

BOARD OF APPEALS
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
SEPTEMBER 14, 2007

A regularly advertised hearing on the petition filed by **MARLENE E. CALVERT (BOA 05-000014)** 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 Valta Cook, Chairman, presiding.

PRESENT: Valta Cook
Diane Gentry
Joel Gimpel
Peter Hendricks
Kim Tavares

ABSENT & EXCUSED: David Drury
Kelly Ann Soo

Brooks Bancroft, Counsel to the Board
Alice Kawaha, Staff to the Board

Roy A. Vitousek III representing Appellant
Amy Self representing Planning Director

And approximately 4 people from the public in attendance

PETITIONER: MARLENE E. CALVERT (BOA 05-000014) - Continued proceedings, including arguments, on this matter relating to the decision by the State of Hawaii Third Circuit Court which remanded the appeal to the Board. This matter relates to 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 is located in Kona-South Estates Unit III, Kahuku, Ka'u, Hawai'i, TMK: (3) 9-2-150:13 and 18.

COOK: I would ask the parties on the matter of Marlene Calvert, Board of Appeals 5-14, if they could come, Mr. Vitousek, it looks like. Do you have any representative with you today? Or, do you want to set up here or you're going to leave them out in the audience?

VITOUSEK: Well, I think that they, it's hard to get up out of the couch so, yeah, but Marlene Calvert and Gene Calvert are here today.

COOK: And Ms. Self, would you introduce yourself.

SELF: Amy Self, Deputy Corporation Counsel, representing the Planning Director and the Planning Department.

COOK: Let me clear my desk here. Okay, as a preliminary matter I want to, on behalf of the Board, I want to thank you for all the additional work that both parties have done on this. We've had a lot of, we've had, I think, two, either one or two pretrial conferences on this. We've had discussions at the last Board of Appeals meeting in Kona; and we asked at that time that, I think, three issues be briefed. And I would note that we have received timely briefs from both parties. And it seems that the Board is pretty well aware, I think, of the issues and what's before us here. But I think maybe we can have a short presentation by each of you as to your positions and what you think is before the Board today and what the Board is supposed to decide. And then, but we are not going to take any more evidence in this case.

I think we all know that we did make a decision in this case before on a technical point, it was appealed by the Planning Director; and the Circuit Court did agree with the Planning Director and sent it back to us for our, I believe, further action. So I think I'll, Mr. Vitousek, I'll give you the floor first to make a presentation on behalf of the appellant, and then we can follow-up with Ms. Self, and then maybe a short rebuttal by you.

VITOUSEK: Okay, thank you very much, Members of the Board. We're back here today, this is an application for a water variance. It was filed in 2005 and it was, a decision was made by the Planning Director in 2005. And so please remember that the Rule 22 of the Planning Department's rules was not enacted until February of 2006. And so at the time this variance was denied Rule 22 didn't exist. In other words, it just -.

COOK: Just for the edification of some of the new Members, I think we probably all know that, but maybe you should explain Rule 22 a little bit.

VITOUSEK: Oh, sure, sure. You know, historically, and then Amy can, you know, make her argument. But historically the Planning Director decided some years ago that he would not approve applications for water variances unless the property was located within the 60-inch isohyet line. In other words he decided that he was going to use some map that -. You know, I'm not, there have been a lot of issues about what the map is, but he was going to use some map. And if you applied for a water variance and you were within the 60-inch isohyet line you could proceed with your application for a variance; and if you were outside you could not. And so there were a series of cases where applicants challenged that decision based on the fact that the Director was applying a rule, the Director had created a rule without going through rule-making procedures under the State Administrative Procedures Act. In other words, he had had this rule that was not disclosed, it wasn't published, it hadn't gone through public hearing, but it was being applied as the sole criterion to decide whether or not a water variance was permitted. And so this Board in a couple of cases had ruled that the Planning Director's use of an undisclosed, unpublished rule was in violation of law and decisions based on an unpublished rule were arbitrary and capricious. So that was the situation. So the Planning Director apparently decided that rather than face that argument over and over again they would go through the rule-making process that's required by -.

SELF: Objection. We're not -?

VITOUSEK: What? They asked me for an explanation. I was trying to give it.

SELF: Well, as to relevancy. We're not here on Rule 22. You just said that Rule 22 is not even adopted, so why even go into Rule 22 at this point? We're supposed to be, you're supposed to be basing it on what's before you; and Rule 22 is not before you.

COOK: I agree that Rule 22 is not. I thought as a background it would be good. I think you've done enough -.

VITOUSEK: Fair enough.

COOK: So go forward -.

VITOUSEK: I was just trying to -.

COOK: With your presentation.

VITOUSEK: Yeah, fair enough. Okay. So, at any rate, the Calverts purchased a property down in Kipuka Puueo which is down in Ka'u down near Ocean View. They purchased the property back in 1978. Mrs. Calvert and her husband bought the property together. Mrs. Calvert's husband was a career educator with the California School system. He was Deputy Superintendent of the schools. And they basically acquired this property with the intent of this being their retirement, you know, the source of income to their retirement. In other words, they mortgaged their home in California, they bought the property. And then in the 1980s they did two increments of a subdivision, okay. The first, and in each one they applied for a water variance, were granted a water variance, applied for subdivision approval, were granted subdivision approval, did the improvements, they did roads, they did landscaping; and then they sold the lots to the public. Okay. So in 2000, and then Mr. Calvert died I believe it was in 1985, was it?

