BOARD OF APPEALS
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
JUNE 8, 2007

A regularly advertised hearing on the petition filed by **JALENE RAMONA HITZEMAN, TRUSTEE OF THE JALENE RAMONA HITZEMAN REVOCABLE LIVING TRUST (BOA 06-000036)** was called to order at 3:13 p.m. in the County of Hawaii, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i, with Chairman Valta A. Cook presiding.

PRESENT: Valta A. Cook
David Drury
Diane Gentry
Kim Tavares

ABSENT & EXCUSED: Peter Hendricks
Joel Gimpel
Kelly Ann Soo

Bill Brilhante, Counsel to the Board
Alice Kawaha, Staff to the Board

Andrew Son representing Appellants
Amy Self representing Planning Director
Planning Director, Appellee

And 7 people from the public in attendance

PETITIONER: JALENE RAMONA HITZEMAN, TRUSTEE OF THE JALENE RAMONA HITZEMAN REVOCABLE LIVING TRUST (BOA 06-000036) - Appeal of Decision by the Planning Director dated November 9, 2006, relating to determination of preexisting lots of record. The subject property is located approximately 3 miles west of Mamalahoa Highway, Kaupakuea Homesteads, South Hilo, Hawai'i, Tax Map Key: (3) 2-8-2:12.

COOK: Okay, we're ready for the Board of Appeals No. 06-000036. Would the parties starting with the appellant introduce themselves, the attorneys and if they have the client with them introduce the client. And then, let's see, we have the Planning Department's attorney, Ms. Self, and also her boss. Okay, would you start off, Mr. Son.

SON: Morning, Andrew Son on behalf of Jalene Hitzeman; and to my right I have Ms. Jalene Hitzeman.

SELF: Good morning, Amy Self, Deputy Corporation Counsel for the County of Hawaii; and to my right is the Planning Director Christopher Yuen.

COOK: Okay, well, we have received a lot of paper on this case and it has primarily been legal arguments which we have requested. In fact, I requested that the last time this came before the Board. And as indicated in some of the recent filings here, I did indicate and both parties had agreed that at the close of that last hearing that we had completed the evidentiary part of the hearing. However, it was indicated that if anyone wanted to bring in any

more evidence then they should file a proper motion. I probably didn't state it in exact those words but I believe that was the way it was. We have, in fact, now received a motion by the appellant to bring in additional evidence. I've had my legal counsel here, by the way we have Mr. Bill Brilhante, the first time he has appeared as counsel for the Planning Board of Appeals and we welcome him; and I did request of him to look into the rule for filing the motion as well as whether I could rule on that motion, or whether the Board could rule on it. And if you would just address the rule first and let us know if this is proper under the rule; and then I'll discuss the other matter.

BRILHANTE: Thank you very much, Mr. Chairman. That's correct, I did receive a call to look into this specific matter regarding whether new evidence could be presented to the Commission for their consideration in this matter. And specifically under the rules of practice and procedure for the Board of Appeals, Section 3-1 entitled "Presiding Officer," specifically section (b) where it indicates Powers, "The presiding officer controls the course of hearings, administers oaths, receives and rules on questions of evidence, holds appropriate conferences before or during hearings, rules upon all objections or motions …" such and so forth. My interpretation of this rule is that Mr. Cook does have the authority to make a ruling on the admission of this newly submitted evidence.

COOK: Okay, I would state that I have read the motion, I've also read Ms. Self's pretty strong opposition to the motion, and I've given it some consideration. And I would point out that the Board generally is rather, what's the word I want to use, rather loose on admitting evidence. And we generally, particularly, if it's something we feel is pertinent, we generally allow that, and then it depends on the weight that we give it. In this particular case, it seems to me that it is newly discovered evidence and of course it seems, the Planning Department, of course, had notice of this particular item because it's part of their records and they've had sufficient time, I think, to state their objections. And I think I'm going to rule that we're going to allow that evidence to come in; however, I would state that if the Planning Director wishes to present any evidence in opposition to that or any comments concerning it in the way of testimony, I would certainly take that evidence. In other words it's conditioned on the Planning Director and his attorney having any evidence they want to put in in opposition. And I guess I would even entertain a motion to continue the hearing if that was felt necessary, although I believe that there has been sufficient time. Ms. Self, what's your position on this?

SELF: We do wish to admit additional evidence to rebut the evidence that he has included because it will give the Board a chance to see that there are two ways of looking at this. I have copies of the document that I would like to have admitted.

COOK: Can you have that disseminated to the Board here -.

SELF: Yes.

Cook: And we'll take a couple of minutes in place. Have you given a copy to the appellant in this case?

SELF: I'm going to right now.

COOK: Okay. While she's (Ms. Kawaha) disseminating it, can you just generally explain what that document is?

SELF: This is a situation, what you received from the appellant was a situation where the Director made a determination that there were preexisting lots based on a flume subdividing the property; and we contend that that was a mistake by the Planning Director. He

never should have made that determination. It goes against Hawaii law. So this document that is now being distributed is an example of a case, same kind of case, where he made the determination that a flume and a stream, State-owned stream, did not subdivide the property. So the other decision he made, it was a wrong decision. This is a right decision because these are easements. It's just like in the case that's before you right now. So I just wanted to show you that, you know -.

