

BOARD OF APPEALS  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
May 11, 2007

A regularly advertised hearing on the petition filed by **MARLENE E. CALVERT (BOA 05-000014)** was called to order at 10:02 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i, with Joel Gimpel, Chairman Pro Tem, presiding.

PRESENT: David Drury  
Joel Gimpel  
Peter Hendricks  
Kim Tavares

ABSENT & EXCUSED: Valta Cook  
Diane Gentry  
Kelly Ann Soo

Ivan Torigoe, Counsel to the Board  
Alice Kawaha, Staff to the Board

Roy A. Vitousek III representing Marlene E. Calvert  
Amy Self representing Planning Director

Marlene Calvert's son, Mr. Gene Calvert, was present.  
And no one from the public in attendance.

**PETITIONER: MARLENE E. CALVERT (BOA 05-000014)** - Determination by the Board of Appeals of further proceedings by the Board following the decision by the State of Hawaii Third Circuit Court which remanded the matter to the Board. The arguments will also be considered by the Board. This matter relates to the Appeal of Decision by the Planning Director dated September 29, 2005 relating to the Denial of Variance Application WH(VAR 05-056) relating to water supply requirements of Chapter 23, Subdivision Code, for proposed 7-lot subdivision on each parcel. The subject properties consist of approximately 42.6 acres and located in Kona-South Estates Unit III, Kahuku, Ka'u, Hawai'i, Tax Map Key: (3) 9-2-150:13 and 18.

GIMPEL: The first item on the agenda today is the Marlene Calvert issue as petitioner. We have to have further proceedings following the decision of the Third Circuit Court that remanded this matter to the Board. And we will consider arguments by the counsel for the Insurance Department and for the petitioner with respect to the scope of the Board's determination today.

TORIGOE: Excuse me, Mr. Chairman.

GIMPEL: Yeah, go ahead.

TORIGOE: Did you just say, "Insurance Department"?

GIMPEL: Did I say the “Insurance Department”? Well, I meant the Planning Department. I’m sorry. I’m so used to my former legal practice that I dealt with so many Insurance Departments. And they are worse than the Planning Department, too. All right, thank you. So I think that I will ask the counsel for the petitioner and the Planning Department to introduce themselves, and then we’ll hear oral arguments, so on, and their positions.

VITOUSEK: Good Morning, members of the Board of Appeals. I’m Randy Vitousek, and I represent the applicant, Marlene Calvert. And Mr. Calvert, Marlene’s son, is present here today as well.

SELF: Good Morning. Amy Self, Deputy Corporation Counsel, representing the Planning Director in this matter.

GIMPEL: Okay, thank you. With that, let’s hear opening statements from the parties. I think, Mr. Vitousek, why don’t you go first.

VITOUSEK: Thank you. My understanding of what we are supposed to do today is make a determination of what issues are still before the Board on remand from the Third Circuit. What I understood based on the pre-trial that we had with the Chair, Val Cook, what we are doing today is just deciding what issues are still alive, and then we are going to set another hearing to actually argue and decide on those issues. In other words, rather than the parties submitting briefs and arguments on every possible issue, what we are trying to do today is narrow the issues to identify what issues are still before the Board, and so that we can focus on those issues.

And so the applicant’s position -. There is actually agreement between the Planning Department and the applicant that the issue of whether this application for a variance meets the portion of the definition of 91-13.5, which would say, is this an application for a business or commercial permit, license or approval. In other words, 91-13.5 says that with respect to business and commercial applications, the agency which receives and reviews those applications is required to set time deadlines for considering and making decisions on those applications; and that if they do not decide within their own time frame, the application is automatically approved. And so the issue presented to the Board in the hearings last time was whether this application met the definition of a business or commercial permit. And there are two components of that definition. One component is: Is it a permit or approval that’s required for the operation or continuation or expansion of a commercial enterprise. And then the other aspect is: Is it an application or permit required under Chapter 46, which is the State Statute that confers zoning power on a county. And frankly what happened was when we drafted – when the applicant drafted – the Decision and Order, we weren’t specific enough in terms of the basis for the Board’s decision. In other words, we said generally that the Board concluded that this met the definition of a commercial permit under 91-13.5, and did not say that it was a commercial, that the Board determined that it was a business or commercial permit. And so when it got up on the appeal, the Circuit Court decided that it wasn’t required under Chapter 46. In other words, it didn’t meet that part of the definition, but said that the record was insufficient to allow the Court to decide whether it was a business or commercial permit. And so it sent it back. So the Planning Department and the applicant agreed that one of the issues is whether this is a business and commercial permit, in other words, whether this application meets the first part of the definition of a business and

commercial permit under Chapter 91-13.5. So is it fair enough that that's, we agree that's a live issue?

