

BOARD OF APPEALS  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
MAY 9, 2008

A regularly advertised hearing on the petition filed by **KALIKO CHUN AND RICHARD NELSON III (BOA 08-000059)** was called to order at 10:06 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, presiding.

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

ABSENT & EXCUSED: Kelly Ann Soo

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

David Kimo Frankel representing Appellants  
Alan Murakami representing Appellants  
Christopher Yuen, Planning Director  
Amy Self representing the Planning Director  
Brian Kang representing the Department of Hawaiian Home Lands

And 4 people from the public in attendance.

**PETITIONERS: KALIKO CHUN AND RICHARD NELSON III (BOA 08-000059) -**  
Appeal of Decision by the Planning Director dated February 4, 2008, relating to the rezoning of Department of Hawaiian Home Lands (DHHL) subject property pursuant to a Memorandum of Agreement (MOA) with DHHL without the approval of the County Council. The subject property consists of approximately 200 acres and is located on the makai side of Queen Ka'ahumanu Highway, mauka of Honokohau Boat Harbor and adjacent to the Kealakehe Wastewater Treatment Plant site, Kealakehe, North Kona, Hawai'i, TMK: (3) 7-4-8:72.

GIMPEL: Kaliko Chun and Richard Nelson, III, Board of Appeals No. 08-000059. This is an appeal of decision by the Planning Director dated February 4, 2008, relating to the rezoning of Department of Hawaiian Home Lands subject property pursuant to a Memorandum of Agreement with the Department of Hawaiian Home Lands without the approval of the County Council. The subject property consists of approximately 200 acres and is located on the makai side of Queen Ka'ahumanu Highway, mauka of Honokohau Boat Harbor and adjacent to the Kealakehe Wastewater Treatment Plant site in Kealakehe, North Kona, Hawai'i. The parties can take the seat. Ms. Self, are you representing the Planning Director?

SELF: Yes. Amy Self, Deputy Corporation Counsel, representing the Planning Director, Christopher J. Yuen.

GIMPEL: Thank you. And would you introduce yourself, please.

FRANKEL: Sure. David Frankel. I'm also here with Alan Murakami. And our clients are here as well: Kaliko Chun and Dickey Nelson.

GIMPEL: Okay.

KANG: Good morning. Brian Kang appearing on behalf of the intervenor, the Department of Hawaiian Home Lands.

GIMPEL: Thank you. All right. The first order of business would be to accept into evidence the record on appeal and documents filed in this case. Are there any objections to accepting those into evidence now at this time, the Index to Record on Appeal that was filed, and everything else?

SELF: No objections. But I would also ask that the Exhibits that are attached to our Motion to Dismiss also be admitted into evidence, if those are not part of what was already -, I think there's maybe one thing that was not part of the record and not part of the Exhibits of the Appellants.

GIMPEL: Okay. Is there any objection to that?

FRANKEL: Are you including in our Motion our Exhibits we submitted?

GIMPEL: Yes.

FRANKEL: Okay.

SELF: Yes.

GIMPEL: Yes, all the Exhibits. All right, they've all been admitted. Now, we also have a document that was submitted, that we received today from the Petitioners in this. This is your opposition to the DHHL cross motion to dismiss the appeal; I just received that today.

FRANKEL: Yeah, we submitted that some time ago. You probably got -, actually -.

GIMPEL: Well, this is a memorandum in opposition to the Department of Hawaiian Home Lands cross motion to dismiss the appeal. It was received by the Planning Department on May 7<sup>th</sup> according to the stamp.

KANG: Yeah, just for clarification, the Department of Hawaiian Home Lands did file a reply to the Petitioners' memorandum in opposition. I'm not sure if that's, Mr. Chairman, if that's what you are referencing.

GIMPEL: Yeah, okay.

FRANKEL: Oh, so a reply.

GIMPEL: Yeah.

FRANKEL: You know, we are -, I'm not entirely comfortable with the fact that DHHL submitted a reply to you. Your rules don't provide for the submission of reply memoranda. And we did not submit our reply memorandum to the memorandum in opposition submitted by the Planning Director to our Motion for Summary Judgment; and we did not submit a reply because your rules don't provide for a reply. But -.