COOK: So this document I notice is dated, well, at least the top document, is dated September 21st and the decision that I just admitted in was in 2005. So this was prior to, so he made this decision, then he prior to that had made a contra decision, and then now he's taking another position. Okay. I think I'll allow this in just to show the positions that the Planning Director has made. Before I do that, do you have any statement, Mr. Son?

SON: Well, we don't have any direct objection to the admission of the evidence. But, I mean, we'd like to get some clarification on whether this determination was that the ditch actually was, I mean, it seems to me from the first reading that this "PELOR" determination states, which is what's stated in the ordinance, that a flume or ditch right-of-way or a road lot doesn't constitute in itself a buildable lot; but it doesn't speak directly to whether that ditch right-of-way or a road lot would bisect a lot creating additional "PELOR" or an additional lot of record. And I think that's really what the distinction is between our deed or Ms. Hitzeman's deed and the metes and bounds included in that deed, is that, you know, we agree with the Ordinance 23-120 which states that, you know, if there was a road lot that divided a lot that the road lot itself would not be in itself a buildable lot but would still bisect the lot. And, really, that's our contention, if there is a right-of-way that was to travel through a lot area it in itself could not be counted as a buildable lot but would still bisect the lot creating two additional lots. You know, of course, this is just a cursory reading. I haven't, you know, had an opportunity to sort of look it through specifically; but it seems to me that this 2001 determination is compliant with, you know, the ordinance; but it's sort of different from the contentions that we're making.

COOK: All right. I think what we'll do here is I'm going to take about a 10-minute break and give the Board a chance to, I am going to accept this additional exhibit from the Planning Director. But I am going to take a break, I'll make a 15-minute break and give the Board a chance to review this. Then we'll come back on the record and decide whether we're going to take any testimony or questions relating to these two documents before we get into making our decision on this or having further argument. Okay, let's take a short break in place.

<u>RECESSED</u> The Chair called a short recess at 10:28 a.m.

<u>RECONVENED</u> The meeting reconvened at 10:47 a.m.

COOK: Okay, if the participants in Board of Appeals 06-000036 just sort of hang loose for a minute. I'm going to move on and take some of the other matters on the calendar that I think we can expeditiously complete and help some of these people that are standing around here so they don't have to wait all day for their turn.

(The Chair at this time stated that the hearings on the following petitions were continued: Patrick John Lawrence, Jr. (BOA 06-000035) and Carnor J. Sumida (BOA 07-000039). The Board then took up the petition of Jason K. Deluz & Melita Deluz (BOA 070-00041).

At 10:57 a.m., the Board again took up the subject application.

COOK: Okay. Now we come back to the Board of Appeals Hitzeman matter. Where we were is that the County had asked to introduce a document in response to our allowing a document from Mr. Son's client to be introduced. First of all, I want to do a little

housekeeping here on the Son's, I mean the Hitzeman's additional exhibit. Now what would be the next exhibit in order for the Hitzeman's?

KAWAHA: The next exhibit is Exhibit F.

COOK: Okay, well, that's Exhibit F then, it would be allowed into evidence.

KAWAHA: And, also, the Planning Director's submittal, Exhibit -.

COOK: Yes.

KAWAHA: That would be Exhibit 1.

COOK: Okay, and that's -.

KAWAHA: Planning Department Exhibit 1.

COOK: Okay. All right. So I think our record is clean now. Okay, so we're ready, I guess. Does either party wish to add any additional comments or testimony relating to either of these documents? Ms. Self, do you have a position on whether you want to introduce some testimony or what's your position?

SELF: Yes. I'll ask Mr. Yuen to answer some questions.

COOK: I'm sorry, you want to what?

SELF: I'll ask Mr. Yuen some questions regarding the two new exhibits.

COOK: Mr. Son, you want to say something?

SON: That's fine. We have no objection to it.

COOK: Okay. Mr. Yuen, would you raise your hand, please. Do you swear to tell the truth, the whole truth and nothing the truth?

YUEN: Yes, I do.

COOK: Okay, proceed, Ms. Self.

SELF: Mr. Yuen, could you please describe how these decisions are -.

(Microphones adjusted)

COOK: Okay, are we ready to go now?

SELF: Yes, we're ready now.

COOK: All right. Go ahead, Ms. Self. Oh, before she starts, I do want to make it clear that because of my ruling today on this particular evidence, I am not making any statement as to the impact that evidence has on the outcome. It's just before the Board. Okay, go ahead, Ms. Self.

SELF: Okay, Mr. Yuen, could you explain to the Board what you think happened in the decision that was made regarding the determination of preexisting lots in the January 12, 2005 decision.

YUEN: Yes. Well, it's a little embarrassing but we did make a mistake on this; and I did sign the letter. I'm pretty sure that all I did was skim this letter. You know, I sign 20 or 30 things a day as the Director. These matters that, these preexisting lot determinations are assigned to staff in the ministerial division. There's one person that normally does them. My role in this, you know, I'm responsible for making sure that the basic principles of how you do this are understood by people. And I knew that we had gone through this issue of flumes before; and that's reflected in the 2001 letter that you have that flumes do not subdivide the property. The letter that was done in 2005 was actually done by Rodney Nakano who was working, had previously been the supervisor, the Planning Program Manager in the Ministerial Section. He was working on a contractual basis on a 90-day contract for the Department. He was a very good employee and normally in my experience very strict and reliable on these preexisting lot determinations. So that's the, my understanding in speaking with counsel who spoke with Mr. Nakano after this came up is that he did understand that the flume lines were not supposed to subdivide the property and does not have an explanation for what happened here. My only explanation or excuse for myself in signing this is that I must have just skimmed through the letter and not realized what was being said in terms of finding four lots in this case where there really should have been three in the Ka‘u situation. There were three grants, they had one tax map key, they proved three grants existed on the property. So there were three valid lots and then there was a fourth with the flume line.

