

BOARD OF APPEALS
COUNTY OF HAWAII

HEARING TRANSCRIPT
OCTOBER 12, 2007

A regularly advertised meeting regarding the appeal of **EDMUND JIN AND EVA Y. LU (BOA 07-000043)** was called to order at 11:21 a.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 ABSENT & EXCUSED: Kelly Ann Soo
David Drury
Peter Hendricks
Joel Gimpel
Diane Gentry
Kim Tavares

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

Roy Vitousek representing appellant
Katherine Garson representing the Planning Director

And approximately 17 people from the public in attendance

PETITIONER: EDMUND JIN AND EVA Y. LU (BOA 07-000043) - Adoption of Findings of Fact, Conclusions of Law, and Decision and Order regarding the Appeal of Decision by the Planning Director dated February 12, 2007, that denied the Variance Application (VAR 06-101) relating to variance from minimum water supply requirements of Chapter 23, Subdivision Code for a proposed subdivision. The property consists of approximately 35.9 acres and is located on the west (mauka) side of Mamalahoa Highway in the Kolo Subdivision, South Kona, Hawai'i, TMK: (3) 8-7-13:11.

COOK: Okay, we're going to move right on with the next item on the agenda which is Edmund Jin and Eva Y. Lu, Board of Appeals No. 07-000043; and this is the adoption of Findings of Fact, Conclusions of Law, and Decision and Order.

GARSON: Good morning, Chairman Cook and Members of the Board of Appeals. Katherine Garson for the Office of the Corporation Counsel representing the Planning Director today.

VITOUSEK: Good morning, Mr. Chairman and Members of the Board, Randy Vitousek representing the Appellant.

COOK: Okay, we do have proposed Findings of Fact, Conclusions of Law which have been submitted by Mr. Vitousek; and we have objections to the proposed Findings of Fact, Conclusions of Law which were submitted by the Planning Director. We have a response to those objections with amended proposed Findings of Fact, Conclusions of Law. And -.

GARSON: Chairman, if I may, I'm not sure if you got the most recent revised version that the Appellant's counsel and I had worked on.

BANCROFT: It's right here.

COOK: Well, no, we have not. But I've been informed by legal counsel that we just received those. So if we could, I sos (phonetic) out again. And while I see Mr. Gimpel is not too happy about it, nor am I, although I may be if the parties have come to some decision on this. So maybe before we read this if I could have some representation by, Ms. Garson since you spoke up I'll let you have the first say.

GARSON: Basically what we've done is come to consent on most of the items that we have disagreed upon. There are only three remaining objections that the Director has. There were three new conclusions of law in this revised order that the Director objects to, and that would be Conclusions of Law 6, 7, and 8. So those are basically the remaining differences that the Planning Director has with Appellant.

COOK: I'm going to let you make one comment and then we're going to come back to the Board; and I think that's going to be it as far as participation from you guys. Okay, Mr. Vitousek?

VITOUSEK: Yeah, fair enough. And we apologize for the, you know, for the late submission but we were continuing to try to work things out. And so what we've done is got everything worked out, except that we were unable to agree on proposed Conclusions of Law 6, 7 and 8. There were forms of those conclusions in the last submission you got from our office before today, but we've modified them just a little bit. And so the only real issue is will the Board adopt, well, of course, the big issue is will the Board adopt the proposed decision. But the dispute is only as to the content of proposed Conclusions of Law 6, 7 and 8, which is on page 16 of this draft.

COOK: Well, but as I understand it, the Planning Director has agreed with all of the, at least as to form, with the other conclusions. Only those three, is that right?

GARSON: Correct.

COOK: All right, so at this point in time then what I'm going to do is I'm going to take a recess in place and give the Board a chance to read those three; and when they've had a chance to do that, then we'll reconvene to discuss the decision.

GARSON: And I can give you just a very brief one-sentence reason why I'm objecting to each. So as you're reading it you could consider that, if that would be acceptable.

COOK: Okay, as long as we can let Mr. Vitousek come around and -.

VITOUSEK Yeah, I have no objection to that at all.

COOK: All right, go ahead.

GARSON: Okay. So as to Conclusion of Law 6 I do not believe that it is an accurate statement of the burden, nor of the facts. What it implies is that the Director had the burden to show that the Appellant did not have the, meet the 60-inch limit; and that is not an accurate statement of the burden. Also, it makes reference to a USGS, USGS rainfall map; and that's a small "r" and a small "m" and I do believe that the facts that had come out in the hearing from the testimony of Mr. Arai was that he had what he was referring to as the USGS rainfall map. And I believe that's in the record on appeal 68, that was a map; and Mr. Arai testified that he used that map and the rain gauge; and he referred to ROA 68 as the USGS rainfall map.

As to Conclusion of Law 7, I think what that Conclusion of Law does is it attacks the validity of the rule itself. It says the isohyet lines on the rainfall maps are not sufficiently specific or accurate to be used as a sole source of a regulatory standard. I do think that that goes beyond this Board's jurisdiction as to opine as to the validity of the rule.

As to Conclusion of Law 8, I also believe that that is an inaccurate statement of the burden. It indicates that the Director did not look at more than one rain gauge. But if you look at Rule 22-4 and the entitlement to the variance, it's something that the Applicant must show, not the Director. And what this Conclusion of Law does is it seems to shift the burden away from the Applicant and onto the Planning Director. So those are the reasons why the Planning Director is objecting to those three conclusions of law.

COOK: That was a little longer than two sentences. But, Mr. Vitousek, go ahead.