SELF: Right. That is a live issue.

VITOUSEK: Okay. Then we disagree after that. Because after that, it's the applicant's position that this Board considered both the procedural issue that is the automatic approval issue, and the substantive issue which was whether this permit, whether the Director's action was arbitrary, capricious or beyond the statutory authority. And if you recall and as the transcript shows, there were actually motions made to find that this permit substantively was arbitrary, capricious or beyond authority. But what happened was there was dual motion made, as I recall, that said either it's automatically approved or the Director's decision should be reversed. But what happened was that got broken down into two motions. But it cannot make sense, because if it's automatically approved, there is no reason to consider the substance. So what happened was the motion became just that it was automatically approved; and that motion was voted, you know, then the Board adopted that motion. So it never went on to consider the substantive issue; it never went on to vote on whether or not the permit was arbitrary and capricious. And so it's our position that if we come back to this Board, or when we come back to this Board, that is still a live issue. In other words, that issue is still, could be determined by the Board. We cited authorities including *Jordan v. Hamada* case that would say that that is a live issue; that that issue has not been foreclosed by the Court's decision on the appeal. So that's our position on that.

Now, the Planning Department in its reply memo raised a new issue, and the new issue is taking the position that under the Zoning Code the permit should be automatically denied. In other words, the Planning Department is now taking the position that if Chapter 19-13.5 does not apply, then the Zoning Code says that if the Planning Director doesn't decide within 60 days, the permit is automatically denied. Okay? It's the applicant's position that that issue is not before the Board because they never argued the position down below, and there was no finding on that position, and they didn't appeal anything on that position. And so -. And it's also our position that then it's like the Board is absurd, because if you recall what happened in this case is the applicant submitted the application, and more than 60 days later the Planning Director wrote a letter to the applicant that said we're going to decide this by October 4<sup>th</sup>. In other words, they wrote a letter, and said we are going to make a decision on this by October 4<sup>th</sup>. And then they didn't; they actually made the decision on October 5<sup>th</sup>. But that was 58 days after the 60 days ran, in other words -. And so what they're arguing now is even though the Planning Director wrote us a letter and said we're going to actually decide by October 5<sup>th</sup> (sic), and even though they actually did make a decision on October 5<sup>th</sup>, they are now arguing that the permit had been denied 60 days previously. In other words, now they are arguing the permit was denied before the Director told the applicant that he intended to make a decision on or before October 4<sup>th</sup>. And so basically even though the Planning Director made a decision and even though he told the applicant I'm going to make a decision, they are now arguing that it had already been automatically denied. They never told the applicant that. And so frankly, you know, it's funny because, I kind of want them to make that argument, you know, because it just shows how incredibly unfair the Planning Department can be to applicants for permits like this. I mean they're basically saying even though we told you we are going to decide and even though we decided, it was actually denied before, you know. And this shows exactly why you need a rule that says they either have to decide within their own time frames or it's granted. Because if you

think about it, that means that every variance granted by the Planning Department over the last five, ten, fifteen years that wasn't granted within 60 days – and you know how effective the Planning Department has been in deciding in 60 days – was actually denied. In other words, even if the Director later granted the permit, it was already denied, if you accept their argument. So that means that everyone who is out there acting on a basis of a variance, you know, if I'm a, you know, the Protect whatever Ohana, I can go back now and take the position that all those permits were denied. Every variance, every business- and development-related permit was denied automatically, because the Planning Department didn't decide in 60 days. Irrespective of what happened afterwards and irrespective of what representations the Planning Department made to the applicants, they were denied. And so, you know, I mean it just helps you to see how incredibly unfair it is to applicants when a permit is automatically denied if they don't act within a time frame, you know. Because here they represent, yeah, we're going to go ahead and decide, we're going to go ahead and decide your permit in certain time. They go ahead and decide it. Then they're arguing now, no, no, it was actually denied 60 days before, sorry, it was denied before. And so in a way we'd like to have that part of the record, even though, you know, because it just really helps make our point. But I think that in truth that was not argued below, that was not appealed, that was not considered by the Court, and shouldn't be part of the record. Thank you.

GIMPEL: All right, thank you. Ms. Self?

