

BOARD OF APPEALS
COUNTY OF HAWAII

HEARING TRANSCRIPT
MARCH 13, 2009

A regularly advertised hearing on the appeal of **MAIKA`I KAMAKANI `O KOHALA INC., 501(c)(3) Nonprofit Organization (BOA 09-000074)** was called to order at 10:12 a.m. in the West Hawai`i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai`i with Chairman Joel Gimpel presiding.

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

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

David Frankel representing Maika`i Kamakani `O Kohala Inc.
Joel Kam representing Kohala Preserve Conservation Trust, LLC
Amy Self representing Planning Director

And two people from the public in attendance.

PETITIONER: MAIKA`I KAMAKANI `O KOHALA INC., 501(c)(3) Nonprofit Organization (BOA 09-000074) - Appeal of the Planning Director's Decision of November 28, 2008, that granted Revised Tentative Subdivision Approval to subdivider Kohala Preserve Conservation Trust, LLC. The project area consists of approximately 365.5 acres and is located in the vicinity and north of Mahukona Harbor, Kapaaunui, Kou, Kamano, and Mahukona, North Kohala, Hawai`i, TMK: (3) 5-7-2:11, 5-7-3:3 and 10.

GIMPEL: This is the case of Maika`i Kamakani `O Kohala Inc., a 501(c)(3) nonprofit organization (BOA 09-000074). This is an appeal of the Planning Director's decision of November 28, 2008, that granted Revised Tentative Subdivision Approval to subdivider Kohala Preserve Conservation Trust, LLC. The project area consists of approximately 365.5 acres and is located in the vicinity and north of Mahukona Harbor, Kapaaunui, Kou, Kamano, and Mahukona, North Kohala, Hawai`i. The tax map numbers are (3) 5-7-2:11 and 5-7-3:3 and 10. Will the parties please introduce themselves.

FRANKEL: David Frankel.

GIMPEL: Use the microphone, David, please.

FRANKEL: David Frankel. Is this on?

GIMPEL: Yes.

FRANKEL: Okay.

GIMPEL: It is for the purposes of taping, it's on.

FRANKEL: All right. David Frankel, Native Hawai'ian Legal Corporation here for Maika'i Kamakani `O Kohala.

GIMPEL: Thank you.

SELF: Amy Self, Deputy Corporation Counsel on behalf of the Planning Director.

KAM: Joel Kam on behalf of Kohala Preserve Conservation Trust.

GIMPEL: All right, thank you. All right, before we proceed with arguments on this case, I note that there has been a motion filed to disqualify me as Chair, well, disqualify me from hearing this appeal, and a Memorandum in Opposition to that motion. First, I do not choose to disqualify myself; and I have a short statement to make. Generally I would adopt the arguments contained in the memorandum filed in opposition to the motion filed by Maika'i Kamakani `O Kohala. And specifically with respect to that memorandum I would add that I have no independent recollection of the conversation that allegedly took place. But even if it did, I note that the parties, that the appellant here is a different entity than the petitioner in the prior case to intervene. And, No. 2, that the facts involved, the issues involved in that case versus this case are entirely different. And, No. 3, that I am not biased against either petitioner in this case or intervenor in the prior case. And with that I will relinquish the chair for purposes of consideration of this motion to disqualify me to our Vice-Chair, Mr. Hendricks. Thank you.

HENDRICKS: Thank you. In the subject of disclosure, I am a member of the Hawai'i Wildlife Center Board of Directors and for, on the record currently, there is a letter dated March 3rd from our Executive Director Linda Elliott to the Board of Appeals; and this letter is in general support of Surety Kohala Corporation for their assistance. And the Hawai'i Wildlife Center is a 501(c)(3) conservation organization established in 2006 to provide a fully equipped native wildlife rehabilitation emergency response and recovery facility. This letter was sent by Linda Elliott without being agendaized at a regular board meeting. She had, I talked to her this morning, she had 24 hours notice, sent a general letter of support. The only reference to this case is the last paragraph that reads, "We respectfully thank the Hawai'i County Board of Appeals for the opportunity to acknowledge Surety Kohala Corporation for the major support they have provided our project." I do not believe this would disqualify me as far as conflict of interest, but I have mentioned this to our Corporation Counsel. So for the parties involved today if there's any objection, then this is the time.

FRANKEL: I haven't seen this letter. And is it really part of the record?

HENDRICKS: These letters were provided to the Board. There are about 16 of them.

FRANKEL: I guess I'm curious why I didn't get a copy of any of these letters.

HENDRICKS: I just was able to read these last night.

FRANKEL: I have to think about the appropriateness of these letters even being considered at this point. If any of these parties wanted to intervene that would be one thing. I don't think any of these are. But I do, I do think this is a problem if you're on the Board of Directors of the organization and you have a fiduciary duty to it; and if Surety is providing Hawai'i Wildlife Center money or other assistance, I think there's a, I think there's a conflict there. Sorry.

HENDRICKS: I'd like to ask our Corporation Counsel for advice on this.