GIMPEL: Okay, all right. Well, we have several motions before us today. The first is the Motion to Dismiss that was filed by the Planning Director; and I believe it would be appropriate to first argue that. And then depending upon the outcome of the Motion to Dismiss, we would then hear arguments on Motion for Summary Judgment that was filed by the Appellants in this case. So I think it would be appropriate first to hear arguments on the Motion to Dismiss filed by the Planning Director.

SELF: Good morning, Mr. Chair and Members of the Board. This whole case is something that should not be actually before the Board of Appeals. The Charter makes it very clear in Section 6-10.2(a) that the jurisdiction of this Board is to hear final decisions by the Planning Director or the Director of the Department of Public Works. In this particular situation, we have a Memorandum of Agreement, which was signed by the Mayor, signed by DHHL; and this precludes the Director from making a decision on things that pertain to that Memorandum of Agreement. This is not a final decision by the Director. What happened was there was a letter from DHHL per the Memorandum of Agreement, stating that they are designating a certain land as a certain zoning; and the Director has no option except to acknowledge that they have designated this in a certain zoning. So this is not the correct forum for this kind of case to come before you. There is no final decision by the Director. He doesn't have the authority to override the Memorandum of Agreement. Now, if you decided to go ahead with this, saying that you think this is a final decision by the Director, then that would put the Board in a precarious situation because then it would be up to you to determine, okay, is this a valid Memorandum of Agreement. And that certainly is beyond your jurisdiction. There is a proper forum for this; it's not this Board. So we would ask, based on that, that you would dismiss this. Thank you.

GIMPEL: Mr. Frankel.

FRANKEL: Thanks. I want to take a step backward to take a look at what is before you. And I think I need to begin by apologizing because there are some very complex legal issues that you need to grapple with; and I recognize that a lot of you are not lawyers. And so I want to -, but I need to address some of the legal issues, and I apologize if

some of the things we talk about today are just -, make no sense. And I would encourage you to interrupt us, if we use legal terms that don't make sense.

The consequence of the decision that you are looking at today is whether the County – or the people on this island should have any meaningful role in deciding how that land is going to be used next to Honokohau National Park, whether people have an opportunity to participate through testimony, through having their elected officials ask questions and vote on whether a project should go forward. That's the impact. If you agree with us and grant our appeal, the public will have a role. If you do not agree with us, the public is iced out, elected officials are iced out. So that's the bottom line through all this legalese that we are talking about.

There are three questions that you really have to resolve, but there is some interrelationship between the three. So I just want to, again, step back. The first question is whether this Board has jurisdiction. In other words, did the Director make a final decision. The second question is whether the County has the authority to zone Hawaiian Home Lands' land when it's not being used for homesteading purposes. And the third question is whether a timeshare resort for tourists is a homesteading purpose. So those are the three questions. Now, although they involve some complex legal doctrines and although they appear separate, there is -, it's hard to talk about one without the other. So for example, you just heard from Ms. Self that the Memorandum of Agreement provides that there is no authority for the Planning Director to make any decision. She is making the assumption that the Memorandum of Agreement is in fact the legal authority, and that it trumps the Hawaii County Charter. There is nothing any government officials can do in this County that can trump the County Charter, unless there is some sort of a State Constitutional provision or something that ties our hands. But, in effect, she is asking you to answer the second question in order to answer the first question. In other words, she is saying because the County has no authority to zone Hawaiian Home lands, the County had the authority to enter into a Memorandum of Agreement, and therefore the Planning Director had to do what he had to do, therefore he didn't make a decision – which is sort of convoluted. And from a very basic and simple perspective, if you look at the letter that Planning Director Yuen wrote, it is a decision. It is a decision. He concurs with DHHL's zoning, and agrees to revise the zoning maps; that's a decision. That's easy. That's easy for you to see that he's made a decision. It's a final decision. And he communicated this decision to the Hawaii County Council; that's in the record. So the jurisdictional issue is probably the easiest issue for you to look at because you can look at his letter and see, yeah, he made a decision. And so that's -, you should look at that, read the letter and see, yeah, he made a decision.