SELF: I did raise the issue down before the Board of Appeals, and it was overlooked because the Board continued or started focusing on 91-13.5. And the reason the Board probably did that was because if 91-13.5 applied, then naturally you would not rely on the Code, Section 23-18, which says, "If the director fails to act within the prescribed period, the application shall be considered as having been denied." Now, if a State Statute conflicts with the Code, of course the Statute trumps the Code. So the Board went with 91-13.5, and determined that it was automatically approved. So therefore, the Code, they didn't have to make a decision on the argument raised regarding the Code.

Now, I'd like to direct your attention to the General Provisions of the Hawaii County Code under the Definitions section; this is the very beginning of the Code, the whole County Code. And under the Definitions, No. 29, the words "shall" and "must" are mandatory. So this is the definition of the word "shall" in our County Code. It's also been decided by the Hawaii Supreme Court in the Leslie case. So at this point, even the Director does not have the authority to – and that's proven in the Leslie case – the Director does not have the power or the authority to override what the Council has passed, and neither does the Board. We have a rule; we have a section of the Code that says if the application is not processed within a certain time, it shall be considered denied.

So the issue that is going to be or that is still before the Board is only the procedural issue as to whether this comes under 91-13.5 in the first part of the definition that Mr. Vitousek explained. Because if you don't find that, then you go back to the Code. This is what you are supposed to be enforcing. So if you go back to the Code, there isn't a substantive issue alive. And this is one of the things I raised down below before the Board to begin with, was that it says, "shall be considered denied." So regardless of whether the Director made a decision, he would, of course he would rather base a decision on merits rather than a time limit, but he cannot. And we only

have one case before you. I don't know what he has done in the past, and we don't have that in front of you. But he cannot make a decision that goes against what the Code says, and that's what happened in the Leslie case; he did go against what the Code says. The County was sued, and the plaintiff prevailed. And it had to do mainly because of the word, "shall", which is mandatory. So I would ask you to consider that. And please determine that we only have one issue before you, and it is a procedural issue; that's the only issue we appealed. I also raised this issue in my brief before the Court, but that is the -, the procedural issue is the only issue before the Board at this time. Thank you.

GIMPEL: And your rebuttal, Mr. Vitousek?

VITOUSEK: Yeah. If you accept the Planning Department's argument, that this application was filed on June 8<sup>th</sup>, 2005, right? Okay, June 8<sup>th</sup> it was submitted. The Planning Department did not acknowledge receipt of the application – so that means 60 days after June 8<sup>th</sup> was August 8<sup>th</sup>, 2005 – the Planning Department did not acknowledge receipt of the application until August 11<sup>th</sup>, 2005. In other words, they didn't even write back to the applicant to say, we got your application, until August 11<sup>th</sup>, so -. And then what they did was they said they were going to make a decision by October 4<sup>th</sup>; they wrote a letter saying they were going to make a decision by October 4<sup>th</sup>. And then they made a decision – I'm sorry – then they made a decision on October 5<sup>th</sup>, and we appealed and went through the whole appeal. And what they are saying now is that the application was denied before they acknowledged receipt of it. That's what they are honestly arguing here. And that is completely a violation of due process of law. In other words, they are saying that the application was denied before they even acknowledged receipt of it. And then they took us and you through months of process, months of process, years of process. Now they are arguing, oh, it was actually denied, it was actually denied before we even acknowledged receipt of it, and you have to accept that. And that is a ridiculous position. That is a ridiculous position. And that just underscores why we need a law that says that you either decide or it's granted. Because this is a -. The Ordinance has set out a process for considering applications, you know, and the applicant never had the benefit of that process because they never, they didn't even -. I mean what they are saying is that it was denied before we even acknowledged that we had it. And if you are comfortable with that, then let's take that up on appeal. But I'm not trying to say it that way. What I'm trying to say is -. I really apologize. I apologize for saying that. I'm just saying -. I'm getting a little too adamant. But because this is really a surprise, you know. It's an ambush, it's an ambush, you know. They -. When you put argument like this in your reply memo, you know -.

SELF: It was raised below, Randy.

VITOUSEK: Show me where. Show me where.

SELF: I'll show you.

VITOUSEK: Okay, please. You didn't manage to cite it in your memo, so if you can find it now, that'll be great. I looked.

SELF: It's on the transcripts.

VITOUSEK: But anyway -.

SELF: It's in the transcripts.

VITOUSEK: Okay. Thank you.

GIMPEL: Ms. Self, any final remark before we subject the parties to questions?