SCHOEN: Mr. Vice-Chair, are you requesting that this Board go into executive session so that you may pursuant to HRS-92-4 consult with your attorney regarding your legal responsibilities, duties, and liabilities in this case? I believe we have to have a motion that is approved by 2/3 of the majority of this Board in order to do that.

HENDRICKS: I think that's probably necessary at this time considering Mr. Frankel's potential objection.

SCHOEN: Before we do that, might I suggest that the Board hear if there are any positions by the other parties.

HENDRICKS: Thank you.

KAM: On that particular issue or on -?

SCHOEN: On that particular issue, just so that the record is clear. Mr. Gimpel relinquished the chair for the specific purpose of dealing with this motion to disqualify filed by Maika'i; and pursuant to Board Rule 2-13, that rule provides that on the issue of disqualification the other Board Members shall decide as to the disqualification. So a decision has to be made by a majority of this Board. And so that's why Mr. Hendricks is assuming the chair right now. But with respect to the letters and Mr. Frankel's position, I guess that's, I'd ask that the parties provide their position with respect to the letters and the potential conflict that Mr. Hendricks, a disclosure that Mr. Hendricks has made.

KAM: My understanding is that the letters were submitted by third parties, they were not submitted by KPCT. KPCT had no control over the letters. They're akin to public comment. I don't see that there is a conflict for Mr. Hendricks to serve, to preside over this particular motion; and that would be our position.

SELF: Deputy Corporation Counsel Amy Self. That's also my understanding. I got these yesterday and we have no objections to this being -. I have no objection to Mr. Hendricks serving on the Board during this decision. Thank you.

FRANKEL: I guess I'd like to elaborate because I didn't read the letters prior to my previous comments. But, you know, this is disturbing, not only is Mr. Hendricks' name on the letter, but it says this license agreement provided by KPCT or by Surety Kohala, which is related to KPCT, is valued at over a million dollars. I just think that it goes beyond the standard

articulated by the Hawai'i Supreme Court regarding the appearance of impropriety or bias. It's just not appropriate. I mean if the letter hadn't come in, it wouldn't, none of us would have known. But it's right there. It doesn't look good.

DRURY: Could I say something? Could I ask a question of Mr. Frankel? Would that be in order?

HENDRICKS: Yes.

DRURY: Mr. Frankel, you know, we are talking about Mr. Hendricks simply presiding over a piece of proceedings having to do with Mr. Gimpel. Frankly, do you honestly see chances for Mr. Hendricks to somehow bias this proceeding to change it from what the outcome would otherwise have been?

FRANKEL: I don't have a problem, you know, on the motion, but what I'm talking about is the entire proceeding, this whole case. It is inappropriate for somebody to be voting on an issue that affects KPCT directly when there's a disclosure that essentially KPCT has provided financial, huge financial assistance to this organization, which is the Board of Directors. If, you know, in, pragmatically I don't have a problem with him, you know, chairing the motion. But what I'm talking about is more substantively the larger, the larger case. You know, maybe we do it one at a time.

DRURY: Could I offer a suggestion then. If you have no objections to Mr. Hendricks chairing this proceeding having to do with Mr. Gimpel, could we get that out of the way and then proceed on the other issues?

FRANKEL: Yeah.

DRURY: Could you drop yours, would you then drop your opposition to Mr. Hendricks proceeding for this piece of the proceedings about Mr. Gimpel?

FRANKEL: Not for this piece, that's fine.

DRURY: Okay.

HENDRICKS: All right. Thank you, Mr. Frankel. I think we're going to entertain a motion regarding Mr. Gimpel's participation as stated.

DRURY: All right, for purposes of discussion, I move that we deny the motion to disqualify Mr. Gimpel from the, as Chair for this.

HENDRICKS: Thank you. We have a motion -.

TAVARES: I'll second.

HENDRICKS: And a second. Discussion?

DRURY: All right. In my own thinking about this, I have read both the motion to disqualify and the opposition in some detail. Two of the points I was going to make, a point that Mr. Gimpel himself has made, we're talking two different petitioners here, there are two different organizations. However much they might overlap in their membership, the facts of the case are significantly different. I would add a third thing. I was overseas when in both October and November and so I have read this, through transcripts, I've read this through the paper record. And from carefully reading the paper record my own impression of this is that Mr. Gimpel acted in a way that was perfectly consistent with a normally functioning chair. What he said to decide, I was far away and didn't know. The record seems to show that he was acting in an unbiased manner. For example, the decision to postpone the motion to intervene because the two parties had stated an intention to settle seemed to be quite reasonable. I'll just leave it at that, he seems to have acted in an unbiased manner.

HENDRICKS: Any further comments? Can we have a roll call.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Hart?

HART: Yes.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: And Vice-Chair Hendricks?

HENDRICKS: Aye.

KAWAHA: There are five ayes. Motion is carried.

HENDRICKS: I would like at this time to relinquish the chair to Chairman Gimpel.

GIMPEL: Thank you. I guess the next item of business is to consider the, I presume a motion by Mr. Frankel to disqualify Mr. Hendricks from participating in the hearing of this appeal.

FRANKEL: Yes, thank you.