Then the next issues, which are more complicated for all of us to talk about and understand, we can start to address them. And we can, you know, talk about the cases and a lot of the legal terminology. But at the most basic level is he made a decision. That's a first decision you need to make is read his -, look at his letter and agree, yeah, it is of the nature of a decision. And if you do that, then you give Kaliko Chun and Dickey Nelson the ability to present their substantive arguments as to why essentially the County does have the authority to zone both Hawaiian Home Lands and State owned land, and therefore everyone on this island has a right to participate in a decision that would put just over 2,000 vacation units, actually 2,500 vacation units and a marina just south of Kaloko-Honokohau National

Historical Park. And if you want the public to have any say in that, the only way for that to happen is for us to succeed in this appeal. Thank you.

KANG: Mr. Chairman, if I may be heard. The Department of Hawaiian Home Lands joined in the County's motion to dismiss. And if I can just briefly add as well to the County's argument. The argument that the Planning Director made a final decision in this case that's asserted by the intervenors (sic) is really a false argument. The Memorandum of Agreement does not provide any discretion to the Planning Director; it does not allow the Planning Director to change the decision of the Department of Hawaiian Home Lands. The only prerogative under the Memorandum of Agreement that was entered between Mayor Kim and the Department of Hawaiian Home Lands is for the Planning Director to concur with the Department of Hawaiian Home Lands' designation of the zoning. The argument that the Planning Director made a decision because he concurred is not -, it cannot be correct under the Memorandum of Agreement because that means that the intervenors (sic) are advocating that the Planning Director could basically ignore the terms of a contract between Mayor Kim and the Department of Hawaiian Home Lands. That is not a decision. That is not a decision that the Planning Director can make. So that is a false argument on the intervenors' (sic) part. Essentially, the intervenors (sic) are attempting to draw the Board of Appeals into interpreting the Memorandum of Agreement, to draw the Board of Appeals then into getting into all of these other issues with respect to the Department of Hawaiian Home Lands and the County and the zoning. And as the County points out, that is not within the jurisdiction of the Board of Appeals, and there are perhaps other forums to address those issues. But it is not before this body respectfully.

Again, given the clear language of the Memorandum of Agreement, the Planning Director does not have any discretion to change the designation by the Department of Hawaiian Home Lands. Thank you.

GIMPEL: Any rejoinder? Rebuttal? Okay. Any questions from the Board of any of the -? Mr. Drury.

DRURY: I have a question for Mr. Frankel -.

GIMPEL: Use the microphone.

DRURY: I'm sorry. Having to do with the word "concur" in the Director's memo. I had nothing to do yesterday afternoon; so I looked it up in a dictionary. And the dictionary gives three definitions of the word "concur:" One is to accord in opinion to agree, the second is to cooperate or to work together, and the third definition is to coincide or occur simultaneously. Okay, those are the three main dictionary definitions. I don't hear anything about decisions in any of that.

FRANKEL: I think the first definition is certainly a decision. It is -. Listen, if I say to you, "Do you want to go to lunch over there," and you say, "Sure," you made a decision; you made a decision that we are going to go to lunch over there. If I say, "You know what? I'd like to eat lunch over there," and you say, "I concur," you are saying, yeah, you agree with that decision, you are making the decision, let's go over there and have lunch. It is a decision.

DRURY: It seems like what's different is that in the example you've brought up, you have the choice to go to this restaurant or that restaurant. The example that occurred to me more was the Director stopping at a red light. You can make the decision not to stop at a red light and go through it; but the red light is a set of procedures that we all have to make sure we don't bang into each other. And it seemed like that was a closer analogy to this situation – just a minute – that you have a Memorandum of Agreement, which is an established procedure as far as we can tell, and the Director was stopping at the red light. How is that not a better analogy?