SELF: Okay, thank you. That's all.

COOK: Mr. Son, you have a question?

SON: Just one question. So on the 2005 determination are the fee owners of that lot able to rely on that determination in whatever subsequent action it might take regarding development?

YUEN: Given that this was a letter that was issued to them specifically, I would not, we would not go and reverse that. If it were something that we found, for example, a week after sending the letter out where there would not have been any reliance or any specific decisions made on the basis of it, we might, you know, then send a letter out reversing it.

SON: So as to those fee owners, that determination is valid although it might be a mistake?

YUEN: That's my position, yes; and there are situations like that.

SON: No further questions.

SELF: Can I have a follow-up question, please?

COOK: Yes, go ahead.

SELF: Mr. Yuen, could you describe the process that you went through in making the determination for the case that's before us right now, the letter that was sent in this case where the flume and the ditch -?

YUEN: Let me see for a moment, because I'm not sure if I was personally involved in pointing the situation out to the staff.

COOK: Can you be a little bit more specific in your question? That's pretty broad.

SELF: Were you ever at any time or anyone in the Department asked by the appellant whether or not the flume or the ditch subdivided the property?

YUEN: With respect to the Hitzeman property, I can see that the November 9, 2006 letter was written by Mr. Cheplic who at that time was normally doing these; and I don't remember if I had an input on this before the letter came to my desk. Normally what happens in the Planning Department, there's the incoming mail; and it has subdivision applications, variance applications, preexisting lots, letters from the public, rezoning applications; and I'll skim through that, just bup, bup, bup, what's coming in. Then there's a process of it being assigned to staff and there are a couple of people that worked on that and we know where things go, all right; and so this kind of work, preexisting lot, would get assigned to, at that time Mr. Cheplic, and then he would work on it. And, you know, when I skim through the incoming or at some point I might have direct input to the staff member. You know, something might come in and I'd put a posted note on it and I'll say "x" on, "oh, this zoning we already found out that the rezoning ordinance has lapsed, watch out for this." So I will sometimes have input before the letter comes up for my signature from the staff member. But most times I don't. The typical probably 90 percent of the time the staff member is assigned the work and they do it; and it comes up to me and I sign it. Or I look at it, I see something wrong, I don't sign it. And this one, you know, at this point I don't remember if I talked to Mr. Cheplic on it or not.

SELF: But it is, the policy of the Planning Department is that these types of things, when it reserves a flume right-of-way or a ditch right-of-way that that does not subdivide the property, is that correct?

YUEN: Right. That's something that I know we had discussed. I know I discussed it specifically with Mr. Cheplic at one point; and that's reflected in the decision we made in that 2001 letter, as an example.

SELF: Is there anything further that you'd like to state for the record?

YUEN: Well, there was a question by Mr. Son about that letter, the 2001 letter, because it's saying that the flume is not a lot; and it's true our letter could be a little better worded, as far as rejecting the flume to subdivide the property. But if you go on to what the application was for that, the application specifically requested to find that the flume line subdivided the property to two. They weren't trying to use the flume lot as a lot in the subdivision. They were just trying to say that the existence of the flume subdivided the property, same as the issue that we have on this property that we're looking at; and that was clearly rejected by that 2001 letter.

SELF: All right, thank you.

COOK: Mr. Son, you have any further questions? I'll give you one more chance here. We're going back and forth.

SON: So is it the stated policy of the Planning Department that a flume right-of-way does not bisect the lot but it only is an easement and it would not subdivide the property? That's the stated policy?

YUEN: Yes.

SON: No further questions.

COOK: Does any member of the Board have any questions here? Mr. Drury, you have a question?

DRURY: Yes, I have one. I'm not sure if it's new evidence or not so you stop me if it's an improper question. We have two cases before us. We have the 2001 case where the ditch or flume was considered to not constitute new lots and we have the 2005 case which you've described as a mistake. Is there any more track record? We have one yes and one no. Are there other cases that can show a consistent implementing of a policy versus not?

YUEN: I know that we did one fairly recently in the last couple of months that, where we rejected flumes as subdividing property.

DRURY: Okay, so just two to one is what we're working with.

YUEN: And I don't know that we, you know, I don't know how comprehensive a search we did for letters on this question. There's a lot of potential situations out there but it hasn't come up that often, I can tell you that. It's not something where -. There might be one or two more, I wouldn't be surprised if there were one or two more instances of requests. But I don't know that we've made a really truly comprehensive search for it. We did find this other instance in 2001 and I do know that we issued a letter within the last two months rejecting lots based on flume. In, fact, I'm not certain whether the time for appeal on that has passed. That was a very large subdivision. It covered, it was an area of several thousand acres and we rejected, there was a request, we found quite a few preexisting lots in that area but we did reject some of the claimed lots that were based on flumes and other issues that could come up. And as I say I'm not sure whether the time for appeal on that has even expired, but it was fairly recent.