GIMPEL: All right. Mr. Hendricks, before we have a motion whether to accept or deny, what is your position on this?

HENDRICKS: Well, even if there's the appearance of impropriety, I would be glad to recuse myself from voting on this matter.

GIMPEL: So you'll recuse yourself from considering this matter?

HENDRICKS: I'd like to ask Corporation Counsel as to the better of the two decisions for the Board in this case, either recuse or accept an objection and the Board vote?

SCHOEN: I would prefer to respond to that in executive session

GIMPEL: Do we have a motion for executive session?

DRURY: I move that we go into executive session.

GIMPEL: Is there a second?

HART: Second.

GIMPEL: All in favor aye?

MEMBERS: Aye.

GIMPEL: Any opposed? We'll go into executive session. Thank you.

EXECUTIVE SESSION The Board went into executive session at 10:28 a.m. and came out of executive session at 10:38 a.m. by a motion made by Ms. Tavares, seconded by Ms. Maedo, and unanimously carried by a voice vote of all members in attendance.

GIMPEL: Mr. Frankel, and Counsel Ms. Self, and Mr. Kam, one, we have determined that these letters that have been submitted are not part of the official record of this case for several reasons. One, we're not sure of the source; and two they were submitted late, etc. etc. That being the case, Mr. Frankel, do you still move that Mr. Hendricks recuse himself from this case?

FRANKEL: I guess I'm not sure how they're not part of the record now that we've all been talking about the -.

GIMPEL: They will not be part of the record if this case is appealed and so forth. They are not part of the official record of the case.

FRANKEL: Okay. Well, I guess that doesn't, unfortunately that doesn't, I guess you can't unring the bell.

GIMPEL: Okay. Mr. Hendricks.

HENDRICKS: I don't, in fact, know the fiduciary or legal relationship between Hawai'i Wildlife Center and Surety Kohala and KPTC. However, to avoid, and before I go on, I think I

can fairly be a member of the board on this case; but to avoid even the appearance of impropriety I'm going to recuse myself from this, from this particular case. Thank you, Mr. Chairman.

GIMPEL: Thank you. We have before us in this case a motion to dismiss the appeal and, of course, a memorandum opposing that motion to dismiss. So I would entertain arguments from both parties. First, the filer of the motion to dismiss, Mr. Kam.

KAM: Thank you, Mr. Chairman. I'd like to respond just very briefly to some of the arguments that were brought up by Maika'i in their memorandum in opposition. There's an argument in the papers that Maika'i filed that Chapter 91 somehow prohibits the Board from dismissing the appeal, from entertaining our motion as a matter of law. And we would argue that that's incorrect. Chapter 91, for example, does not prohibit the Board from dismissing an appeal over which the Board has no jurisdiction. And our motion, the basis for our motion is essentially one of jurisdiction; and that is essentially that the basis for the appeal, the decision that is being appealed has been rendered null and void by your decision in the Kako'o matter, and also has been expressly revoked by the Planning Department. There is a copy of that decision, the November 28th decision, that's being appealed that was attached to the record on appeal that was filed by the County. It's at page 2 of the Record on Appeal; and handwritten on the first page of the letter is the statement that it's null and void. So the Planning Department, you know, irrefutably considers that decision to be null and void. There is no decision to be appealed. That's it, that's the end. There's nothing to appeal.

The other thing I would say is that there's also an argument raised by Maika'i that, you know, the Board has to have a full evidentiary hearing before it can make a determination as to whether Maika'i has proper standing to bring this appeal. And we would also submit that that is also incorrect. The issue of standing is a preliminary matter that you need to determine at the outset. You don't need to have a full evidentiary hearing in order to make a determination as to whether Maika'i has standing. And it's just a really simple common sense argument that in order for them to demonstrate standing they need to demonstrate an injury. But in this case there can be no injury because there is no decision. How can there be an injury from something that doesn't exist? So that's basically it, there's no decision; and because there is no decision, there is no standing. That's it, that's the end.

GIMPEL: Thank you. Mr. Frankel? Oh, I'm sorry, Ms. Self, I didn't mean to ignore you.

SELF: I just wanted to state the Planning Director's position on this particular appeal. The Board, our position is that there really is no issue for this Board to decide; and I'll explain briefly why. The Board found in its decision and order that the, that you just adopted this morning, that the preliminary plat map was deemed approved as of June 21, 2008. Now in compliance with the Board's Order, the Planning Director proceeds to change the effective date of the preliminary plat map to June 21, 2008. Now based on the Board's Decision and Order, the Planning Department's position is that the tentative approval letter that was issued by the Planning Director on November 28, 2008 is now null and void. So there is no longer an issue before this Board; and, therefore, this appeal should be dismissed. The Planning Director complied with the Board's Order. It was ordered to change the effective date, it did so. So now the letter that is the issue of this appeal, where is it now? We've already done what you ordered us to do. So that's

why we would, our position is that there is no issue to be decided by this Board and you should, therefore, grant the motion to dismiss. Thank you.

GIMPEL: Mr. Frankel.

