

BOARD OF APPEALS
COUNTY OF HAWAII

HEARING TRANSCRIPT
NOVEMBER 14, 2008

A regularly advertised hearing on the application of **KOHALA PRESERVE CONSERVATION TRUST, LLC (BOA 08-000070)** was called to order at 10:35 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i, with Chairman Joel Gimpel presiding.

PRESENT: Joel Gimpel
Charlene Hart
Peter Hendricks
Karen Maedo
Kim Tavares

ABSENT AND EXCUSED: David Drury

Renee Schoen, Counsel to the Board
Alice Kawaha, Staff to the Board

Joel Kam, Esq. representing Appellant
Christopher Yuen, Planning Director
Amy Self representing Planning Director

And three people from the public in attendance.

PETITIONER: KOHALA PRESERVE CONSERVATION TRUST, LLC (BOA 08-000070) - Continued hearing, including consideration on the Petition to Intervene filed by Kamakani O Kohala Ohana (KAKO`O), on the Appeal of Decision by the Planning Director dated July 3, 2008, to defer action on the application for proposed subdivision and approval of preliminary plat map. The project area consists of approximately 365.5 acres and is located in the vicinity and north of Mahukona Harbor, Kapaaunui, Kou, Kamano, and Mahukona, North Kohala, Hawai'i, TMK: (3) 5-7-2:11, 5-7-3:3 and 10.

GIMPEL: Now the first item, regular item on our agenda is KOHALA PRESERVE CONSERVATION TRUST, LLC (BOA 08-000070). And this is a continued hearing, including consideration on the Petition to Intervene filed by Kamakani O Kohala Ohana (KAKO`O), on the Appeal of Decision by the Planning Director dated July 3, 2008, to defer action on the application for a proposed subdivision and approval of the preliminary plat map. The project area consists of approximately 365.5 acres and is located in the vicinity and north of Mahukona Harbor, Kapaaunui, Kou, Kamano, and Mahukona, North Kohala, Hawai'i. The tax map number is (3) 5-7-2:11, 5-7-3:3 and 10. Do we have the petitioner and representative here? Where's the petitioner?

SCHOEN: They're out there.

GIMPEL: Oh, they're outside parleying. They're parleying. And I see that the Planning Director and his counsel are outside, so we will take a short recess until they return.

RECESSED The Chair called a short recess at 10:36 a.m.

RECONVENED The meeting reconvened at 10:37 a.m.

GIMPEL: We're back in session. I've announced that this matter, the Kohala Preserve Conservation trust appeal, is now before us. Is the representative of the petitioner here? Would you give your name and information please into the microphone.

KAM: Good morning, Board Members. My name is Joel Kam. I represent Kohala Preserve Conservation Trust, the petitioner in this matter.

SELF: Excuse me, I didn't hear the name.

KAM: Joel Kam.

SELF: Good morning, Amy Self, Deputy Corporation Counsel here on behalf of the Planning Director.

GIMPEL: Okay. And I see the Planning Director here. The first matter on the agenda is whether the Petition to Intervene should be permitted. Do we have a representative of the petitioners to intervene here?

KAM: Mr. Chair?

GIMPEL: Yes.

KAM: Before we get to the Petition to Intervene, as you know, the parties have been involved in some discussions and are trying to work out the differences that currently exist between my client and the Department. And at this time we would like to ask for another continuance to the next meeting of the Board so that the parties can have a chance to work things out. We understand that this does, is inconvenient for the proposed intervenors who came down to argue and testify this morning. So if the Board is so inclined we would, you know, like to ask that the Board allow the proposed intervenors who came down to say what they have to say but to defer a decision on this application to intervene until we find out whether it's really necessary or not.

GIMPEL: Ms. Self?

SELF: We would have no objections to that. The parties are working very hard to settle this and we've gotten new information that we didn't have prior to today, at the fault of no one. And so we would, we are agreeable to continuing this so that the parties do have a chance to complete the settlement negotiations.

GIMPEL: All right. I understand that the settlement negotiations are underway. But I think all of these people are here. If the intervenors have a statement they wish to make I think

that would be appropriate to hear that at this time. We will defer decision on the petition to intervene pending possible settlement of this case, in which case obviously the petition to intervene would be moot. So if you're going to represent the intervenors, would you please come up. And I would hope that your statement will be the rationale for your petition to intervene and the right to intervene. So go ahead, please give your name and other information. Thank you.