SELF: I'd like to point something out in addition to what he has said. These agencies, these departments of the County, they're human beings like everybody here. They are not infallible. Mr. Yuen can make a mistake just like any of us. But when there's Hawaii case law that says this is what you go by, it has general rules for determining what is actually being conveyed in property, when you have that and the agency discovers that there has been a mistake, although it came up because of this appeal, you cannot expect just because they've made a mistake in the past, it doesn't mean that you can hold them to that mistake. You have to follow Hawaii law; and once you've discovered that mistake, the Planning Director has an obligation to change or to comply with the Hawaii law; and that's the situation we have here. You know, it's unfortunate that a mistake was made on another property but that doesn't affect this property. It's not like you go by track record of the Planning Department when there's Hawaii case law telling you how to interpret these things.

DRURY: Well, the reason I bring it up is in several of the things put before us it's mentioned as a Planning Department policy. And I had made notes on my documents that, well, is this Planning Department policy or is this Hawaii law? And you seem to be saying here that it's Hawaii law. But it's -.

SELF: And the policy is based on the Hawaii law.

DRURY: Okay, although we do have some decisions from the previous Planning Department under the previous administration that are also not in line with the present policy. So just as a naïve person reading these things, I'm looking at policies that seems to change; and yet you're talking about Hawaii Law. That didn't change during the last few years, did it?

SELF: No.

DRURY: Okay.

SELF: And you can't hold this administration responsible for what the previous administration did. Once you've discovered it, it needs to be corrected. Because what could happen is you could get a whole lot of these coming in after this. This could set a precedent,

unless we go to Circuit Court, of course, and get it straightened out. But once you've discovered the mistake, even if it was done by a prior administration, doesn't mean it was correct.

COOK: Well, I think at this point I want to, you guys are getting into the argument, which we'll give plenty of time for that. But do we have any more questions of Mr. Yuen or is there any more evidence that needs to be presented before we get into the arguments?

SON: No, no additional questions for Mr. Yuen. But Ms. Hitzeman is requesting that could she at least make some kind of statement before we go into final arguments; and I would just like to make a request to the Board.

COOK: She's going to testify about some issue here?

SON: Right, right. I mean she had made some, I guess, preliminary inquiries with Department of Land and Natural Resources and -.

COOK: All right. We'll, I think we're getting pretty lenient here on the statements and what have you, so I'll go ahead and give her the opportunity. So your full name is?

HITZEMAN: My full name?

COOK: Well, whatever name you go by. You've got a big Hawaiian name?

HITZEMAN: Can you keep up? My full name is Jalene Kanani Eva Marie Ramona Bell Hitzeman (phonetic).

COOK: Okay, would you raise your hand please. Do you swear to tell the truth, the whole truth and nothing but the truth?

HITZEMAN: I do.

COOK: Okay, so I'm going to give you a little leeway here, but let's try to make this fairly short.

SELF: I'm sorry, excuse me, is he going to ask her questions? Is she a witness or -?

COOK: I just swore her in. She's a witness. I'm treating her as a witness. Yes, go ahead.

SON: Have you made any specific inquiries with the Department of Land and Natural Resources or the Planning Department directly regarding the status of lots on your property?

HITZEMAN: Yes. I inquired with the Planning Department. I went there a few times and looked over the plat maps and was just trying to do my homework on this piece of property. And I did work with a couple of clerks. One in particular looked at the plat map for the lot and did concur with what I was saying that the stream, the flume and ditch, excuse me, I'm nervous, the ditch and flume did intersect the lot. And he had actually given me the number of four. The last time we were here one of the gentleman on the panel had said, oh, well, you know, really if you had looked at it you could probably take into account the stream and so forth, which would have been something like six lots. And actually that was kind of looked at. But the gentleman at the Planning Department looked at it and he said no, it looks like it's four lots and also we'll talk about the fee interest in it, which makes a huge impact on, you know, really what we're saying

because that is actually, that's not owned in fee as you saw in the deed; but I'll step back on that. And then also Department of Land and Natural Resources -. It became apparent at the last hearing that, cause we thought it was just, you know, in the deed, it's general knowledge that I own this amount of land and I do not own the -. There's a gross and a net so I don't own the land that is reserved, that we're calling reserved. And so from the last meeting that led me to inquiring with the title company who said, no, indeed you do not own that land. So I asked them well, who does; and they said, well, it looks to us that the County of Hawaii owns the land. So I said, well, how do I know that; and they said, well, go down to the Department of Land and Natural Resources. So I did in Honolulu, which is where I live. And I sat with the clerk there who looked at my plans and my deed and so forth; and his, you know, unofficial determination sitting with me was that, you know, I'm sorry, the State of Hawaii owns the land, not the County of Hawaii, but the State of Hawaii would own the land. So there's actually a sign posted that says everything you need to get it in writing; and they're not even allowed to give you their name, which I completely understand. So they gave me the address here that I needed to send the request to. So I had Andrew's office submit a letter, I believe it was April 4th to the Department of Land and Natural Resources to give us some kind of determination on this. We haven't gotten any response yet. And also I did some investigation on-line.

COOK: We're getting a little bit afield here. I don't think I'm going to allow that kind of testimony.

HITZEMAN: Oh, sorry.

SON: If I could just ask one specific question.

COOK: Yes, Mr. Son.