FRANKEL: Thank you. I'm going to take a bit longer. As a preliminary matter I need to know a few things. First of all, we did amend our appeal for a second time after seeing what KPCT submitted. And that appeal includes the Planning Director's recent decision to backdate the approval. So I want, so that amendment expands what we're appealing on. And for that reason alone dismissing this entire case doesn't make sense.

Secondly, I want to point out that if the November decision is, if the appellees, KPCT and the County, believe that the November decision is not good, they should be joining us in our appeal to invalidate it. But there's a reason that they're not doing so; and that is that Amy told me on the phone some time ago that KPCT has agreed to comply with all the conditions in the November letter. So the fact that there is an agreement between the County and KPCT to comply with the provisions in the November letter suggest this is not moot, this is a real issue. And if we go to hearing on this, we will be subpoenaing witnesses to put this all into evidence.

Now let me go over the points that we raised in our memorandum more directly. The Planning Director and the Planning Director's Corporation Counsel has previously taken the position before this Board that a motion to dismiss for lack of jurisdiction is not appropriate, it's not authorized by law. And we provided not only, well, we provided a copy of that whole argument, submitted to this Board; and we quoted from it on page 2 of our memorandum. It's just not appropriate.

As far as standing goes, it appears that KPCT has pulled back on its argument. Now they're only essentially duplicating the fact that they believe it's moot. But the fact is your rules do not require that a party seeking intervention or even appealing produce evidence in their application of how their interest would be harmed. That's not what your applications require. That is why you have hearings later on; and that is what we would produce at a hearing. However, an abundance of caution, we did attach the declaration of Fred Cachola that demonstrates that he engages in, has engaged in, traditional customary practices on this property.

Finally, the issue of whether the November decision is moot or not -. As you know, or as I hope you know, your January decision is on appeal before the Third Circuit now. And it would be, let me suggest, inappropriate for this Board to dismiss this appeal pending that decision from the Third Circuit Court. And there are various reasons why you would be concerned about that decision. This Board lacked jurisdiction to approve KPCT's subdivision. Preliminarily your jurisdiction is to hear and determine appeals from final decisions. There was no final decision that KPCT appealed from to you. They appealed the non-decision. That is not a final decision. So if you read the Findings of Fact entered this morning, you'll see that there was no final decision that was being appealed from. Therefore, the Board could not have rendered the decision that it did.

Moreover your jurisdiction does not allow you to approve a subdivision. That is something only the Planning Director can do. In addition, you have to when you render a decision act consistently with the Subdivision Control Code. This Code requires that information be submitted by the applicant. There are all kinds of information that's supposed to be submitted. Now the Planning Director has the authority to waive those requirements. That didn't happen in this case. If you're

going to backdate your approval to the 45 days or whatever, when after you considered KPCT's application to be complete, the fact is they did not submit all the information that was required. And the Hawai'i Supreme Court has already ruled in the decision Leslie vs. this Board of Appeals that the informational requirements are mandatory and those must be complied with. You also can't do something that's inconsistent with Chapter 343. Chapter 343 is the State Statute that requires that disclosures of environmental impacts be made prior to decision making. Chris Yuen in his letter to KPCT made it clear that Chapter 343 needed to be complied with. There are a couple of triggers we can point to that demonstrate why 343 is triggered by this project. No. 1, KPCT proposes to make improvements to a public road, State Highway, in addition is proposing to make improvements to County parks. These proposals are part and parcel of their project. And in case after case after case, the Hawai'i Supreme Court says when a small part of your project involves the use of County or State lands, you need to do an environmental assessment for your entire project before decision making. In fact, that's what the Supreme Court ruled in its first case dealing with Mahukona, Citizens for the Protection of the North Kohala Coastline versus County of Hawai'i.

In addition this Board is under the constitutional obligation to investigate and protect Native Hawaiian traditional and customary practices.

GIMPEL: Excuse me, Mr. Frankel, you're getting into the merits of the case, assuming that we have jurisdiction. Would you please keep your arguments as to whether this motion to dismiss is proper, not whether the merits of the case merit our consideration.

FRANKEL: Well, you know, the two are inextricably linked; and let me try to explain why. KPCT has filed a motion saying that this case is moot, it's moot because of the prior decision of the Board. And what we're trying to point out to you is the Board lacked the jurisdiction, was unable to make the decision it did for these reasons: Because it lacked the jurisdiction, because it could not legally have made the decision that it did, the November decision of the Planning Director cannot be vacated, could not have been vacated and is still out there. Is that confusing?

GIMPEL: It's not confusing. I understand your argument. But I think that's as far as you really need to go, because now to get into what the Planning Director did or did not consider in making his November decision is for later if we believe we have jurisdiction.

FRANKEL: Understood. Actually -.

GIMPEL: Okay.

FRANKEL: I guess there are two related arguments. One is the Planning Director was obligated to do these things. In addition, the Board of Appeals was obligated to do these things; and that's what I'm addressing. Because the Board of Appeals did not insure that traditional and customary practices were protected, its decision, it could not have made the decision it did. And, therefore, the November decision is still out there, the Planning Director's decision is out there, and it's not moot.