CALVERT: Right.

VITOUSEK: Nineteen eighty five. And, you know, Mrs. Calvert, sorry, is of retirement age at this point. And her goal is to do the next increment of the subdivision in order to sell the lots and fund her own retirement. So in 2005 they initiated the process of applying for the water variance, just as they had with the two previous increments; and these are like side by side by side, the different increments. And in this case their application was denied because the Planning Director determined that it was outside the 60-inch isohyet line.

The sequence of the application or the timing is important in this case. The application for the variance was filed on June 8, 2005. Okay? And then there was no response from the Planning Department whatsoever until August 11, 2005 which is more than 60 days

after June 8th. And so when the Planning Director acknowledged receipt of the application he said, and this is a quote from his letter of August 11, 2005, “the Planning Director shall render a decision on the subject variance on or after September 5, 2005, but no later than October 4, 2005.” Okay. And so the Director actually didn’t render a decision until October 5, 2005. But, so he didn’t even meet the deadline that he imposed. Now this is relevant because there’s a couple of statutes and rules that are important to this decision. The first is the Planning Commission’s Rule 6, I’m sorry, the Planning Department’s Rule 6-7(a) which says that when the Planning Department or Planning Director receives an application for a variance they will grant or deny that application within 60 days. Okay?

And then there’s Hawaii County Code or part of the Subdivision Code 23-18 which says that if the Planning Director does not make a decision on a variance application within 60 days the application will be considered automatically denied. Okay? That’s the Hawaii County Code rule. And then there’s Hawaii Revised Statutes 91-13.5 which says that if a State and County agency is considering an application for a business or development-related approval, they have to set a time frame for making decisions. In other words, each agency has to set its own time frames for making decisions; but that if it doesn’t act within the time frame that it sets, the application is automatically approved, not denied. Okay, the reason for this law as set out in the Legislative history is that Hawaii was developing a reputation for being unfriendly to business -- as an unfriendly climate for businesses where businesses or individuals would apply for permits, they would sit forever, and there was nothing that gave the business a sense they were going to be treated fairly and the applications will be decided in timely manner. And so what the Legislature did was it said agencies you can set your own time frames, you know, you can decide how much time you need to decide, but you have to publish a time frame; and then if you don’t live up to it the permit will be considered granted, not denied. And what the Legislature was doing by that was essentially shifting the risk or the burden that the Legislature didn’t act in a timely manner to the agency, not the applicant. In other words, it’s saying in order to be, show business that we’re serious about business, if the agency delays, your permit is granted. That will motivate the agency to decide within their own time frames.

So in this instance we have an application filed June 11, 2005, we have no recognition of that being filed until the Director writes in August 11th and he says I’m going to decide this but I’m going to decide it between September and October 4th, but he doesn’t decide until October 5th. And now what the Director is arguing, honestly, the Director is arguing that this was automatically denied in June, I’m sorry, automatically denied June 8th, I’m sorry, August 8th, 60 days after it was filed. So what they’re arguing is that this thing was automatically denied before we wrote you the letter acknowledging receipt of your application and before we represented to you that we were going to decide it and we’re going to decide it between September and October. He’s saying, what they’re arguing to you, honestly, they’re really arguing this to you now, is that at the time that the Director wrote the letter to the Calverts telling them he’s going to decide by September 5th, it was already denied. He didn’t bother to tell them it was automatically denied, he didn’t tell them that their appeal period had already elapsed because, you see, you only

have 60 days after, I'm sorry, only 30 days after a decision in which to appeal. And so by the time he issued his decision, not only, he said he was going to issue a decision. By the time he issued the decision, not only had that decision period lapsed but the appeal period had lapsed, you know. And they're really arguing that to you. You know, they really want you to decide that the Calvert's application was automatically denied before the Director represented to the Calverts that he was going to decide it and before he actually decided it. And so you've got to think back what the Legislature was thinking about, that we don't want Hawaii to be a business unfriendly state, we don't want it where agencies can ambush businesses or can ambush applicants, and so we're going to make it where if they don't act according to their time frame it's approved, and not denied.

So the three issues before you today are: One, does this application constitute an application for a business and development-related permit. Issue number two is whether it was automatically denied by operation of the 23-18. The third issue is the substantive issue which is was the Director's decision arbitrary and capricious because he relied on an unpublished rule and because he did not look at all the relevant factors in determining whether or not catchment was appropriate for this third phase of the subdivision.