SON: In your preliminary discussions with the clerk at the Department of Land and Natural Resources, did they have an opinion as to who owns the flume right-of-way and the ditch right-of-way?

HITZEMAN: No, because I did not ask him that question. It was before that was a discussion.

COOK: You had some questions, Ms. Self?

SELF: Yes, I do. Ms. Hitzeman, did you make these inquiries prior to purchasing your property?

HITZEMAN: Well, I came here several times, both before and after. So the time that I spoke with that particular clerk about the four lots, I don't know if it was before or after.

SELF: Okay. And so you didn't really, when you purchased the property you didn't base your decision on purchasing the property on whether or not you would have four lots?

HITZEMAN: Well, this is going to sound like an odd answer but I kind of did.

SELF: Excuse me, how do you kind of? Could you explain that please.

HITZEMAN: Okay, I purchased in the assumption that I would be able to do this. I have three children and it was very advantageous for me to be able to buy a lot, consolidate and resubdivide it for myself and my three children so that was, it made that lot more attractive than another lot.

SELF: But you can't say that that's the reason you bought the lot, was because you knew you could subdivide it without going through the subdivision process to get four lots, is that correct?

HITZEMAN: I see where you're going with this. You're looking for a fiduciary responsibility and you didn't provide me with any written statement saying that I could indeed do what I wanted to do prior to buying the lot; and no. I mean, you didn't provide me any written statement, no.

SELF: Okay. Thank you. And one last question, if your testimony is that you don't in fact own the property over which the flume and the ditch lies, how is that if you're now saying that there are four preexisting lots, how are, if you have four existing lots and you sell these lots off, how are these people who bought these lots supposed to access these lots without crossing over the flume and the ditch? Cause your prior testimony, well actually the argument that has been made by your counsel is that because you don't own the ditch and the flume that you can't utilize that, that you can't cross over it. But the way, if you look at the map, if the Board would look at the map that was provided with the land patent, there are three of those four lots you're saying that this is now subdivided into, the only way you could access these is to cross over that flume and that ditch. So now with an easement you're able to do that because you would actually own the property that's underneath the easements. So if you're telling us that the reason you have four pre-existing lots is because you cannot access this flume and this ditch, then how do you expect access, how are you supposed to get access to these three lots?

HITZEMAN: Here's a challenge, nobody can tell me exactly what I have and what I don't have and what I have rights to and what I don't have rights to; and that's very frustrating and very confusing. I went into it thinking that, sorry, I guess I should -. I went into it thinking that, not knowing the entire process of how you consolidate and resubdivide, not knowing the, I mean from our last meeting till now we've actually had to do more research to present, but I don't know what I can and cannot do. I've been relying on the Planning Department, I've been trying to rely on my title company, on the Department of Land and Natural Resources to provide me with this information. With information we do have, we feel very compelling that it follows what we're asking for. And it's my opinion that it was policy, it was the Planning Department's policy to be able, based on a preexisting lot condition, to consolidate and resubdivide. So I was looking to everyone else for answers, and I don't think you're able to give me the answer.

COOK: Okay. Yeah, I think actually you're getting into legal questions; and actually that's going to be part of your argument, I think. So I don't think this witness is competent to go that direction.

Mr. Son, do you have any other questions? Mr. Son, do you have any more?

SON: No additional questions for Ms. Hitzeman.

COOK: Okay. I hope that completes our testimony and our evidentiary part of this hearing. Does everybody agree with that?

SELF: Yes.

SON: Yes, Mr. Chairman.

COOK: All right, we're going to move forward now. Okay, I appreciate, and I think the rest of the Board does, the work that both counsels have done in the legal research on this issue. It seems to me in reviewing this that the major issue here in determining whether or not there are four lots here is whether or not that flume and the ditch are easements or whether or

not the State has retained title to the land over which those two, the flume and the ditch, run. It seems to me that's the central issue. Would you agree with that, Ms. Self?

SELF: Yes, I would agree with that.

COOK; So, in other words, if in fact they're easements, then there is not any subdivision here because easements don't create subdivisions, right, of the lots?

SELF: That's correct, that's correct.

COOK: But if in fact the State retained the title to those two then it would create four lots, is that correct? Let the record note that you're discussing this with Mr. Yuen. You don't want to admit to that?

SELF: No, no. For this particular situation, we would need to do more research to make sure that that would be applicable. But yes, that's what we are -.

COOK: It's sort of the argument that I think was made by you and I think -.

SELF: That is the argument, is that an easement does not subdivide the property -.

COOK: And that these are easements?

SELF: Yes. Because you can use the land, you just have to provide them access to their easement. You can't do anything that would interfere with the rights of the easement owner. But if, on the other hand, if like say for instance there's a road lot, there's a road that goes across the property, that would be a road lot and would subdivide the property into different lots. He wants to make a statement.

COOK: Wait, wait, you've got counsel here. I don't think we're going to go that far to allow the parties here. I'll tell you what I think we would do at this point, is we've got a lot of written arguments here, written statements. But what Id like to do is give each of you about a maximum of five minutes to capsulize your arguments; and then I want to open it for the Board to ask questions of you, and then we'll -. Well, I want to point out here that we have only four people here on the Board today. And I'm a little uneasy about, you know, this is a very important decision, as most of our decisions are. But I think here, you know, there is a lot of public policy that seems to be involved in this; and whoever looses this or wins, whoever looses it probably going to appeal it because there has not been, I don't think, a court case specifically in point on this issue. And so I do have three other members of the Board and would sort of like to have their input. However we are legally constituted here and we can make a decision on it. But after we have the arguments I'm going to see what the feelings of the two counsels are here about our making the decision or continuing and have the other members of the Board participate. Okay, Mr. Son, are you ready to make your capsulated arguments?