FRANKEL: Okay, let's use your analogy. When I decide to stop at a red light, that is a decision. I think it's important to recognize the Planning Director makes decisions everyday, probably hundreds of times a day, regarding various projects. He is always governed by the County Charter, the Zoning Code, what have you. So simply because he uses the framework within which, he makes decisions is governed by a legal framework does not take away the fact that it's a decision. In other words, if I decide to run a red light, if I make a conscious decision to do that, that's a decision. If I decide to stop at a red light, that is also a decision. It would be foolish for me to run a red light, but it is still a decision. It is smart of me to stop at a red light for safety reasons but also from legal reasons; but it's a decision. When he said he concurred, he made a decision. Did he have a choice? Yes. He could have written a letter that said, Micah Kane, we don't concur with your prerogative, we don't agree with the interpretation of the Memorandum of Agreement, we believe this Memorandum of Agreement is without legal authority, we disagree that the Memorandum of Agreement lets you do this in this way. There's all kinds of things he could have done, but he chose this response. Writing a letter is an act; it is a decision -.

DRURY: Okay, okay, I get your basic drift. But that means that in your idea of decision it means that to make the decision to -, in order for that to be a decision he would have to decide to break the law or break the contract.

FRANKEL: No.

DRURY: It sounds like it.

FRANKEL: No, because if you decide – I'm giving you the flip side – but my decision to stop at a red light, your example, is a decision. His decision to concur is a decision just from a very basic -.

DRURY: All right. Then the final thing, then I'll be quiet. Is this idea of decision, decision to implement a standing procedure, is that a decision as envisioned in the County Charter of 2000 when they defined the rules for the Board of Appeals?

FRANKEL: Actually, the Board rules, I believe, were decided well before 2000.

DRURY: No, but the revisions were.

FRANKEL: Okay. Can you repeat the question?

DRURY: Yes. All right. In your vision of what a decision is, you defined implementing normal procedures as essentially making a decision because you can decide not to implement normal procedures or contracts; you can decide to run a red light. Then my following question – and is my last question – is, is this the idea of decision that was envisioned in the County Charter when it set the parameters for the kinds of jurisdiction that the Board is allowed?

FRANKEL: I believe so. I believe so. And if you wanted to -, us to go back and look at the legislative history and stuff like that, I suppose we could do that. But to take a big step backwards, the County Charter itself does not authorize this kind of memorandum of agreement between the Mayor and Hawaiian Home Lands; and it's the County Charter that governs everybody's conduct. So to suggest somehow that, you know, the assumption and one of the questions way back was that the Planning Director's actions are governed by the Memorandum of Agreement and this is a standard operating procedure; in fact, that is not the case. His actions are governed by the Charter and by the Code. And whenever an applicant comes to the County with a request to change the zoning of a parcel of land, the Planning Director is acting within the confines of what the Charter provides and what the Zoning Code provides -.

DRURY: You're going to make those arguments later. But it sounds like you are agreeing with Ms. Self in a sense that for us to decide that the Director made a decision, we must decide that the Memorandum of Agreement was invalid in some way.

FRANKEL: You know, obviously, I don't -, it's not a question of the Memorandum of Agreement being invalid; it's a question of the Memorandum of Agreement having no force and effect of law that trumps the County Charter and Code. There is a subtle difference, and I think it's important. I mean, you know, the Mayor can enter into a memorandum of agreement; it's the question of whether that trumps the provisions of the Charter. So that's one thing. But, no, I don't think you need to -, I think Ms. Self has, you know, Ms. Self has made that argument. And I'm happy to argue over the validity of it, if that's what you want. But if you want to assume that it's valid, what I am saying is even, even if you assume the Memorandum of Agreement is valid, the Planning Director's action is still a decision. So for example, if I come to you with a subdivision, okay, or come to the Planning Director with a subdivision application, and the Planning Director approves the application, and some third party comes in and says I would like to appeal the Planning Director's decision, if the Planning Director's response is, well, I granted the subdivision application because it complied with the requirements of the Code and I'm obligated to approve it, well, simply because he feels he's obligated to approve it doesn't divest you as a Board from hearing the appeal. Or take the previous case, somebody has applied for a variance from the water, you know, the water rule. The Planning Director has denied their variance. And he has a good reason, too, because that's what the law says; they didn't meet the standards. Well, if I appeal, and Ms. Self says, oh, no, you can't appeal this because that's not really a decision because the Planning Director had to deny it because it didn't meet any of the criteria, well, there's no meaningful distinction between that case and this case. Simply because you may feel or Ms. Self may feel that he had no choice but to concur, that doesn't mean it's not a decision.