So on the first issue the question is does this constitute a business or development-related permit as defined in HRS 31, I'm sorry, 91-13(b). And what happened was the, see, the definition of application for business or development-related permit, license or approval essentially has two parts to it or two separate definitions. What it's, the definition states that any state or county application, petition, permit, license, certificate, or other form of request, one, for an approval required by law to be obtained prior to the formation, operation or expansion of a commercial or industrial enterprise. Okay, so that's definition number one. Or number two is for any permit, license or certificate or any form of approval required under HRS Section 46-4, 46-4.2, and that lists some other Statutes. Okay, so what happened in the Board hearing before is that there was a motion made and there was discussion on the Board about whether this constituted a business-related permit. And the, and I'll quote from Board Member Gimpel on the transcript right before the vote, and Board Member Gimpel said "What is commercial? Commercial is something that is done for profit. When you operate a farm for example and you sell products that's a commercial enterprise. If you have a big piece of property and you subdivide it in order to sell the lots for profit I would maintain that is a commercial enterprise without further definition by the Statute." So the Board, I believe the Board was actually voting on whether this property or this application fit the definition of a commercial enterprise under the Statute. What happened was, and frankly I've got to take some responsibility for this because when the decision was written up and sent up to the Court, the Court ruled that it did not meet the second part of the definition. In other words, the Court ruled that this was not a permit required by Chapter 46 or any of the other specific statutes enumerated in 91-13.5. But the Court felt that there was not enough you know, information before it on the record and the ruling wasn't clarified that it did meet the component of the definition that says that it's a commercial, that it's a permit required by law before the formation or extension of a commercial enterprise. And so what we're here to argue for you today is that in fact the application that's before

you is an application for an approval required by law before the expansion of a commercial enterprise.

We submit that clearly Mrs. Calvert is applying to expand the subdivision, this is Phase III. We submit that a subdivision where you buy property, subdivide lots, pay for infrastructure, get entitlements and then sell lots to the public is a commercial enterprise; and we submit that the variance is required by law because you couldn't do the subdivision in that situation without a water variance. And the standards for a water variance, you know, say that you have, or any variance, say that, the question is is there any reasonable alternative. And if there's no reasonable alternative then that's one of the criteria for granting a variance. And we've demonstrated on the record that there was no reasonable alternative to a water variance in this location because of where the County waterlines are and because it is cost prohibitive to build a well and water distribution system for a 14-lot subdivision. And we had Steve Bowles who offered an affidavit that supported that. We had other evidence on the record supporting that there was no reasonable alternative.

So it's our position that where you can't get, where you can't get a subdivision approval without a water variance and where the water variance can't be granted unless there's no reasonable alternative, then that is required by law. What the County argues is, well, they could have bought a different property. In other words, they could have bought some other property and they could have developed that, or they could have, you know, gone into a different form of land development business which didn't require a variance. But I don't think that's what the law means. I mean this is, and we also forget that this is the third phase. I mean she did have two other phases where she went exactly along this track, and what happened is the Planning Department changed the rules. And so, you know, at the time she acquired the property it was perfectly appropriate to apply for a water variance and to subdivide the property based on the water variance, because that's what she did twice before this last application.

So I think just on a plain meaning of the language, this is a commercial enterprise. It is a permit that's required before the commercial enterprise is expanded. The County argues that Mrs. Calvert applied as an individual and not as a business; and there's really nothing to that argument because individuals can do business. I mean it's a question of what the activity is, not whether it's a corporation, or a partnership, or a limited liability company. I mean sole proprietors can do business, professionals can do business. So the status of the individual as a person or as an entity really, really doesn't matter. I can assure you the IRS does not make determinations based on whether it's an individual or a corporation. They will tax people for doing business, they will tax business people as business.

So I think that, what I would ask is that the Board make a determination that this permit was automatically approved by action of HRS 91-13.5 because the Planning Director did not make a decision to grant or deny it within 60 days of when it was filed.

Turning to the automatic denial argument by the County, there's really just nothing to that. There is a direct conflict between, if you conclude that it's a business-related permit, okay, then there is a direct conflict between HRS 91-13.5 and the Subdivision Code Section 23-18. In other words they cover the same subject matter; and the State Statute says that it's automatically denied, I'm sorry automatically approved. The County Statute says it's automatically denied. So there is a clear conflict. And in those situations the State Statute preempts the County's rule because it's the State that granted authority to the Counties to regulate land use, actually granted all authority to the Counties. And when they granted that authority to the Counties it specifically said that you have the freedom to regulate and pass ordinances, except where it's inconsistent with State law. And so in this particular instance, if you find that it qualifies that as a development-related permit then it is inconsistent, and the State Statute preempts the County Ordinance. If you find it's not a development-related permit, you still should not find that it was automatically denied because the Director clearly waived any application of that. In other words, 60 days after the application was filed, more than 60 days after the application was filed, the Director represented to the applicant that he was going to decide the application. And so it's, you know, he did not say it was automatically denied. He did not notify them that they have a right to appeal, which he's required to do if there's a decision. And so I just, you know, there's really nothing, nothing to that argument.

Turning to the argument on the merits, again, this is an application, the issue here is whether the Director's decision was in violation of law and/or was arbitrary or capricious. And we submit that the difference with this application compared to the more recent ones is that in this instance the Director was applying a rule that it was in his mind but was nowhere else. In other words he was applying a 60-inch rule before it had been duly enacted by the procedure required by the Hawaii Administrative Procedures Act. And so we think a decision based on an illegal unpublished rule is legally invalid and should be overturned.