SON: Yes. And I'll try to be as brief as possible. Thank you very much, Chairman. I know that there have been a lot of discussion and evidence present -.

COOK: Wait now -.

SON: I'm sorry.

COOK: I'm sorry. Can you hold on just a minute. Okay. My counsel pointed out to me that the Board does have the authority to do the continuance based on a majority, that is

four votes; but I do want to get the input of the counsel at the close of the arguments here. Okay, Mr. Son, sorry to interrupt you. So go ahead.

SON: As I was saying, I know that there has been a lot of evidence and testimony even presently at this hearing regarding these lot determinations. You know, a lot determination was made by Chris in 2005, and then another one made in 1999 by the prior administration; and then our determination; and there was some sort of back and forth on how these flume lines or flume rights-of-way have been treated. But I think that really in essence as Chairman Cook had tried to address, really the essence of these determinations should be based upon the underlying conveyance documents. And those conveyance documents are the deed and actually more importantly the grant; and it should focus actually mainly on the grant because that was previously from the State of Hawaii to the subsequent grantee. And although, you know, the determination that we had submitted on behalf of Ms. Hitzeman and also the alternate determination submitted by the Planning Director does make reference to, you know, excepting and reserving language and also the flume right-of-way. You know, there is a clear distinction in the grant for Ms. Hitzeman's property. It's not only that it does have the excepting and reserving language but it also, you know, it does have a metes and bounds description, a specific description about the entire area of the lot, and also specifically identifies the 15-foot flume right-of-way and the 10-foot ditch right-of-way, and has the calculation as to the gross acreage of the entire lot and the net acreage that was actually conveyed to the grantee or the next person. And, you know, although Hawaii law in some sense is not clearly settled on the treatment of this excepting and reserving language as easements or fee interests, you know, it is settled as to what is actually conveyed in a conveyance document. You know, and really the overriding controlling factor is that the intent of the grantor as described on the face of the conveyance document, I mean, you can only look at the grant to determine what actually has been conveyed. And there is no ambiguity or contradiction in what has actually been conveyed in the grant and also the deed. The grant of the property as described with no contradiction is just in that area and that has specifically excluded, you know, the area that encompasses the ditch and the flume right-of-way and has retained that to the State of Hawaii. And really that's all I have.

And I know that, you know, we could try to dig through all these determinations to see, you know, what has been made, you know, what determinations have been made regarding the flume and whether it's, you know, that grants an additional lot or did not grant an additional lot. But since there is no specific sort of the law or ordinance, you know, giving guidance, I understand there might be some unstated or now sort of verbalized policy regarding how these flumes are treated, really it is up to the discretion of the Planning Director. And, you know, pursuant to the discretion if there are contradicting determinations then, I mean, we have to argue that, well, you know, who's to say that our determination was not a mistake and this, you know, determination that we submitted was a mistake. That seems to me a bit arbitrary. I guess that's all I have, really have.

COOK: If your client wants to confer with you for a minute before you complete there, please feel free.

SON: And I think I somewhat discussed this in the beginning, the determination that we had submitted, requested to be admitted and also the determination presented by the Planning Director is different. You know the grant itself is described differently and laid out differently; and it is different from the grant that we are looking at now; and that should be the focus. That's it.

COOK: Okay, thank you, Mr. Son. Ms. Self?

SELF: I'd like to ask for one of the, I gave Alice my large survey map the last time and I'd like to point to that one while I'm talking to the Board if I could. It's part of the record on appeal. It has already been admitted as evidence.

I don't know how many of you are familiar with reading survey maps and metes and bounds descriptions, but if you could look at this map this shows the metes and bounds description. This is Lot No. 3, you could just kind of, you have copies of this. This is a survey map. If you could just look at that and follow along. Okay, let me give you a little background first. The reason I'm doing this is because we have a Hawaii Supreme Court Case that set out general rules for interpreting conveyances. Now the only, the one thing that the appellant has relied on throughout the argument, the only thing they've actually provided for their argument is they rely on this word "net," "net area." That is part of a statement of the area of land conveyed. Now we have a Hawaii Supreme Court case Ahmi versus Waller that has said a particular description prevails a very general description, "a statement of the area of the land conveyed is a comparatively unimportant part of the description, or, as sometimes said, the least important part." And the reason is because they've had situations, there's other Hawaii case law, where there have been mistakes made in the number for the, that gives you the specific area of land, I mean the statement of the area of land. Now if you follow the metes and bounds description around Lot 3 on the survey map, you'll see that it covers the entire parcel. It does not cut out the flume or the ditch. That's why it has been conveyed, the Territory conveyed this in a grant, they conveyed one parcel of land in the grant. And in her warranty deed, same thing. There were never any preexisting lots. There was one lot, Lot No. 3. So everything that's in the particular description, which is the metes and bounds description, is inside the parameters of this property, including the ditch and the flume. So this is what has been conveyed to the appellant. The appellant has use of the ditch and the flume. So to say that she doesn't have use of it and that this then subdivides the property into four lots, that's not, how can that be? If you were going to carve, she's saying that, look at the shape of the lots that she's saying exists. Look at this one on the right-hand side of Lot 3. It's like a triangular shape, two of them are these triangular-shaped things. There's no access to those from a public road. So it's just not a logical conclusion.