GIMPEL: I'd like you to address the issue of the effect of the Planning Director's withdrawal of opposition to the running of the County Code provision that said that if there is a delay for more than 45 days the application is deemed approved.

FRANKEL: Say that again.

GIMPEL: As you will find in the transcript of the hearing in the earlier case, that's, I forget the citation number, you will find that the Planning Director withdrew opposition to the operation of the Statute, the County Statute, that said if there is no decision within 45 days it is deemed approved. The withdrawal of the objection to that then resulted in making moot the November letter of the Planning Director and having the County statute operate to approve the application.

FRANKEL: Okay, let me, cause I have several answers. First of all, is, where do I start? I guess the first thing I'd like you to understand is that my understanding is that the reason for that is there's an agreement by KCPT and the County that has not been presented to you, and that is that KPCT would comply with the conditions of the November letter. And I can, the rationale -.

GIMPEL: I can tell you that that is not pursuant to the transcript of the hearing.

FRANKEL: I understand that.

GIMPEL: There was no agreement at the time, period.

FRANKEL: I understand that.

GIMPEL: Okay.

FRANKEL: There's nothing before the Board. However, Ms. Self told me that KPCT had agreed to comply with the conditions in the November letter, and that KPCT was supposed to be sending a letter to the County to that effect. I understand that that agreement was not presented to you. That is disturbing, but that is something that, that, you know, in terms of your question, that's part of what's going on.

GIMPEL: My recollection, and it's to be borne out by the transcript of the hearing in January, is that that agreement did not exist at that time, that they withdrew their opposition. In fact, there was argument that, as to whether the conditions of the November letter still applied.

FRANKEL: If you could maybe direct your question to the two parties that entered into this agreement, which are not, which unfortunately were not provided to the Board of Appeals, I think that would help. But Amy told me that KPCT had pledged to comply with the conditions of the November letter.

SELF: I'll respond to that.

GIMPEL: Ms. Self.

SELF: Those conditions in that letter are just restated. It's more, it serves as a checklist for the Planning Department so that when they're doing the final subdivision approval they don't have to go digging through the rezoning ordinance to see what the conditions were on the rezoning, they don't have to go dig through the SMA Permit conditions, so that those are already there. It serves as a check list; and, of course, they're agreeing to do all of that because they know they can't get final subdivision approval until they do so. So it was Kohala Preserve's decision to go forward with whatever reason they had to go forward, with the hearing. But the Planning Department says why, because they don't get give final subdivision approval until all of the conditions are met. And those are conditions that are of the rezoning, the SMA Permit, and everything that's required under Sections 23-62, 63, 64, 65, and I believe even 66.

KAM: Mr. Chairman, may I -?

GIMPEL: Yes, Mr. Kam.

KAM: There is no agreement between KPCT and the Planning Department to perform any specific conditions. I'll just state that for the record. KPCT's position is that the November 28, 2008 letter is null and void, and that it is not bound by that particular letter. KPCT understands that it needs to comply with all requirements of law and any other entitlements that may apply to the project that the Planning Department may consider to be conditions precedent to the approval of final subdivision approval for the project; and KPCT intends to comply with all requirements that are imposed by other applicable law. But there is no agreement to perform any specific conditions. We will perform simply what is required by law. That is our position.

I think what's important to keep in mind here, too, is that if you move forward with this appeal the decision that Maika'i would like you to render is that the November 28, 2008 letter, tentative approval, is vacated, is reversed, is no longer in effect. We agree that it's not in effect. We agree that it is invalid at this point. The Planning Department also takes that position, evidenced by their revocation of the effectiveness of that letter based on your decision. That really should be the end of it. Mr. Frankel also said that they amended their petition to include that decision as part of what's before you today. But the Planning Director's decision to revoke that letter was based on your decision. It's not an independent decision. It's carrying out the legal effect of your earlier decision. So I don't think that is an appropriate basis for appeal.

GIMPEL: Mr. Frankel.

FRANKEL: What you heard from Ms. Self is that the County's position is that KPCT has to comply with the conditions that are laid out. It is the County's position that all of those conditions that are required are the ones laid out in the November letter. So what you're hearing is KPCT saying we're only going to do what's legally required, and the County is saying what's legally required is what's in the November letter. So the suggestion that the November letter has no significance is simply not true.

To get back to the original question that you asked, not only is the fact the November, the relevance of the November letter is still at issue based on the County's position as to its applicability to this project, but, in addition, this Board could not have rendered the decision that it did because it lacked jurisdiction. Your jurisdiction is to render appeals from final decisions. The

appeal that KPCT brought before you was the fact that the Director did not do anything within a certain timeframe.

GIMPEL: I beg to differ. The appeal that was brought before us was to challenge the November letter as an improper final decision because it had been made moot by virtue of the running of the time of the County Statute. Is that correct?

KAM: That's correct, Mr. Chairman. If I just may make a quick comment as well.

GIMPEL: Yes, go ahead.