SELF: The County Council passed an Ordinance, which is codified in Section 23-18. They make the laws. The Planning Director doesn't make the law. This Board doesn't make the law. But this has to be followed, regardless of what. And they did this for reason. This is a variance; this is not an application for a subdivision. This is an application to ask for an exemption from something that is required under the Subdivision Code. So there must have been a reason for why the Council wanted the Director, in case he didn't have an opportunity to go through the merits of these applications, that it will be denied. Because they didn't want, obviously they did not want variances to be approved unless it met with the requirements under the Variance section of the Code. So this was done for reason. The Council passed this. So this has to be followed. This is law for the County. Thank you.

GIMPEL: Thank you. Any of the Board members have any questions? Mr. Drury?

DRURY: I do have a question for Ms. Self. You had quoted several times from Section 23-18 about if the Director fails to act within the prescribed period, the application shall be considered as having been denied. Well, you know that the next two lines after that are in Section 23-18. So I'm just a little confused about this. The section goes on to say that "Such denial is appealable pursuant to section 23-20 of this division." And if you look at 23-20, that's a whole bunch of citations that I don't have legal stuff to follow up on. But it seems that 23-18 itself says that such actions, automatic denials may be appealed. It just seems to me, wasn't that exactly what Ms. Calvert did?

SELF: Yes, you are right.

VITOUSEK: May I address the question also? If you look at it, what it says, Mr. Drury, is that appeals have to be filed within 30 days of when a decision is made. And so what the Planning Director actually did was he – if it was automatically denied – he misrepresented to the applicant that they were actually going to decide by October, and the appeal period would have run on September 8<sup>th</sup>. It's that bad, you know. So the argument they are making -. I mean if the Planning Director believed that it was automatically denied, he would have said that in his letter of August 11<sup>th</sup>. Instead, he said in his letter of August 11<sup>th</sup>, he said, oh, we've received your application. And so -.

DRURY: If I remember writing the Findings of Fact, Conclusions of Law, both sides did agree that a timely appeal was filed.

VITOUSEK: A timely appeal from the letter denying it, you see. But that was, the letter denying it was October 4<sup>th</sup>, you see. So what I'm saying is the Director's action would have lulled the applicant into not appealing in a timely manner, in other words, it was not appealing

within 30 days of when the application was denied by automatically, which was August 8<sup>th</sup>. And so I'm just saying it's really, you know, it's really bad; this is a really out-of-control argument. Thank you.

GIMPEL: Any other questions? None. I was going to ask the same question. Okay. So I think if we are coming down to, the first issue that we have to decide, principle issue we have decide today is whether this is an application for a business or commercial permit.

VITOUSEK: No.

GIMPEL: No?

VITOUSEK: I think, I think -. Okay, let me make a -. Let me make a -. Let me ask for something, and then you can consider it.

GIMPEL: Okay.

VITOUSEK: What I'm asking is that the matter be set for hearing for legal argument on the issues of 1) whether this is a business-related permit under the first component of the definition in 93-13.5 (sic), and 2) for a determination, if they conclude that it is not, then for a determination of the merits of the appeal, which is the issue of whether the Director's decision should be reversed for substantive grounds, and then the third question is whether this argument that's being raised by the County as to an automatic denial is going to be heard by the Board as well. So I think what we are doing today is just deciding what issues are presented to the Board.

GIMPEL: Yeah. Okay. I think then from what I understand, we have an agreement that the first issue, whether to be decided or to be briefed, is whether this is an application for a business or commercial permit. So that's the first thing we have to do, and both parties agree on that.

SELF: Correct. Yes.

GIMPEL: All right.

VITOUSEK: That's correct.

GIMPEL: Then the second issue is whether the substantive issue would remain if the answer, depending upon the answer to the first issue.

SELF: Could I do a short follow-up on that -?

GIMPEL: Sure, go ahead.

SELF: In answer to your first question? Any denial, I mean any decision, final decision by the Planning Director is appealable. And that's why the sentence is in Section 23-18. But when you appeal that, you would determine whether or not, one of the things you would determine is whether or not the decision was made within the 60 days. If the Board found that

the decision was not made within the time limit, then it shall be considered denied. So that's what the Board would be looking at. And that's why I contend or the Director contends that this is a non-issue. If you find that Mrs. Calvert does not fall under the first definition of 91-13.5, then 23-18 applies. And it would not be -.

GIMPEL: And the application was denied, and an appeal was filed to that denial -.

SELF: Right.