Further, you know, we've been around on this issue. But the decision should be considered arbitrary and capricious, not in the sense that it's like malicious but in the sense that a decision which does not have rational grounds to support it, and which does not come from an examination of all relevant factors, is by law considered arbitrary and capricious. And in this instance the Director only considered the amount of rainfall, whether it was by using a 60-inch isohyet line or using the Manuka or Opihihale rain gauge data. He only considered the amount of rainfall. And there are, you know, as we've discussed in other matters, there are other very relevant factors to assess in determining whether or not catchment is adequate. Those include what is the catchment area. I mean, what is the rainfall, how much catchment area do you have, what's the surface area of your roofs and other surfaces, and then what's your storage capacity and what's the monthly rainfall? In this particular instance the Director could have looked at the fact that there were two other increments to the subdivision in exactly the same location that had been developed and sold, and houses built on them, and crops planted on them, mostly citrus trees that are doing just fine, you know, that are doing just fine with catchment water, and have been for many years. And so we think that the Director's

decision on the Director's failure to consider these other factors and his use of a rule that really didn't exist at the time render his decision unsubstantiated.

I'd also point out that in this case, you know, the Director didn't testify before the, didn't come to the Board and testify. The map that they tried to offer into evidence was rejected because they couldn't prove what it was. In other words, so, so there really was no evidence offered to the Board to support the Director's decision. And a decision made without support, you know, should be considered to be arbitrary and capricious.

You might recall, and I'm almost pau, but you might recall that procedurally a motion was made to deny, to uphold the appeal and to reverse the denial on two grounds. On the grounds that it was automatically approved by law, and the other ground was that it was arbitrary and capricious. And so there was a motion made by Mr. Gimpel that said "I'll move to uphold the appeal finding that the decision was 1) late and therefore the approval is required pursuant to State law which requires approval for applications...as a waiver within the 60 days and 2) that it was arbitrary and an abuse of discretion." And so the first, the motion that was made by the Board was to uphold the appeal on two grounds. And then there was some discussion about, well, if we rule on the first ground then it's automatically approved, then we don't go to the second ground. And so that's what actually happened, was the Board voted on the first ground and determined that it was automatically approved, and so the Board did not vote on the second ground of whether it was an arbitrary decision, even though that was thoroughly discussed by the Board and that motion was actually made.

And so what I would ask the Board to do is to determine that it was automatically approved because it is a business-related permit and that it was approved within, after the Director did not decide within 60 days, and then also go ahead and say in the alternative, decide whether or not the Board feels that it was an arbitrary decision or based on an illegal standard. So that if we go up on appeal again, we'll have both those issues before the Court. And thank you.

COOK: Okay. I think I'm going to allow the Board to ask questions, but I'm going to do it after both counsels have made their presentations. So, Ms. Self, forward yours.

SELF: Okay. Well, actually Mr. Vitousek may have noticed in my brief that we have determined too that the Board should go ahead and make a decision on the merits as well, since the Director did make a decision based on the merits to deny the case and, plus, so that we'll expedite this and the issue will be right for the Court to decide if it goes up on appeal.

To respond to some of the specific things that Mr. Vitousek mentioned, the Director did not just base the denial on 60 inches of rainfall. I would refer you to page 16 of the Director's brief. I have listed all, well, a lot of the factual findings that were in his denial letter supporting his decision. I'm not going to read through all of this. You can look at

it yourselves. Page 16 of Appellee's memorandum of position regarding the remaining issues before the Board of Appeals, I would like to point out at least a few of them.

When the Director receives an application for a water variance, it is sent around to some of the main departments, the departments that are relevant to this decision, one being the State Department of Health. He asks for comments on the water variance. The State Department of Health in their memorandum dated August 17, 2005 recommended that the subdivision lots be connected to an existing public water system. The Department of Health does not support the use of private rain catchment systems for drinking purposes since the quality may not meet potable water standards. And then the memorandum dated January 14, 2005 from the Department of Water stated that the nearest Department of Water Supply's water system facility cannot support the proposed subdivision at this time. I'd like to point out at this point that the catchment water in times of drought are going to need water hauled to supply them. That's why rainfall is so critical on this issue. Because even though they're saying that they're supplying themselves with catchment so they don't rely on the public water system, they do in fact rely on the public water system. You have the Department of Water Supply saying the system cannot support this. So it's not an issue of one subdivision on catchment. This is an issue of all of the subdivisions. When the Director is looking at this, he's taking into consideration the entire island or even this part of the island, and making a decision on, you know, in terms of is there going to be hauling, all of this comes into play. So the Department of Water Supply is saying they cannot support it. Hauling trucks, when they go to get water they get it from the public water system. So the water has got to come from some, you know, there has got to be enough water for everyone. The next one that I'd like to point out is, well, I'll leave it at that. You can read the rest. There's a whole page of all the findings that he used to support his decision.