KAM: That issue is on appeal to the Third Circuit. The question whether the Board had proper jurisdiction to rule as it did will be passed upon by, or Kako'o is attempting to get the Third Circuit to pass on that issue. There is some disagreement over whether -. We don't necessarily agree that the scope of the appeal is that broad, but they are attempting to have the Third Circuit review that decision. And so that's not before you. There has been no stay of your decision. The Third Circuit has not ordered any kind of stay of your earlier January decision; and it's not for you at this time to revisit whether you had jurisdiction or not.

SELF: May I add something also? I want to respond to something Mr. Frankel said about me. At that time that he, Mr. Frankel called me and asked me why we were not appealing this. And I gave him the explanation that we were going to settle, at that time we were going to. The settlement broke down. But I'd like to explain what tentative approval is, to begin with. Tentative approval is not the letter that went out from the Planning Director. Tentative approval is stamping the effective date on the preliminary plat map. That's what you're approving. You're approving the preliminary plat map. So that's why it was not necessary to send out a new letter or rescind that letter. The only action that the Planning Department had to do was change the approval date of the preliminary plat map which was ordered by this Board. So the letter that went out on November 28th, as I explained, is something that Chris Yuen, the Planning Director at that time, did routinely as it's more, like I said, a check list for the planners to know what was going to be required at final subdivision approval. So I don't know, the new Director, maybe the new Planning Director won't send out letters like that. I don't know how she intends to handle tentative approvals. But the tentative approval is the approval of the preliminary plat map. So the preliminary plat map has now been changed to reflect the approval that was determined by this Board. That's why the November 28th letter that went out is of no issue at this time, because that date was what was previously on the preliminary plat. That has now been changed to reflect the Board's decision. So I don't know why there would be an issue any longer with that letter because that date is no longer, it's no longer the date of approval of the preliminary plat.

FRANKEL: I think part of the confusion on this is that an approval, a subdivision application is more than just the map. There are intense informational requirements required that are in the Subdivision Control Code. And that's why you get a letter such as Chris's, the first sentence of which reads, "Please be informed that Revised Tentative Approval of the third submittal of the second revised preliminary plat map dated May 5, 2008, is hereby granted with modifications and conditions." It is not simply putting a stamp on a map. It is far, far more than that.

I do need to revisit the issue the Chair raised because I don't think I was understood. I didn't make myself clear. When KPCT appealed, when they appealed, they were not appealing from a final decision. They were appealing from the lack of a decision. And this Board has no authority to take an appeal from the lack of a decision. The County Charter says that you are to make decisions, sorry, you are to hear appeals from final decisions. KPCT's appeal was not of a final decision. And because of that it is not possible to conclude that the November decision of the Planning Director is moot. That is the point I was trying to make. Thank you.

GIMPEL: That's interesting point. Are you finished now?

FRANKEL: Yes.

GIMPEL: Do you have any, do you have any rebuttal?

KAM: Just that that issue will be decided by the Third Circuit.

GIMPEL: Thank you. Any questions from the Board? Let's first have a motion regarding the Motion for Summary Judgment. Can we have a motion to either accept or deny it before we have a discussion on it. And it'll be just for purposes of discussion.

DRURY: It's just for discussion purposes, so -.

TAVARES: I understand that. Okay, well, I'll make a motion, for the purpose of discussion, to continue this case at some later date after the other case gets decided in the Civil or in the Circuit Court.

GIMPEL: Is there a second?

MAEDO: Maedo second.

GIMPEL: Would you care to discuss your motion to continue?

TAVARES: Okay. Well, I was reading all the paperwork here, too, and a lot of, you know, there are a lot of words in between that don't make a lot of sense. But the very last part of what you said is what I picked up, that Mr. Frankel said, is what I picked up out of it – that in the first decision that's being appealed, I mean in the first case, Case No. 1 is being appealed and so it's not over, it's not closed. So if that one is not over and closed, then neither can this one be closed until there's a decision on that. Whether that one is actually approved or not is going to determine whether or not the November letter is truly effective or not.

GIMPEL: Further discussion?

DRURY: I would like to ask a simple question of Mr. Frankel. In 25 words or less in your second amended petition, what is your remedy? What exactly do you want us to do?

FRANKEL: That's different from the first petition?

DRURY: You have the seconded amended petition. This presumably is what we're dealing with today. I scanned this, and it may be my fault, I scanned this for a clear idea of what exactly you are asking us to do in this proceeding, and I didn't find it. So I'm asking you, could you deliver that orally, what exactly is the remedy you want from the Board today?

FRANKEL: To reverse the Planning Director's decision approving this subdivision application of KPCT.

DRURY: Which, this is the decision of November?

FRANKEL: Correct.

DRURY: Okay.

FRANKEL: Well, let me take, it's more than, it's a decision of November, it is in addition. There's an undated decision by Bobby Jean Leithead-Todd to back date the approval on the plat map as well. So there are essentially two decisions.

DRURY: So you are asking us to abrogate the November 28th decision?

FRANKEL: That is correct.

DRURY: Okay. So it is then clear that if, so that if this were made moot that effect that you're asking us for, meaning that the November 28th decision be abrogated, would in fact be the case if the decision were made moot? I'm just trying to get that clear.

FRANKEL: Well, I can't say I followed you completely. But our point is it's not moot. I think that's the issue. We're arguing it's not moot. You seem to assume that it is moot, and we're saying it's not moot.