GIMPEL: Which is still before us. And it's still before us. In fact, the merits of the application were argued before this Board. We decided not to decide on the merits because we had made a decision on the timeliness. So now if we -. And the Court did not preclude us from deciding on the merits, as I understand it. The Court said, hey, you decided wrong on the timeliness because you used the wrong statute. So now if we go back and say, gee, even under the right statute, it's still denied, now we come to the merits of the denial. Are you going to make this gentleman file an appeal and re-argue the merits?

SELF: We may have to file an appeal. We may have to go back to court to get a final decision.

GIMPEL: No, no, an appeal to this Board, and to re-hear the merits. That's not necessary -. The merits are still before us because that was never decided upon by this Board. And it was not decided upon by the Court because we didn't make a decision on the merits. So that still is pending. That's my view. That's my view, so -. And whether the Board agrees with me, I don't know, cause that we have to vote on yet today. Any other comments from the Board members?

HENDRICKS: Question. General question. If a petitioner is denied automatically, is there still a requirement by the Planning Department to notify the petitioner, or is there an assumption that the petitioner is going to take action at the end of, say, 60 days or whatever the statute says?

VITOUSEK: Yeah, can I address that, Mr. Chair?

GIMPEL: Go ahead.

VITOUSEK: Notice is a key component of due process of law. In other words, before you take action with respect to an application for a governmental permit, giving the -. I mean certainly if you are saying the appeal period is going to run, then notice of a decision is a key component of due process of law. That would be our position.

GIMPEL: I'll challenge you a bit on that. The law school model in my school is res ipsa loquitur – the thing speaks for itself, and ignorantia dem juris neminem excusat – ignorance of the law doesn't excuse anybody. The law is quite clear; if you don't get a decision within 60 days, you deem it denied. Therefore on the 61<sup>st</sup> day, you could have had, as you noticed, to file the appeal. One might argue that. Now you received, however, a letter from the Planning

Department before the time for appeal had run, saying we are going to rule on this sometime in October.

VITOUSEK: On the merits.

GIMPEL: On the merits. So I don't see any concern regarding the timeliness of the filing of the appeal.

VITOUSEK: Thank you.

GIMPEL: Okay. Any other questions?

TORIGOE: Mr. Chairman, may I?

GIMPEL: Sure. Go ahead.

TORIGOE: I'm just wondering, Mr. Chairman, if -. Well, it seems okay there is agreement that the issue of whether this is a business and development-related permit should be the threshold issue that everybody is going to argue. The question that has been raised about the application of Subdivision Section 23-18 is something that seems to have some real questions that are kind of tied up in there, because for one thing, as it has been observed, it says that "denial is appealable pursuant to section 23-20", and Section 23-20 is reserved; there isn't any text there. And there has been the issue raised as to notice as well, and how you go about filing an appeal for something that has an automatic approval. Chair Pro Tem has made some very cogent statements about, you know, there being notice in the law itself. But these all raise quite interesting issues. And I'd like to suggest that you may want to give the parties an opportunity to think about them and to make arguments or brief, if they feel like that might be helpful to do. And that might be helpful for you all in making a final decision, or -. And so what I'm suggesting is that when you go to hearing, that this might be something that you include as part of the hearing. You know, you have the initial question as to whether this is a business or commercial development-related permit. And then you may, if you find that it is not, then you may have to address this question of the effect of 23-18 and the auto approval, and the effect that that will have on your approach to the merits.

VITOUSEK: May I address that, Mr. Chair?

GIMPEL: Sure.

VITOUSEK: Yeah, I agree that -. You know, I would prefer to see all the issues in one hearing because then we only need one appeal.

GIMPEL: No, I don't want to limit either party in raising issues that are -. I think we have the agreement on the first that the issue is there; whether this is a business or commercial permit application. And then you differ on whether the other issues exist. Fine. Let's have the briefs on whether the other issues exist, whether it's substantive, and whether we can decide the substantive issues or not. And finally, as Ms. Self raised, what is the effect of the existing Ordinance empowering the Director to -, that says it's denied after 60 days automatically? Does

that preclude any further determination by this Board? That's the issue you've raised, right? Okay. Do we need a motion for that?

TORIGOE: You should have some kind of a motion that states specifically what the scope of the hearing is going to be, what the issues are, and then -.

GIMPEL: Okay.

TORIGOE: Well, you have to have consensus because you only have four Board members here.

GIMPEL: More than consensus we have to have unanimity.

TORIGOE: Yes.

GIMPEL: All right. Can I have a motion to that effect from somebody?

DRURY: I can try.