So this Board is required to rely on Hawaii law when it makes a determination. And one of the determinations you have to make is did she receive a fee of the entire lot, Lot3, or did she only receive part of it excluding the flume and the ditch? Now how can you exclude the flume and the ditch when your metes and bounds, which is what the Supreme Court said you had to rely on, the metes and bounds covers the entire parcel. So, in fact, she received the entire parcel. So the only conclusion you could arrive at is that the State reserved an easement for a flume and a ditch. There are other Hawaii cases that say that excepting and reserving of a right-of-way is generally an easement. The Henry Waterhouse Trust Company versus Henry Freitas states that "A reference in the deed," I'm sorry, this is out of Am.Jr. "A reference in the deed to the future use intended to be made of the portion reserved or excepted indicates that the parties intended to reserve a mere easement rather than to accept the fee." And then that was actually done in the Henry Waterhouse case where the language was "excepting and reserving the Makiki stream and all riparian and other rights in or to this stream and the waters thereof." So there they found that language to be an easement. The cases that were presented in the appellant's argument weren't even Hawaii cases and they stood for something entirely different. It was a case where there had been a, a reversion had been reserved, which means that it couldn't have been an easement cause it would have, if the use of the property had not been for what was in the deed, it would have reverted back to the original grantor. These are the kinds of cases that were presented in the argument. All the cases that were presented in our argument are Hawaii cases. You have a Hawaii Supreme Court from the Territory days telling you how to interpret a conveyance. So if you follow the Hawaii Supreme Court I don't think you can possibly say that this is, that she did not receive the fee for the ditch and the flume.

And the other argument that they're relying on is that, well, they're not making the argument of equitable estoppel which means that she relied on something that the Planning Department told her before she went out -, she bought her property on reliance on what the Department had told her. So she didn't, there isn't an equitable estoppel here; and that's why they didn't make that argument. The argument they're making is, well, you did it for one person so now you have to

do it for me. Even if that doesn't go along with Hawaii law, do you think that the Planning Director should continue to make a mistake that flies in the face of Hawaii law?

So that's the argument, those are the two arguments they're making, and it defies logic. And I hope that the Board can see through this and rely on the case law as it is today. Thank you.

COOK: I usually defer to the Board before I ask my questions. David, you have some questions?

DRURY: Give me a second.

COOK: Okay. How about to my right here, any questions then?   Well, while -.

DRURY: I have one -.

COOK: Yeah, go ahead, David.

DRURY: I have one brief question for Mr. Son. How exactly is the, you had said that that case that has just been brought up before us, this 2001 denial of a lot of record, that it was different from your case.

SON: Right.

DRURY: How exactly is it different?

SON: Well, one thing that I did find was that similar to the determination, not to be confusing but similar to the determination that we had submitted, it does express it as "excepting and reserving the right-of-way of a ditch through this lot." And it does have a generalized description of the ditch and the fact that it excepted. But it doesn't include any descriptions of the new acreage as it's included in our grant. And I think that really is the distinction. If I may, and I know that Ms. Self has made the argument that, yes, you know, your grant has metes and bounds description and it lays out the entire lot and really the lesser important component of that conveyance document is the net area determination. And I think that happens, well, I know that that has happened and that is stated law. Because, you know, when these metes and bounds descriptions were made they tend to be a lot, they are a more specific survey description, and then the actual calculations of the area that's conveyed could be in error. So because those were more specific, they should be counted as more specific; and there is more weight to that description. But in our case, in our land patent, it does lay out the metes and bounds description for the entire lot, and it does include a calculation of the area of that entire lot; and it also breaks down the areas that are excluded, and then finally calculates the area that's conveyed. There is no contradiction within that grant itself in any of the area or the amount of property that was conveyed.

DRURY: So it's basically the fact that they had calculated the areas of the flume and the ditch? That is the essential difference?

SON: Right, right, accurately. And that the, you know, the actual conveyance was for only a certain amount of the entire lot.

DRURY: In your own grant did they also use exactly the same language for the streams and riparian areas? The only difference in your grant is that they don't give the amount of the acreage?

SON: Right, right. And, you know, I did look into that somewhat and I, you know, not to sort of, you know, expound my opinion too much on the riparian rights but, you

know, those are reserved to the State of Hawaii to sort of reserve so that the property owners would not divert the flow of whatever natural waters are occurring over their property; and those are reserved sort of as easements, admittedly as easements. And I think that the cases, you know, as in Price Waterhouse and Kelly, they don't really come to the decision of whether is this an easement or is this a fee ownership. You know, they are described as easements. That's not really something that they're actually deciding. You know, it's sort of given that they are considered easements and that's it. I'm sorry. And you know, in the Kelly case the excepting and reserving language is not, as they say, it's generally determined to be easement but really the Kelly case is about breaking the bounds of whether that is an easement or that is an exclusion. You know, traditionally an exception was described as retaining the interest to the grantor and traditionally a reservation was retaining an interest to a third party. And the Kelly case stands for the fact that, well, we're not going to be stuck by those bounds any longer. You know, it's going to be like I said, you know, subject to the face of the document and what the grantors had intended to convey.