Now going to issue number one, 91-13.5, the Court has already determined that the second part of the definition or the second category under 91-13.5 does not apply. That was the, it referred to zoning, so that's been determined. We contend that also the first category does not apply. It says the definition is required by law to obtain prior to the formation, operation, or expansion of a commercial or industrial enterprise. Now I understand, you know, Mr. Gimpel's statements about that Mrs. Calvert has a business of subdividing land and then selling them, which makes it commercial. Okay, so I haven't, regardless of whether she's established as a business, if you have a business in Hawaii, there's one thing for sure, the State requires you to have a general excise tax license. That's an example of something that is required by law to be obtained prior to the formation of a business. Other things that are required for the formation, or operation, or expansion of a commercial business, if you're a contractor you have to have a contractor's license. So it depends on what kind of business you have as to what you need in order to form, or operate, or expand a business. Now ask yourselves this – Someone who is in the business of subdividing land and then selling those lots off, individual lots, is it absolutely required by law that person get a water variance? It is not, because it depends on where you buy your land. If the same person could have the same kind of business, but yet be selling off properties that are either close to or can hook up to the County water system, or in the case of large developments, they're required to have

enough water commitments from the Department of Water Supply or else they have to create their own source of water. In other words, they have to drill and make their own water system. So how is it then that in order to form and operate or expand a business you have to have a variance? That doesn't make sense. The reason she needs a water variance is because she put herself into a situation where she now is trying to subdivide land that happens to not be close to the water supply, the Department of Water Supply water system. Another developer who has a license to do business in Hawaii is doing the same thing she's doing except they're developing in an area that is close to the water system.

Now the other thing is, okay, so the point of that is that you can still have a business, you can operate a business without getting a water variance. The Subdivision Code applies to the general public and not just businesses in particular. So an individual can go in and apply for a subdivision. It doesn't have to be a business that applies for a subdivision. And it doesn't have, an individual can go in for a subdivision of land unrelated to a business. For example, families will go in for a subdivision in order to provide properties or lots to their individual family members. And then another thing is if a variance is required by law to be obtained prior to the formation, operation or expansion of a business, then why is it that the City and County of Honolulu's Subdivision Code doesn't even contain a provision for variances? So if a variance is required for the operation of a business, why is it that they don't have a variance provision in their Subdivision Code?

The example I gave to you to compare this as a comparison, well, as a comparison I've given you an example. The Corporation Counsel in the City and County of Honolulu wrote a formal opinion that the automatic approval did not apply to park use permits. So even though a business like members of the public might apply for a park use permit they stated that "We are unaware of any statute, ordinance or regulation which requires an individual to obtain a park use permit prior to the formation, operation or expansion of a business." This is the same type of situation. You do not need a variance to form a business. You do not need a variance to operate a business, you do not need a variance to expand the business. So our contention is that, again, 91-13.5 does not apply either under the first category or the second category. So given that, you would turn to Section 23-18 of the Code, the Subdivision Code, which says that if it is not, if the Director fails to act within the prescribed time the application shall be considered as having been denied, now it is considered as having been denied. But since the Director did go ahead and decide this case on its merits, then we contend that the Board should also get into the merits of the case and decide it on its merits.

The other, okay, so for the third issue on the merits, this Board has no authority to determine whether the reasons for the Director's denial is a rule or not. You have no authority to decide whether, even if it is a rule, whether or not it's a valid rule. This is an issue that will have to go to the Circuit Court to decide whether or not it is a valid rule or not, even though the rule had not -. Right now we're considering that there is no rule because there was no rule at the time that this case was decided. And, also, keep in mind it is the appellant's burden of proof. It's not the Director's burden of proof. Chapter 91 says that it is the appellant's burden of proof. So what this Board has to look at is, you

have to determine based on the Director's statement of factual finding supporting this decision on whether or not his decision was arbitrary or an abuse of his discretion. So you have to take into consideration each and every one of his factual findings in his denial letter, which is evidence on the record, and make a determination based on whether or not his decision was arbitrary and capricious. And I think that's all I'm going to say because we've briefed this thing to death and I don't want to go on and on and on. So, thank you.

COOK: Mr. Vitousek? If you want, just very short.

VITOUSEK: Sure.

COOK: Then after you've made yours then we're going to take a short break, and then we'll come back and see if the Board has question of both counsels, and then we'll move from there.

VITOUSEK: Yeah, thank you. So I just want to, you know, quote from the Legislative history of 91-13, this is why the Legislature passed this act. It says "the purpose of this Act is to require that the establishment of maximum time periods for review and approval of all business and development- related permit approvals and licenses. Issuing agencies are required to review applications for completeness in a timely manner and then act on the applications within an established time frame, or the application approval should be automatic." And so what they're saying is it's not, you know, it's not just for GE tax licenses. It's permits and approvals that are required by businesses to operate and expand. And this is clearly an application for a variance which is required in order to subdivide the property; and the subdivision of the property is a business activity.

It's funny because the Department, you know, they're trying to, it's funny. They're kind of arguing like we're going to, these things are going to be automatically approved; but that's not the case. You know, the Department established its own time frame; that's what the law says, you establish your own time frame. All the law says is if you don't act within your own time frame it's approved, not it's denied. And so all the arguments about, you know, about what's fair and that Mrs. Calvert could have bought another property, or that she should have bought something that didn't need a variance, all that's just argument. The point here is the Department set its own time frames, it didn't follow them. And so that's why it's automatically approved. That's what this law says.