DRURY: Okay, except that a water variance is defined as a discretionary operation, and this, as far as we can tell, is not discretionary. I will be quiet and give to the rest of the Board.

GIMPEL: Are there any other questions from the Board? Anybody else? I have a couple. What has been brought, I think, into contention is the authority of the County to enter into this Memorandum of Agreement. But that is not within this Board's jurisdiction. So we have to presume, I think, that the Memorandum of Agreement was authorized and was fully within the law. If not, the challenge to it is not before this Board; it should be in to court. Assuming, therefore, that the Memorandum of Agreement for the purposes of this hearing is valid – it was validly entered into within the authority of the County and the DHHL – its term said that “the following general principles have guided the development of this MOA:” – and the first one is the key – “The Hawaiian Homes Commission is responsible for determining land use on Hawaiian home lands. The County may not use its land use and zoning powers to prevent the Hawaiian Homes Commission from controlling the use of Hawaiian home lands;” to me, that means that the Planning Director has no say in the zoning, no say in it. So therefore, his act, I think, was a ministerial act, not a decision. It merely says, okay, Hawaiian Home Lands, you've determined that this is going to be zoned this way, I'll change the maps. Had he said, “I won't change the maps,” then he could have been sued, not in this court (sic), but for violating the Memorandum of Agreement, I think. And then Hawaiian Home Lands would have a case against the Planning Director. So my question I guess is, is a ministerial act really a final decision? And I'd like to hear opinions on that.

FRANKEL: Yeah, clearly a ministerial act is a final decision. Whether a decision is discretionary or ministerial has actually no significance to the question of whether it is a final decision or not. So, for example, I think there is universal agreement that the receipt of a building permit is a ministerial act. Now, obviously that's not a decision that the Planning Director makes; but that is a decision that can be -, that is a final decision. I'm not sure if the Swire case is directly applicable. But there is no question that -, if the Charter was to confine the authority of this Board of Appeals to final discretionary decisions, that's what the Charter would have said; the Board of Appeals shall hear appeals of final discretionary decisions by the Planning Director. It does not use -.

GIMPEL: In effect, our jurisdiction is to hear final decisions, and judge them on the basis of whether they violate the law or arbitrary or capricious, so forth. So in effect, that's what our authority is. Now, his determination to change the zoning map in accordance to what somebody else decided isn't a decision in my view. He's just said, it's like a clerk, okay, this is what the Mayor and you agreed to, and this is what you are saying it is, I'll fix it. That's all.

KANG: Mr. Chairman, if I may. You know, this is a ministerial decision in one sense, and another sense it's not. It's not a ministerial decision in a sense that for typical ministerial decisions, for example building permits, the official is going to go through a checklist, you know, does the building meet certain criteria, is it safe, etc. etc.; there is a checklist to go through. In this instance, there is no checklist. The Department of Hawaiian Home Lands makes a decision on the zoning, and the Planning Director does not

go through a checklist to determine whether that decision is correct or, you know, what criteria is there; he must concur under the Memorandum of Agreement. Thank you.

FRANKEL: I'd like to point out two things. If you feel that this Board's authority is only to render decisions on discretionary approvals, then I'd like you to ask Mr. Yuen whether he believes subdivision approvals are a discretionary approval or not, because you hear appeals of subdivision approvals. I've been before this Board – I think before all of you folks were on this Board – on two appeals, two or three appeals, and I know that Mr. Yuen has taken the position that subdivision approvals are not necessarily discretionary. His -, well, you can ask him what his view of that is. But I think it would be -, it would put you in a contradiction, if that was your view.