DRURY: Okay, so coming back to your land grant, if I understand you right, in the case of the streams and riparian areas you're admitting that that's an easement?

SON: Yes.

DRURY: So the language is exactly the same for the riparian areas and the ditch and the flume, except that you have areas defined for the ditch and the flume. So that's the crux of your argument, if the area is defined it's fee -?

SON: Right.

DRURY: So that's the only difference?

SON: Right. I think, you know, the most reasonable interpretation of the grant itself is that you have a lot, that's the area of the lot, you have a stream running through it, you have a ditch which is a specified area, and a ditch as a specified area, and you are conveyed this lot excluding those two areas. I think that's unambiguous.

COOK: Any questions to my right here?

GENTRY: No.

COOK: Ms. Self, I was really interested in the Waterhouse case. And the four items as I recall that you looked at in interpreting whether it's an easement or, the fee -. And I think what you're keying in on is that, look, we have a specific description here which is the metes and bound as that goes around the side. Okay? And so that should control over general description, such as land area?

SELF: Correct.

COOK: But the problem I have with that is that in this specific case, you know, we don't really have any problem with the total land area. It's stated there, which is the metes and bounds part. It's stated. So we don't really have a conflict, I think, in the metes and bounds description and the total of the property. And what really strikes me is that the way I'm looking at this is that the specific description includes the exception out of those parcels. And the reason that strikes me that way is because on the map that's attached to the land patent, it specifically has the acreage for both of those, for the flume and for the ditch. Now I don't know how they got that specifically unless they, you know, went out and surveyed it. But it is specific there. And then there's a total amount that's exempted out and then it shows a net amount that's conveyed out. So I have a little problem with saying that the metes and bounds on the outside is

the only specific description. This is a difficult case for me. And I want to ask Mr. Son about this, if our lots are created from this, what about getting in and out, the ingress and egress? Is that something that we should be concerned about here or what is your response to that?

SON: Well, it's my understanding that when there were, you know, previous grants I guess back in Territory days, I mean, there wasn't a limitation on having a grant because it somehow lacked access. I mean the grant was the grant. It was the, you know, a piece of property. I don't think that having or not having access on that grant, you know, meant that that grant didn't exist or it wasn't a lot in itself. Really, that's sort of the only thing that I can add.

COOK: Yeah, I must admit that in law school Real Property was always a problem for me, particularly when you get into these easements by necessity and all kinds of things for ingress and egress on properties. But, anyway, that's something that bothers me. And this whole, the issue here, it troubles me and it's something very important to be decided. Does anybody else on the Board have any other questions for either of the counsel here? Okay, maybe it's clear to them. At this point, before I decide whether or not I'm going to ask for a motion, whether I'm going to continue this till I get my full Board here, I'd like to have the comments from the two counsels as to how they would like the Board to proceed on this. We do have only four; and you realize, I'm sure the parties realize that if one of us votes differently from the other three we're not going to have a decision anyway, and it's going to go to the next meeting for another vote. So, let's see, you're the appellant, Mr. Son, what's your inclination here?

SON: You know, I think that the members today I guess really heard the most robust arguments and I believe that, you know, sort of got all of our last two cents on what the situation is; and you probably have the most understanding, you know, absent rest of the Board, of the issues at present. So we're comfortable with the Board taking a vote today.

COOK: Ms. Self, what's your input?

SELF: I believe it's a decision for the Board to make so I'll just leave the decision for you guys to make.

COOK: Okay, could I have a little input from the Board before I take a motion here? Mr. Drury, what's your feeling on this matter?

DRURY: Well, I've read the materials and listened to the, I have read the materials - .

COOK: No, I'm not asking for your decision but as to whether or not we should make it today or we should postpone.

DRURY: I know. I was going to finish my sentence.

COOK: Oh, I'm sorry. I thought you were going to give us your -.

DRURY: No, I'm basically saying that I've read the materials closely and listened to the arguments. I personally am prepared to vote. So -.

COOK: Okay, Ms. Tavares.

TAVARES: I have to say the same thing as David. I've read everything and I'm ready to vote if that's what we do today.

GENTRY: I concur.

COOK: Okay, then I'm ready for a motion. Could I have a motion either to uphold the Planning Director's decision denying this variance, or a motion that we overturn the Planning Director's decision. Okay, I'm open for a motion.

DRURY: I move that we uphold the Director's decision to deny the variance.

GENTRY: Second.

DRURY: Okay, I've got a motion and a second to uphold the Planning Director's decision. Do we have any further discussion?

GENTRY: I don't have any.

COOK: Okay, then I call for the vote; and would the clerk call the roll please.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Gentry?

GENTRY: Aye.

KAWAHA: Ms Tavares?

TAVARES: Aye.

KAWAHA: Chair Cook?

COOK: I want the full Board to decide this so I'm going to vote no, and that doesn't mean that that's going to be my vote finally. But I do want the whole Board to decide this issue, so my vote is no on the motion. Could you give us then the result.

KAWAHA: Mr. Chair, there are three ayes and one no, motion does not carry.

COOK: Okay, so then this matter will be brought up again at the next Hilo meeting of the Board of Appeals.

The discussion ended at 12:04 p.m.

Respectfully submitted,

Sharon M. Nomura, East Hawaiʻi Secretary