On the issue of whether the applicant had the burden, you know, the applicant actually offered evidence and testimony in this case. Like I said the Planning Director didn't come before the Board. The applicant offered testimony in the form of an affidavit from Steven Bowles who's a hydrologist who actually did the Kau Water Plan on behalf of the County; and he testified that if there was adequate catchment area and adequate storage there would be adequate water for houses in this subdivision. Dr. Steven Denzer submitted an affidavit which said that water would be safe, you know, if you followed the criteria for maintaining your water system it will be safe. And the applicant offered

testimony that other houses, that they had sold their lots, they sold and people built houses in the subdivision were doing fine on catchment water and didn't require water hauling, that's what's on the record. So the applicant has said that they would impose conditions which would require sufficient catchment areas and sufficient storage capacities, and that they would require that the homeowners follow the specific requirements or specific suggestions for healthy catchment systems that were set up by Ms. Macomber in her study. We have drafted those CC&Rs that would require that. We have no problem if the CC&Rs or the terms of the CC&Rs are included in the decision and order. We just ask that, you know, that Mrs. Calvert be allowed to proceed with the third phase of this development, just as she had with the two previous phases. Thank you.

COOK: Okay, we're going to take a, what time is it, quarter after. We'll be back at, 11:15 now, we're going to come back at 11:25.

VITOUSEK: Thank you.

RECESSED The Chair called a short recess at 11:15 a.m.

RECONVENED The meeting reconvened at 11:26 a.m.

COOK: Okay, the Planning Board of Appeals will come to order again. Okay, what we're going to do, we're going to open for questions. Any Member of the Board have questions of counsel here? We'll start to my left. Anyone, Pete you have any questions?

HENDRICKS: No.

COOK: No questions. How about to my right over here?

TAVARES: I don't know where to start. I got some questions.

GIMPEL: Start.

COOK: Kim, go ahead.

TAVARES: I don't know which one to ask first. Okay, maybe I'll, I think I'll start with Amy, Planning Director's -. My question would be starting off with regards to variances in the first place, with relation to whether or not you need it for, to start a business. You want to just define for us what variance means, please?

SELF: Well, a variance is, first of all you start with the Code which says that in order to subdivide you have to provide a water system that is approved by the Department of Water Supply. Now that means you either have to be in a location that you can hook up to the public water system, or you have to create your own water source which would be drill a well, which often times happens. And then so that there would be

another, you know, you would have your own water supply; but then that would be approved by the Department of Water Supply. So that's what's required under the Subdivision Code. Now a variance, you can get a variance, you can apply for a variance. But there's no, for some reason or other applicants for variances, it has gotten to a point where they go out and purchase land knowing that there's no water available, meaning that they are not close enough to hook up to the public water system but yet they go ahead and purchase the property even though they know there's no water, thinking that -.

VITOUSEK: Excuse me, there's no, there's no evidence on the record. We can't argue based on, I mean, this -. You know, she's making factional statements; there's no basis on the record.

SELF: Okay, I'll -.

COOK: Okay. Well, we'll -.

SELF: Let me just get to the point, okay. So if you apply for a variance there is absolutely nothing that guarantees you're going to get a variance. It's in the Code. It's up to the Director's discretion as to whether to grant a variance or not; and I'll leave it at that.

TAVARES: And that was kind of my question. So you're saying that a variance is actually a deviation from the Code?

SELF: A deviation, it's an exemption from the Code, so that you don't have to fulfill something that's actually required by the Code.

TAVARES: Okay. All right, thank you.

COOK: Is that all?

GIMPEL: I have a couple of questions. Amy, with respect to the first issue that you drew attention to, and that's whether this denial was based on more than rainfall, presumably, and the fact that it was inadequate rainfall. I'm looking at the reasons stated for the Director's denial. And to be honest I find nothing that says that it's other than the rainfall is inadequate; and inadequate is nowhere specified. What is adequate rainfall versus inadequate rainfall? What the Director found was that there was somewhere around perhaps 40 inches of rainfall as shown by meters in the area, more or less. But nowhere does he say this is inadequate. So we have to presume that the 40 inches that was found in the various meters in the area, he determines to be inadequate. On what basis did he determine the 40 inches per year was inadequate?

SELF: Well, you have to first look at the fact that the Code, going back to the Code, the Code requires a water system. So from that, well, you can, from the Code you can see that that is, it's important, it's very important -. The County Council

assumed that it's very important to have water in subdivisions because that's in the Code. Okay, so it's a requirement.

GIMPEL: I understand that.

SELF: But then when you're granted a variance, because it's up to the Director's discretion to grant a variance. He has to make a decision, okay, where can I draw a line so that at least we can be assured that there's going to be enough rainfall in order to exempt you from the Subdivision Code. Because it is very important that these subdivisions be -.

GIMPEL: I understand the reason for the Subdivision Code and I understand the need for water. The Director has taken it upon himself to make a determination that a variance in some cases would be appropriate and in other cases might not be appropriate. In this case he determined that it was inappropriate after finding that there was approximately 40 inches of rainfall a year, correct? Basically correct?

SELF: That's correct, right.

GIMPEL: Okay. My question is what is the criteria other than rainfall amount per year that he used?

SELF: All the things that are listed in his letter denying the variance.

GIMPEL: There's nothing else listed in his letter. All he says is the alternative to the water system, in other words, the rain catchment that has been proposed, would not meet the intent and purposes of the Subdivision Code. Why not?

SELF: Which means to have enough water supplied through the Subdivision Code.

GIMPEL: Why wouldn't the catchment system meet the requirements?

SELF: If there is not enough rainfall it doesn't matter how big you make the catchment tank.