DRURY: Okay. I don't want to go back to the whole thing again. It just seems that if that's what you wanted, that's what you would be getting by the decision being made moot. I just don't understand the distinction myself, although I'm willing to not have another huge discussion about it.

FRANKEL: Well, there, the bottom line is my client does not want this subdivision approved as it has been because there are many laws that would be violated by doing so. There are various decision points. And we have, in this case we have appealed both the November decision and the more recent decision by Bobby Jean to back date the approval of the subdivision plat.

DRURY: So you have no confidence then that between the tentative approval and the final subdivision approval that Chapter 343, Section 6-E, and the rest will not be carried out? Is that what's underlying your argument?

FRANKEL: That's a great question; and let me address that. The way 343, 6-E, Ka Pa'akai which is the analysis that had undergone to investigate and protect Native Hawai'ian rights, all those things are supposed to occur prior to decision making. Now why has it happened,

why is that important in this case? Well, let me give you an example. You have a subdivision map, okay, picture one in your mind. And let's say you do your investigation and you find out, you know, this particular area, this area is a really important area for traditional customary practices, and it would not be a good idea to have a mansion built right at this location -- and, therefore, the subdivision plat map should be changed because, because of this issue; or maybe it's an issue with regard to runoff, or maybe its an issue with regard, you know, whatever it is -- and you want to do it. The way the law works is even though we call it a tentative subdivision approval, at that point developers argue their rights are vested. So it becomes very difficult for a County entity, the Planning Department, to say, you know what, you can't have your lot here, or you're going to need to reconfigure. Cause what developers then do is say, well, we're going to sue you. And so that is why it's so important that this kind of information come forth before decision making and before tentative subdivision approval.

DRURY: Okay, now, I'm sorry for taking up the Board's time. But I would like to follow that up with a question to Ms. Self, and this is a question I did ask myself. Customarily in the County, you know, Chapter 343 does say that an EA, an environmental review, should be carried out before major permit approvals. What is the custom of the County for requiring an EIS or making an exemption determination? At what stage in the subdivision approval process is the exemption determination for an EA or EIS made? Is it normal to do it between tentative and final subdivision approval, or does it normally happen earlier? I ask this because -.

SELF: I'm sorry, what is -?

DRURY: I asked an important question.

SELF: I'm sorry.

DRURY: All right, a question about Chapter 343. The law says it should be carried, that there should be a determination about triggers and exemptions before major permits are, before major approvals are made. That's what the law says. My question was a practical one. In Hawai'i County in the subdivision approval process, where normally does this decision to do a, to consider a 343 trigger an exemption? Where does it normally happen? Is it after preliminary subdivision approval or does it normally happen before that? Mr. Frankel is saying that Chapter 343 has not been carried out -- which is true in many of the issues that he's talking about where it would be at least disclosed through an EA, EIS process. Are you planning to do an EA? That's germane to the point, I think.

SELF: That has already been done.

DRURY: An EA?

SELF: Attorney -?

KAM: Yeah, I would take exception to the assertion that, you know, there has been no compliance with Chapter 343. I think what's important to remember is that this project is already entitled. It has been through SMA, it has been through hearings at the Planning Commission. It has been all the way up to the Supreme Court. And it's already entitled. And what we're dealing with here is a subdivision application. There was an issue that the Citizens

group, the predecessor group to Kako‘o, raised regarding compliance with 343. That issue was litigated to the Supreme Court.

DRURY: In what year?

KAM: I think it was before the Supreme Court in, '99 I believe was the decision, '98 or '99. You know, the project has, the requirement, the feature of the project that led to the requirement to perform an EA that was before the Supreme Court in that case, that feature has been withdrawn from the project. It's no longer a feature of the project. So that trigger for 343, you know, is no longer a part of the proposed project.

DRURY: But the fact that now the DOT in most cases has been asking if there is a use of State and County lands, Mr. Yuen seemed to think in March of 2008 that an EIS would be necessary. I'm sorry for getting into all of this but it seems to be germane to the question.

SELF: I believe you're referring to the EA that has to be done for the parks, the park improvements.

DRURY: And you're not -?

SELF: That's County property. That, the County has to do that, the Parks Department has to do that.

FRANKEL: Can I clarify a couple of things on that?

GIMPEL: Yes.

FRANKEL: There is, KPCT has submitted a draft EA to the County. That, it is my understanding, has not been published. It has not gone out for public comment. However, those, there are two EAs I believe, cause there are two public parks. What we're saying is the environmental assessment that needs to be done needs to be done for this development as well as the parks. And the law is very clear on that. On Maui for instance there was a development that was just going to put a drain pipe under a public road. And the Hawai'i Supreme Court said you need to do an EA for this drain pipe and for the project, this big residential development that's going on with it. It doesn't matter that your use of State or County land is small, you've got to do it for your whole project. The law is very clear about that. So that has not occurred in this case.