The other thing I want to emphasize is we have not questioned, and I think it's been mischaracterized, we have not argued – and this is an important distinction, subtle – we have not argued the Memorandum of Agreement is invalid. What we have argued is the Memorandum of Agreement doesn't trump the County Charter. And so what a -, you've got to make a decision; are you going to comply with the requirements of the Charter or an Agreement. And in this County, the Charter rules. There's no way the Mayor -, I mean, I don't -, think of the unilateral way the executive branch is empowered to act. As a mayor? You're telling me then that a mayor can enter a memorandum of agreement with anybody, anybody. Come up with a set of conditions and that could override any -. It's not approved or ratified by the County Council. It's not ratified by the Council; it's never gone to the Council. So you're telling me that this kind of agreement trumps the Zoning Code? That trumps the County Charter? There's no way. Yeah, you can come into an agreement – an agreement which has no enforcement provisions, an agreement which, you know, if you violate, there is no consequence. And you're telling me that you're going to say that this Agreement trumps the Charter that was voted on by the voters, that it trumps the provisions of the Zoning Code that were passed by the Council and approved by the Mayor? I mean, that's -, I'm sorry, that's just not a valid view of the way the law works. And I want to encourage you to go into executive session and talk to your Corp. Counsel about that. But you -, that's just not right.

GIMPEL: If you are arguing that the Memorandum of Agreement can't trump the County Charter, I think you are in the wrong forum because then you are arguing against the validity of the Memorandum of Agreement.

FRANKEL: No. No, I -.

DRURY: Please explain again. I don't -. I'm sorry. You've tried to explain it before. I don't understand this contradiction between you saying the Memorandum of Agreement is valid and yet it doesn't trump the County Charter. We both read paragraph by paragraph what the MOA says. And if the MOA is actually trumped by the County Charter, then it cannot be carried out the way the language is; then it would be an invalid contract because it could not be acted upon.

FRANKEL: Well, okay, there are many different provisions in this Agreement, okay. You know, the DHHL and the County will work cooperatively together, you know, all that stuff is -.

DRURY: C and D is very clear, it seems to me.

FRANKEL: Well, you've got provision D that's on the second page – when you say C and D, there is “Guiding Principles” and there is “Relating to Planning and Land Use” – you've got provision D on the second page, which says, “All normal land use controls will be applied by Hawaii County to DHHL property according ....” You know -.

GIMPEL: “To the zoning district ....”

FRANKEL: Right, “selected by DHHL.” But to apply the normal land use controls, you've got to comply with the Charter. And you know, I understand -, do we think that the -, do I think the Memorandum of Agreement has no legal validity? Probably. Do I need you to make that decision? No. I'm not asking you to do that. What I am asking you to do is consider whether, I mean, the initial question is whether the Planning Director made a decision. It is not critical for you to decide whether the MOA has legal authority or not to recognize it's a decision. If I, I mean in the analogy, if I decide to stop at a traffic light, the law requires me to, it's still a decision. And if the law requires the Planning Director to deny a variance request because it doesn't meet the criteria, it's still a decision. I just -, it is -, I just don't think it's meaningful to argue it's not a decision. Once we got passed that hurdle, we can argue about, you know, all the other intricacies.

GIMPEL: Well, I think for the purpose of this determination we have to assume that the Memorandum of Agreement is a legal document. And if it is, then the Planning Director's determination to change the zoning map according to what DHHL says, he has no choice. That's not a decision. That's merely a you-told-me-to-do-this-I'm-going-to-do-this; because that's what this agreement, which we have to assume is valid, commands him to do.

FRANKEL: What about what the County Charter commands him to do?

GIMPEL: No, the County Charter merely says you're the Planning Director, make zoning decisions. But we've taken this zoning decision away from him because this document is a legal document; we are assuming that. If we don't assume that, then we are in the wrong court (sic). So we have to assume that this is a legal document, and that any act that he does under this is commanded by this document. It's not a final decision; it's a ministerial -, putting a piece of -, writing on a map. That's all. If your contest is to whether that should be a change of zone, then you have to contest the Memorandum of Agreement's validity. And this is not the court (sic) to do that in. That's my feeling. That's all.