GIMPEL: So in other words we're getting back to rainfall. But what if the catchment system was large?

SELF: Well, if you have a drought it doesn't matter how large your catchment system is. If there's no rain, there's no water.

GIMPEL: So, in other words, what I think you're suggesting is that the Director would be perfectly justified in denying every water variance request.

SELF: That's true.

GIMPEL: Okay. All right, all right.

SELF: He could do that. But given that there is, his discretion is that he can.

GIMPEL: But he has the obligation, of course, in the Statute to exercise his discretion correctly and not abuse his right to have discretion, correct? Isn't that correct?

SELF: That's correct.

GIMPEL: Yeah, so if we find that there's an abuse of discretion we could say your determination, Mr. Director, was incorrect, okay. And second issue, you're saying that the variance isn't required by law to, for the commercial enterprise. And here was not the establishment of a commercial enterprise, it was arguably the expansion of a commercial enterprise. Let me ask this - Is a license required by the State, or by the County, for the operation of this particular commercial enterprise? In other words, a license to own land and subdivide it, is that required?

SELF: Not to subdivide.

GIMPEL: Okay, thank you. All right, is there any requirement in the State law or the County that a business be operated intelligently?

SELF: Intelligently?

GIMPEL: Right. In other words, can a business person make a mistake and not violate State law, make a business mistake and not violate State law?

SELF: I think it would depend on what kind of mistake it is.

GIMPEL: Well, let's say a business person, hard-pressed to think of an example, bought property in a zone not zoned for a business and sought to open a business there and get it rezoned but the rezoning fell through. Is that against the law to buy the property?

SELF: It's not a very wise business -, but it's not a -.

GIMPEL: Ah ha -. But it's not against the law, correct?

SELF: No.

GIMPEL: So, in other words, a business person can make a mistake -?

SELF: Well, it would be against the law if they did not go in for a rezoning and did it.

GIMPEL: Ah ha. Oh, oh, oh, so it would also be against the law if a business person wanted to buy agricultural property and subdivide it and failed to get a water variance if it was required in order to subdivide?

SELF: They're still a business.

GIMPEL: Ah ha, thank you. Okay.

SELF: And they don't have to have a variance in order to have a business or to even expand the business.

GIMPEL: But in order to operate that, but in order to expand -.

SELF: You can expand. You can operate a business and they can go somewhere else that has water and subdivide.

GIMPEL: No, no, no. No, go somewhere else -. You're operating a business on land you already own and you want to subdivide it, that's expanding the business.

SELF: But you buy that property knowing full well there's no water and you're going to expand a business?

GIMPEL: Just the same as you buy the property knowing full well that it's not zoned for a business and you seek a zoning. Okay, thank you. I'm just pointing those things out.

Third issue, you're urging that the fact that the Director sent the letter saying I'm going to decide on this by the blank day of blank and the letter was sent well after the prescribed time for his decision, you say ignore that, decide, we should decide this on the merits of the case, right?

SELF: Right.

GIMPEL: Okay. Okay, now the Board has authority to decide -. You're also suggesting that this Board has no authority to decide if the criteria on which the Director made his merits decision is valid or not, in other words his "rule" which wasn't a rule -?

SELF: Well, you have to look at each of the things that he lists in his letter. He gave you a statement of findings -.

GIMPEL: Right.

SELF: Which led to his decision to deny.

GIMPEL: Which we've already gone over, yeah. Okay.

SELF: Your decision has to be determined based on those.

GIMPEL: Yeah, and that was the subject of my first series of questions. It was based on inadequate rainfall and a failure to meet the Department of Water standards, and so forth and so on. But we don't know what inadequate under the, the Director found apparently that 40 inches is inadequate?

SELF: Correct.

GIMPEL: Okay. Forty one inches, forty two inches, don't know. Thank you. Those are my questions.

COOK: I want to follow-up a little bit on this. When a case is appealed and the Planning Director has issued his decision, and you've pointed out these approximately 16 reasons for the decision, when it comes up here doesn't the Planning Director have some obligation to support those items that he has relied on? And I'm specifically thinking of the rainfall. I mean he says, in effect, you know, there's only 40 inches of rainfall here. I forgot, there was mean and there was average and, you know, but he's basically saying there's only 40 inches. But then when he comes here and the appellant introduces evidence that would tend to indicate at least from their standpoint that there is sufficient rainfall, then doesn't the Planning Director have a duty to support his decision with some evidence? And in this particular case I remember specifically one of the things he relied on, I believe, was a map that was attempted to be introduced here but was not authenticated and was not introduced. So I don't recall any specific evidence to even support the 40 inches that he was relying on there. So my point is that the Director can't just come in and say, okay, this is my decision at the appellate level and say the burden is on the appellant to prove all the issues, and then if the appellant comes forward with evidence then the Planning Director can say, well, here's my decision and I've got my reasons. And the decision he's got to, I think, at least in order to not be arbitrary and capricious, he's got to present some evidence for that.

SELF: Could I respond?

COOK: Of course you can respond.