GIMPEL: Go ahead.

DRURY: I move that the hearing be continued to allow for further argument on three areas: The first, whether the action was in fact a business-related permit as defined under the first part of Section 91-13.5. Secondly, issues related to Subdivision Code 23-18 and the automatic appeals process, and its implications for our consideration of the substantive issues. I guess the third part would be with the understanding that, if needed, we consider the substantive merits of the case. The Board is free to modify or improve that; that was kind of off the cuff.

GIMPEL: I think there was the other one regarding Ms. Self's assertion that the automatic denial would preclude further.

SELF: I think that falls under the second one.

DRURY: You're right.

GIMPEL: Under the second one. Okay.

VITOUSEK: He said automatic appeal. But you're, you're absolute -. Yeah, you did. But, but just, I say on behalf of the applicant, we agree with that statement of the issues.

GIMPEL: Okay. Do I have a second?

HENDRICKS: Second.

GIMPEL: We have a second. Call the roll?

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: I wanted to hear the motion back one more time.

DRURY: Sure.

TAVARES: I was in pieces.

DRURY: That's okay. Yeah.

TAVARES: Is that not possible to do?

GIMPEL: As I understand the motion and I won't, I can't, I'll have to paraphrase it. One, to, that we're asking for continuance to permit time to prepare arguments: 1) Regarding business-related issue, whether it's a business-related expansion permit, 2) whether the automatic appeals process applies as before the Board, and 3) whether we can then consider the substantive merits of the case.

SELF: I thought No. 2 was the issue regarding the implications of 23-18.

GIMPEL: Yeah, I didn't cite the part.

TAVARES: Okay, so the motion is just to continue it so everybody can get more information?

GIMPEL: Yeah, and to allow the parties to argue these particular issues in briefs to the Board.

TAVARES: 'Cause we can't do anything, we can't do anything about it today? There is nothing that can be done today?

VITOUSEK: It wasn't set for hearing on that today; it was set for hearing on deciding what the issues are.

TAVARES: Okay. Well, it sounds like there are too many issues here for me. But, we do have to have another hearing. Okay, I'll go along with that. Okay. Aye.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Chair, there are four ayes. Motion is carried.

GIMPEL: Okay. Thank you very much.

VITOUSEK: Thank you.

GIMPEL: So that's that.

TORIGOE: Mr. Chairman, I'm just wondering if you want to clarify -. You mentioned briefings where the parties are to brief these issues?

GIMPEL: Yes. And we have to set some times. And when is the next Kona meeting, please?

KAWAHA: It's set for July 13<sup>th</sup> that's on a Friday.

GIMPEL: July 13<sup>th</sup>?

KAWAHA: Yes.

GIMPEL: I don't have my calendar in front of me. I'm just thinking that we should have the -. You want to -. You need to file, one, the brief, a responsive brief, and a response to that.

VITOUSEK: Right. So the applicant has requested that we not hear it until September.

GIMPEL: September?

VITOUSEK: Based on their schedule. Yeah.

GIMPEL: Then we have plenty of time. Okay.

VITOUSEK: Yeah. And you know we can -. What if I ask that the Chair set it for another pre-hearing conference by telephone with yourself or with Chairman Cook, and we'll set briefing schedule -?

GIMPEL: I'd prefer to do that with Chairman Cook; and it would be appropriate.

VITOUSEK: And then we can set that by telephone conference within a couple of weeks, and get a schedule.

GIMPEL: Okay.

VITOUSEK: But we are, if we're not aiming for a -.

SELF: For the till briefing schedule?

VITOUSEK: The briefing schedule, right.

SELF: Okay, okay.

GIMPEL: Yeah, okay. So that would be a September meeting. And what's the date set for a September meeting? Do we have that?

KAWAHA: September 14<sup>th</sup>.

GIMPEL: September 14<sup>th</sup> in Kona?

KAWAHA: Yes.

GIMPEL: All right. Then, can you two confer with Chairman Cook about a date for a -?

VITOUSEK: Yes.

SELF: For a telephone conference?

GIMPEL: For a telephone conference -.

VITOUSEK: Yes.

GIMPEL: Within a next week or so?

VITOUSEK: Yes.

GIMPEL: Okay.

VITOUSEK: Thank you very much.

GIMPEL: Then we'll do that. That's fine.

VITOUSEK: Thank you.

GIMPEL: Thank you.

The discussion ended at 10:42 a.m.

Respectfully submitted,

Noriko Sauer  
West Hawai`i Secretary