WITHINGTON: Members of the Board, my name is Tony Withington. I am representing Kamakani O Kohala Ohana – KAKO`O, which is petitioning to intervene in this case. I think the people who talked to you earlier have indicated to you that the public in Kohala has had no opportunity to participate in any way in this resort and resort subdivision since the County Council meeting of November 8, 1993. We've been aced out of everything. We take this opportunity to talk to the County because we believe that the County should know that the community of Kohala is really upset about the idea that we have been aced out of very important public decisions to be made in Kohala, including public access to Mahukona which is a very, very public place, has been in its entire history, to the use of the conservation district and shoreline of it that the developer has promised to use in public use which we had no say in the agreement and into the parks, improvement for the parks. And it just seems so crazy that when park improvements happen in the County that the community that uses them has no say at all about what goes on.

Now as to the matter of the continuance of this, we were prepared on October 10th to come before you and talk about the legal aspects of this. We're not talking about -. What I just told you was the emotional aspects of it. Okay? And we have submitted to you a very specific procedural account of what's going on in this case. And to our way of thinking, our arguments about this case, which is before you -- which is whether the Director's deferral of the subdivision was proper or whether the developer was supposed to get a 45-day automatic approval -- our arguments were very clear, very straight forward. There isn't a lot of wishy washy in it. The developer came in on March 4th with a preliminary plat, with a written application for a subdivision, paid the fees for the subdivision. The Director six days later was in discussion with him, several days after that wrote a letter to him. The applicant wrote a letter back. The Director basically said we want to modify your application. A month or so later they came in with a revised application. They did not include a written application. They just changed the map. The Director responded to that. The Director told the applicant that there were things about it that needed to be modified and he also told them that there were things that he was waiting for, that he could not give tentative approval to this project until he had, specifically it was the historic sites mitigation plan. He had been in touch, and back and forth, there was conversation going on. Now on May 8th it was that the applicant came in with a new third revised plat with no written application, with no fee paid. That is when the applicant is trying to tell you that the preliminary plat, the 45 day start counting. There was no way for the Director to know that the 45 days were supposed to start on the third revised application of the preliminary plat.

Our group believes that law requires that you determine that the preliminary plat was submitted on March 4th and that the Planning Director responded in an appropriate way. Three or four times there was a conversation going on between the applicant and the Planning Director during that entire time and that the 45 days started on March 4th and the Director followed the County's procedures properly. Now we also feel that, that is our argument, basically.

And I don't see how any negotiations between the developer and the Planning Director can change those facts. That's what's before you. I don't see that there's anything to negotiate. The only thing that might be around to negotiate is the second part of our testimony to you; and that is that the law requires the Planning Director to disapprove this subdivision; and the reason that he must disapprove this subdivision is because the applicant has not complied with the conditions of the COZ and the SMA that were issued to it. And we very carefully document at least five or six areas where this happened. Now there were other conditions that the applicant has also not met. But the five or six that we outlined to you very specifically say and show where the conditions have not been met. We think perhaps that the Planning Director erred in deferring when the law says that he should have disapproved the subdivision. I think if there are any negotiations going on here it might have to do with the second thing. But I think that the real matter that's before you is whether the applicant is entitled to a 45-day automatic approval or the Director should withdraw his deferral. But I don't think there's any way to withdraw his deferral because he has in his files all kinds of places where the applicant hasn't met the conditions that would even allow him to go ahead and approve or make tentative approval of the subdivision. So I don't see why any negotiations have to carry on. I think this is, we've already gone through a month's delay. We were prepared to be here on Oct. 10th and tell you what we're telling you now. And now we're here on November 14th and now you're saying we're going to defer it again. I don't know that you have any reason to call for a delay.

GIMPEL: All right, thank you. I have a question. Your position as I understand it is that the time should have started on March 4th, correct?

WITHINGTON: Yes. In our petition we say that the preliminary plat and the written application for subdivision was submitted on March 4th.

GIMPEL: Okay. And so therefore the 45 days for the Director to make a determination starts running then and that if the 45 days elapses and the Director has made no determination then it is considered approved. Correct?

WITHINGTON: Yes. But the Director did make, the law says that he may disapprove, approve, modify or defer. He's given four choices.

GIMPEL: Yes.

