems in the district: Olaa-Mt. View, Pahoa, Kapoho, and Kalapana. The total average consumption of these systems is 1.2 mgd.

The Olaa-Mt. View water system consists of eleven service areas and extends along the Volcano Road from the former Puna Sugar Company mill to the Olaa Reservation Lots and along the Keaau-Pahoa Road to the vicinity of Kaloli Drive. Water for this system is supplied by three deep wells. Two of the wells are located at the former Puna Sugar Co. mill site and the third is near Olaa, between Keaau and Kurtistown. The average consumption of this system is about 0.82 mgd. Olaa Well C, the primary source for this system, has a maximum pump capacity of 2.0 mgd. Olaa Wells A and B have capacities of 1.6 mgd and 0.72 mgd, respectively.

The Pahoa water system, located in the geographic center of the lower Puna region, extends from Keonepoko Homesteads down along portions of the Kapoho and Pohoiki Roads to Kapoho. The present average consumption is 0.40 mgd.

The Kalapana Water System extends from the Keauohana Forest Reserve along Highway 13 down to the Kaimu Beach intersection and continues in a southwesterly direction along Highway 13, ending in the vicinity of Kaimu. The water for the Kalapana system is supplied by two deep wells at Keauhana with maximum pump capacities of 0.38 mgd and 0.50 mgd.

The Hawaiian Beaches subdivision located in Waiakahiula is served by a privately owned water system. The developer had constructed this non-dedicable system.

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

STATEMENT OF RELATED CASES

Plaintiff-Appellant CHRISTOPHER J. YUEN, PLANNING DIRECTOR, COUNTY OF HAWAI'I is unaware of any related cases known to be pending in the Hawai'i courts or agencies.

Dated: Hilo, Hawai'i, December 30, 2008.

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

By _____
AMY G. SELF
Deputy Corporation Counsel
His Attorney

NO. 29376

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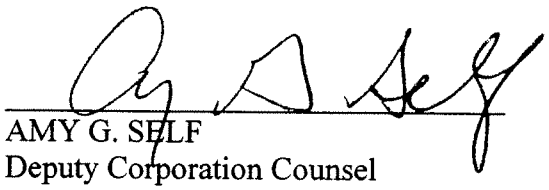
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2008, two (2) copies of the foregoing document was served upon the following in the manner indicated below:

	Hand Delivery	Mail
ROY A. VITOUSEK, III, ESQ. Cades Schutte 75-170 Hualālai Road, Suite B303 Kailua-Kona, Hawai'i 96740 Attorney for Defendant-Appellee MARLENE E. CALVERT		X

	Hand Delivery	Mail
BROOKS L. BANCROFT RENEE N.C. SCHOEN Deputies Corporation Counsel Office of the Corporation Counsel 101 Aupuni Street, Suite 325 Hilo, Hawai'i 96720 Attorney for Defendant-Appellee 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	X	



AMY G. SELF
Deputy Corporation Counsel
County of Hawai'i