VITOUSEK: Yeah, I just would say, you know, I think that the Corp. Counsel's office has acted in real good faith in this matter. And we were able to work out most of the problems; and we were able to agree to disagree on these. And, you know, Ms. Garson actually, we were at this until last night. She actually produced this document to hand out to the Members of the Board. So I think that she really deserves some credit for trying to limit the issues to present to the Board and to, I just feel they acted in complete good faith. So the reason that we've included, you know, these are Conclusions of Law and Conclusions of Law are for the Board to make. In other words, the Board, this is where the Board makes its Conclusions of Law. And so what we've done is, you know, we had the Calvert appeal where the Board made a decision, it went up to the Court, the

Court found that the Findings were inadequate to explain the Board's decision. So we had to come back down and we argued again. So I was trying to be a little bit more specific in this. And I was just trying to say in Number 6 that you will recall that the Planning Department was not able to get a rainfall map admitted into evidence in this hearing; and so I was trying to say that, you know, if you're going to argue that the variance should be denied because of a particular map, you should at least get the map into evidence if you're going to make that argument. And so I tried to say that, you know, where the Director did not get a map admitted into evidence where that's the regulatory standard, that it's impossible for the Board to determine based on this evidence whether or not the Director's denial was consistent with the rule. And so that, I just wanted to have that as a Conclusion.

The Rule, you know, Rule 22 says that they're to consider the 60-inch isohyet lines and data from comparable rain gages. And so what Finding of Fact 7 is is that isohyet lines on a rainfall map is not sufficiently specific and accurate by themselves to be used as a sole source of the regulatory standard. In other words, the regulation requires that they consider all relevant sources in trying to determine whether there's adequate rainfall. So I think that is an accurate statement.

Also, the issue on Rule 22 about comparable rain gauges you will recall that the Planning Department only considered one rain gauge data in this thing, in this particular application, and there was reference in the transcript to the fact that the standard calls for looking at comparable data from other rain gauges. And you'll also recall that in questioning Mr. Arai could not say whether other rain gauges were considered or why other rain gauges might be considered comparable or not comparable to Opihihale or to the property. So we would just ask that the Findings, I'm sorry, Conclusions of Law 6, 7 and 8 be included. If not, fine. I mean, you know, we're just trying to make sure that the record is clear and that a decision is issued. And thank you for your time; and thank you, Kathy, for your cooperation.

GARSON: Thank you.

COOK: Kathy, I don't think I'm going to go any further. Okay. We have before us proposed Findings of Fact, Conclusions of Law that we received this morning which has been basically agreed to by the Appellant and the Planning Director, with the exception of the Planning Director objecting to Findings of Fact, I mean, Conclusions of Law 6, 7 and 8, was it, 6, 7, and 8. Okay, with that I'm open for a motion. Mr. Gimpel

GIMPEL: I have a question first, couple of questions.

COOK: You're going to ask, you wanted to ask these parties questions?

GIMPEL: I will ask the parties questions, if I can.

COOK: All right, I'll allow it.

GIMPEL: Refresh my recollection. Rule 22, was it in effect during this -?

GARSON: Yes.

GIMPEL: Okay, that's No. 1. No other questions. I'll move to accept the revised proposed Findings of Fact, Conclusions of Law and Decision and Order with the exception of Conclusions of Law 6, 7 and 8.

DRURY: Second.

COOK: Which we will, wait a minute. I want to make sure, which would be removed from the proposed findings.

GIMPEL: From the proposed Conclusions of Law. So I said except those Conclusions of Law.

COOK: Right, okay. Do I have a second?

GENTRY: David seconded.

DRURY: I already did.

COOK: Okay, any discussion? Mr. Drury?

DRURY: I was one of the people who did lot of asking about the data sources and things; and 6, 7 and 8 from my personal experience don't reflect in terms of Conclusions of Law what occurred in the hearing proceedings. My own take on this is they are unnecessary and too general.

COOK: So you support the motion. Any other discussion?

GIMPEL: Yeah, I'll explain the reasons for my deleting 6, 7 and 8. No. 6 I think is refuted by the precise language of Rule 22-4 which says that the annual rainfall can be proven by rainfall record at comparable rain gauges or by the USGS rainfall map. It doesn't say he will utilize a USGS rainfall map. No. 7 I don't think, believe there was any Finding or Conclusion that I made of Law that the isohyet lines are not sufficiently specific or accurate to be used as a sole source of a regulatory standard. And No. 8, the reference to comparable rain gauges requires that other rain gauges besides the one used also be comparable. It is quite possible that the Director finds that this is the only comparable rain gauge. Therefore, my reasons for deleting those three.

COOK: Okay, anybody else wants to add anything? Okay, I would ask that we call the roll, please, or the vote on the motion before the Board.

KAWAHA: Mr.Gimpel?

GIMPEL: Aye.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Gentry?

GENTRY: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Chair Cook?

COOK: Yes.

KAWAHA: Chair, the motion moves with six ayes.

VITOUSEK: Thank you very much.

COOK: I want to commend both counsels here for working out this language. It was quite, I don't know about the other members of the Board, but I've spent quite a bit of time looking at the original proposed findings, and the objections, and then the revisions. So we really appreciate the, and I believe the issues were stated very clearly to the Board; and I feel good that before we made a decision we fully understood it. Thank you very much.

VITOUSEK: Thank you very much.

GARSON: Thank you.

The discussion ended at 11:35 a.m.

A T T E S T: Respectfully submitted,

Noriko Sauer, West Hawai'i Secretary

Sharon M. Nomura, East Hawai'i Secretary