WITHINGTON: What he did was he modified. He got back to them in six days and said you need to change your plat because it's not correct, it doesn't include this. And they did that. They came in with another one. And he said you're going to have to modify again. So he had four choices, the choice he chose was to modify. So he did fulfill the requirement of the law in providing them with direction for which way they can go. And they voluntarily entered into a conversation with the Planning Department about modification of their -.

GIMPEL: Okay, and you're still saying that the 45 days start to run on March 4th?

WITHINGTON: Yes.

GIMPEL: And what happens after the 45 days?

WITHINGTON: Well, the 45 days is only for automatic approval.

GIMPEL: Correct.

WITHINGTON: Okay.

GIMPEL: So he modified.

WITHINGTON: It says unless the, and it gives the Planning Director time to either approve, disapprove, modify or defer.

GIMPEL: Okay. And so he made a modification. Then the new 45-day, doesn't the new 45-day -?

WITHINGTON: So he responded within the 45 days.

GIMPEL: Okay. But then doesn't a new 45 days start to run?

WITHINGTON: Why would a new 45 days start to run?

GIMPEL: Because they filed -.

WITHINGTON: The law doesn't say that. The law just says from the submission of the preliminary plat and the written application and the submission of the fee. It says from that date the 45 days, but it doesn't say that there's another 45 days running.

GIMPEL: Are there any other arguments regarding your petition, right to intervene in this matter that you'd like to make at this point, standing, so forth?

WITHINGTON: I think we've covered pretty much our arguments very carefully in our statement to you. I believe you all have that. Is that correct?

GIMPEL: Yes, we received it, we got it this morning. Most of us got it this morning. I got mine yesterday and -.

WITHINGTON: This morning? Oh, really? Okay.

GIMPEL: Oh, well, the latest submission that you had that you filed.

WITHINGTON: Well, the latest was part to the index.

GIMPEL: Yes.

WITHINGTON: Yes, okay. But our testimony we had in the proper time.

GIMPEL: But all the information was completed this morning; and yesterday we finally got it.

WITHINGTON: I think we show very clearly that the applicants have not met the conditions of their change of zone and their SMA. I think that they are major, major, major long-term decisions that they have not been fulfilled even to this day.

GIMPEL: Thank you. Are there any comments from the petitioner in this matter? Mr. -?

KAM: Not at this time, Mr. Chair.

GIMPEL: Okay, thank you. From the Planning Department?

SELF: No.

GIMPEL: None. All right, thank you. As Chair I have the right to postpone or continue the hearing. So I am going to agree to a continuance of this hearing until our -. When is the next meeting in Kona, in January?

KAWAHA: January 16th.

GIMPEL: January 16th at which time we will make -.

WITHINGTON: You will need a bigger room.

GIMPEL: That may well be, at which time we will consider whether the matter has been settled; and if not we will consider the petition for intervention. And thank you for coming.

WITHINGTON: Excuse me, may I ask a question?

GIMPEL: Yes. You can ask any other questions.

WITHINGTON: What I don't understand, and it seems to me that's another version of the same thing we're getting all along, that decisions are being made behind doors that the public is not being aware of. What I don't understand is what is it that the parties need to negotiate? I can't get it in my mind settled what sort of things that, is it possible for you to ask the parties if they would tell us what things are still left open to be negotiated?

PUBLIC: It affects our community.

GIMPEL: I recognize that it affects your community. This matter is limited, the jurisdiction of this Board is limited to final decisions of the Director. And whether that, and so as I view the issue before us right now is whether the Director's final decision to defer was proper under the law. If he chooses to enter into a settlement with the petitioner regarding the subdivision application then the matter is concluded, period. I don't know on what terms they're talking about settlement; and I think it would be improper for us because we have no jurisdiction over that to inquire. Okay?

WITHINGTON: Is it proper then to ask that KAKO`O, as intervenors, be a party to that -?

GIMPEL: You're not yet intervenors. You're not yet intervenors. And so you may ask them as a member of the public; and if they choose to share that with you, that's up to the parties involved. But we can't force them to. Okay? Thank you.

WITHINGTON: Okay. That means that the public then would, if they chose not to then the public would have no say in the matter, again.

GIMPEL: Then you have your recourse to the courts, obviously. Thank you. All right, so this matter is postponed until our meeting in January; and we will try, and if necessary, obtain a larger venue to accommodate all of you.

The discussion ended at 10:53 a.m.

Respectfully submitted,

Sharon M. Nomura East Hawaii Secretary