SELF: Okay, Chapter 91 says that the burden of proof is on the appellant. Now in this case I don't see any evidence on the record that shows that a study was done, even by Steve Bowles, to determine whether or not there's sufficient water for this property. Knowing that they are required to have a water system under the Code, there's nothing that establishes, nothing in this record that establishes that a study has been done. They have an expert, Steve Bowles. Was there a study done to determine whether or not there is sufficient water for this property? So there's nothing for, there's no basis for this Board to deny the Director's decision. It's not his burden of proof at this point. It's a burden of proof that's on the appellant. The appellant has not given you sufficient

evidence to show that this property has enough water available to go without complying with the Subdivision Code.

COOK: Well, we had, let's just take that one at a time. We had Mr. Bowles testify. He had an extensive background which was presented to the Board. He gave his opinion. We're entitled to give it whatever weight we want to give it to. It's not that he had to go out and make a study, a particular study to support it. So it's up to us -.

SELF: But you're asking the same thing of the Director.

COOK: Wait a minute. It's up to the finder of fact to determine what weight we want to give to any particular evidence. But I didn't see any evidence that came in to counteract what he had said. And the other one relating to the safety, there was quite a bit of, and I think there was even a medical doctor who had come in to testify that there had been no problem with this. So just for the Planning Director to say, well, the Department of Health says it doesn't meet their specifications so, you know, we're going to deny it, I can't go with that. Okay, anybody else have any questions? Okay, I think the Board then is ready for a motion, either to uphold the Planning Director's decision or to reverse it on the grounds, either way. Okay, I'm open for a motion.

TAVARES: I'll make a motion.

COOK: Okay, go ahead.

TAVARES: My motion is to uphold the Planning Director's decision.

COOK: Do I have a second to that? Looks like it fails for lack of a second. Could I have another motion.

GIMPEL: All right. I'll move to uphold the appeal on the grounds that, one, the 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, Subsection (c) and, in the alternative, that it was a decision denying a variance, 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.

COOK: Do I have a second to that motion?

GENTRY: Second.

COOK: Okay. Do we have any discussion? Okay, then I'm going to call for the question. I think we should have a roll call, Madam Clerk.

KAWAHA: Mr. Gimpel?

GIMPEL: Aye.

KAWAHA: Ms. Gentry?

GENTRY: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Nay.

KAWAHA: And Chair Cook?

COOK: Yes.

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

COOK: Okay, I would ask Mr. Vitousek to prepare proposed Findings of Fact, Conclusions of Law to support it.

VITOUSEK: I will do so very carefully.

COOK: Okay. And would you submit those to Ms. Self. Let's see, we'll try to approve these or take these up at our next meeting. So when can you have those to her?

VITOUSEK: Next meeting is October -.

SELF: October. I won't be here.

COOK: No, I don't mean next meeting. I mean the next -.

GENTRY: Kona meeting, November.

COOK: November meeting.

VITOUSEK: So how about 30 days?

SELF: Yeah, 30 days, not an extra three weeks.

VITOUSEK: Thirty days.

COOK: Okay, all right.

GIMPEL: Mr. Chair, may I -?

COOK: Yes.

GIMPEL: Remind the Board that we were advised by Mr. Torigoe at the last meeting in Hilo that there is a requirement that all voting members pay attention to the record, evidence, especially the parts that the parties point out as relevant and that State law requires that if some of the Board Members who were voting were not at all at prior hearings they must before making a decision serve the proposal for decision to the parties, and so forth and so on.

VITOUSEK: Yes, that's true, except what the Statute says is if adverse to anyone but the agency, if adverse to any party to the proceeding other than the agency. In this case your decision is adverse to the agency -.

GIMPEL: Okay, to the agency, so we're okay.

VITOUSEK: And so we still have to circulate a decision and it still has to obtain a representation that all members have examined the evidence. But we don't need to follow technically the proposal for a decision. What they're reacting to, Mr. Gimpel, is an appeal that I had before the Circuit Court on a Planning Commission decision.

SELF: So you're the one that caused all this -.

GIMPEL: So it only applies if it's adverse to the agency. That wasn't -.

VITOUSEK: That's what it is, 91-11, 91-11.

COOK: I just want to make sure that every member of the Board here has either been at all the hearings or has reviewed all the evidence. Mr. Hendricks, I think you've been to all the -?

HENDRICKS: I have been present or reviewed -.

COOK: Okay.

HENDRICKS: The materials provided.

COOK: Okay. And -.

GENTRY: I was present at some of the hearings, not, I think I missed one.

COOK: But you've read all -?

GENTRY: But I've looked at all the materials.

GIMPEL: But actually, but this doesn't apply in this case because the decision is adverse to a party other than the agency, is adverse to the agency in this case.

COOK: No, I'm on another issue. My issue is that everyone has reviewed all the, either been present at all of the hearings or has reviewed the record. Ms. Tavares, you've done that also?

TAVARES: I probably wasn't at all the hearings cause I'm new, but I did review all the material.

COOK: Read all the record, okay. And Mr. Gimpel?

GIMPEL: I've read thoroughly all the material.

COOK: Yeah, and the Chair has also, believe me.

VITOUSEK: Thank you very much.

COOK: Okay, thank you.

The discussion ended at 11:51a.m.

Respectfully submitted,

Sharon M. Nomura, East Hawai'i Secretary

A T T E S T:

Noriko Sauer, West Hawai'i Secretary