I fully appreciate the concern you have over the need for the public to have a voice in this particular property, the rezoning of it and the potential use of it. I'm very sympathetic to that, believe me. But I don't think this is the forum to contest it. Are there any other questions or concerns by the Board? Could I have a motion with respect to the motion to dismiss filed by the Director? You move? To what?

HENDRICKS: Dismiss.

GIMPEL: Move to -, use the microphone, would you, please.

HENDRICKS: Move to uphold the decision of the Planning Director.

GIMPEL: No, it would be to -.

HENDRICKS: I'm sorry, I'm sorry.

GIMPEL: If you are going to move to accept the Planning Director's motion to dismiss, uphold the motion to dismiss -.

HENDRICKS: I was doing by our usual cases.

GIMPEL: Okay, is that what you do?

HENDRICKS: Correct.

GIMPEL: Do I have a second?

TAVARES: Second.

DRURY: Could someone restate it clearly?

GIMPEL: I believe that the motion was to uphold the Planning Director's motion to dismiss the appeal. And it's been seconded by -.

TAVARES: Kim. Second.

GIMPEL: Okay. Is there any discussion? I think we've had enough. Would you call the roll, please.

TAVARES: I just have one -.

GIMPEL: Use the microphone.

TAVARES: Okay. The discussion is just mostly back to the letter saying, okay, we'll rezone it or however it went. Did you even have to write that letter? I mean, with the Agreement between the County and DHHL, DHHL tells the County this is what we are going to do with our land. The letter basically just says, okay, we'll do it. Is that what it, is that how it works?

SELF: Yes. The Director just acknowledged that they had the authority under the MOA to designate the zoning for that property. And -.

TAVARES: Yeah, so it was an acknowledgment of their -.

SELF: It was an acknowledgment -.

TAVARES: Yeah.

SELF: In that he would change the zoning maps accordingly. Because once they designate the zoning, obviously you have to change the zoning maps so that everything -, so that it's there.

TAVARES: Right. So it was a courtesy to respond to the letter.

SELF: Definitely. Yes.

TAVARES: Okay.

DRURY: And in fact, the actual wording of the concurrence was – if I remember right – I think the concurrence was with the fact that DHHL was authorized to make the decision about the district; the concurrence was not about the type of district that they chose, if I understand it right.

SELF: Correct. And I'd like to spell out that, you know, if Mr. Yuen chooses to stop at a stoplight or not to stop at a stoplight, that's not a decision that comes before this Board; he makes a lot of administrative decisions everyday, but it's not the type of decisions that would be appealable to this Board. I just wanted to clarify that. Thank you.

GIMPEL: Any other discussion? Mr. Hendricks.

HENDRICKS: Could I ask Ms. Self a question? As I understand it, the 2002 MOA was the beginning of a new era in cooperation between the County of Hawaii and DHHL in general -.

SELF: That's correct.

HENDRICKS: So that it was a positive move agreed upon by both parties and signed by both parties.

SELF: Correct.

HENDRICKS: So that hasn't been mentioned today. The MOA was not specific to this case, but was a general agreement. Correct?

SELF: I'm not sure -. (Director Yuen spoke to Ms. Self.) Yes.

HENDRICKS: Thank you. That's what I thought, but I wasn't sure -.

SELF: Correct.

HENDRICKS: Just for clarification.

GIMPEL: Thank you.

TAVARES: I guess -, just one more thing.

GIMPEL: You have one more? Go ahead.

TAVARES: I just wanted to say -, so the County Charter -, the MOA can't trump the County Charter, but the Hawaiian Home Lands, the State Law can trump the County anytime it wants to; and I think that's what we see going on here.

GIMPEL: Thank you. I think it's time. Could you call the roll, please.

KAWAHA: Sure. Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Maedo?

MAEDO: Yes.

KAWAHA: Ms. Hart?

HART: Aye.

KAWAHA: And Chair Gimpel?

GIMPEL: Aye.

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

GIMPEL: Thank you. Ms. Self, would you draw up the final decision accepting the motion for dismiss.

SELF: Yes, I will.

GIMPEL: Thank you.

The discussion ended at 10:49 a.m.

Respectfully submitted,

Noriko Sauer, West Hawai'i Secretary