To get back to your earlier question, in that case as well, the Maui County argued, oh, we'll do the EA (environmental assessment) later, when it comes to the use of that drain pipe. And the Supreme Court said no. The law says you do an environmental assessment at the earliest practical time. That's the exact the language from HRS, Chapter 343. And the Hawai'i Supreme Court has repeated that over and over again. In Sierra Club versus Land Use Commission, which is a development in central Oahu, Castle and Cook proposed to put drain pipes under H-1, H-2, and the Hawai'i Supreme Court said -- and Castle Cook argued, oh, we'll do an EA later -- Supreme Court said no, Land Use Commission is rendering a decision now so you need to do the EA or EIS prior to decision making. Finally, it is, I don't agree with the statement that this project is entitled. It is seeking its entitlement by seeking subdivision approval. Until it gets its subdivision approval, it is not entitled. It is so important that prior to subdivision approval that an environmental

assessment be done so that adjustments can be made to the subdivision itself. If you have, if the Planning Director has all that information prior to decision making he or she can make a good decision about where, how the subdivision is going to be shaped.

KAM: Mr. Drury, even if Mr. Frankel is correct, assuming he is correct about what he's saying about 343, the result that he's seeking is invalidation of the November 28th approval, right, because among other things he would claim Chapter 343 hasn't been complied with. The November 28th approval is already null and void. So I'm not sure what the Board could do by moving forward. Now Board Member Tavares raised the question of should we continue this matter until the Third Circuit decides the appeal by Kako'o. And we would submit that the appropriate and procedurally efficient thing for the Board to do is to dismiss this matter. If the Third Circuit determines for whatever reason that the Board did not have jurisdiction, we would have to start all over again. Maika'i can intervene in whatever decision then follows. But, you know, we're not really sure what the Third Circuit could do. The Third Circuit could decide that it was appropriate for Kako'o to be allowed to intervene and send it back to you. You know, at that point there would be another administrative proceeding and Maika'i conceivably could have the opportunity to intervene in that proceeding if it wanted to. But it doesn't make sense to postpone this one indefinitely while that Third Circuit appeal is pending.

GIMPEL: Is there any further discussion?

DRURY: I -.

GIMPEL: Go ahead.

DRURY: Ms. Self, this subject of connected actions, which I think Mr. Frankel was bringing up, has there been any determination by the County of whether the EIS triggers of the road and the parks via the idea, the doctrine of connected actions, applies to the larger project?

SELF: I don't have the Planning Director here today because we were not going to get into the specifics of the case today. But I will point out that Mr. Frankel neglected to discuss the most recent Supreme Court case, not U.S., Hawai'i Supreme Court case, the Nu'uano neighborhood case that has now sort of changed the way we're looking at the triggers of EAs. And that case said merely a connect, a hookup, to a County or State road is not, does not trigger an EA. So now I don't have the details today because I didn't bring my witness with me; but if they're merely hooking up to a State or County road, that will not trigger an EA. My understanding was there is an EA that's going to have to be done by Parks because that's a County park, not part of this project. But they're going to be making improvements as a condition of the rezoning for a public park. I thought an EIS had already been done, I know that an EIS was already done on at least one of the properties. It's confusing because this thing goes back to the eighties; and so there was like two different parcels being developed, and they were separate but they were considering it as one project. So it goes way back. And I thought there had already been an EIS, at least on one of the properties. I'm not certain about -. And I know that the archaeological inventory was done, I'm looking at it right now, and that was sent to SHPD. SHPD has made its recommendations. They're waiting to hear back from SHPD, I believe, as to which sites need to be preserved; and I don't know if a preservation plan is in place yet or not, but SHPD is involved in this as well.

GIMPEL: Go ahead.

KAM: I also don't have all of the exact details of the project straight in my mind, cause I wasn't prepared to address the merits this morning. But just for purposes of background since you asked the question, Mr. Drury, my recollection is that back in the eighties or perhaps it was the nineties, under the original configuration that was planned for the project, there was an environmental impact report that was required under County law that was prepared for the project. So the project under the previous configuration has been through environmental review. And the case before the Supreme Court that Citizens brought the issue essentially was whether the environmental impact report prepared pursuant to County law was sufficient to satisfy the 343 requirement for an EA. So I -.

DRURY: And the Court said yes?

KAM: No.

FRANKEL: No, the Court said no.

KAM: The Court said no. But I just wanted to bring up that in an environmental review process the project has been through that under its prior, you know, configuration. So there has been consideration of environmental issues.

FRANKEL: And to belabor the point, yeah, so there was an EIR which was not consistent with the requirements of 343. It didn't comport with the public participation or informational requirements under 343. As far as the Nu'uau case goes, the Nu'uau case held that in that case the environmental group failed to produce any evidence that a public land was being used. All they pointed to was discussion about hookup. Here in this case we have plenty evidence of proposed use of the land, both because of the use of the County parks to make the improvements and, in addition, the use of public highways to make the, there's actually highway improvements that need to be made for this project to go forward.

I did also want to jump on the discussion about the preservation plan issue. You know, that's kind of the problem. SHPD hasn't approved their preservation plan. And so how can you make up tentative subdivision approval until you see what's being preserved and how it's being preserved? You don't want to create a lot that is entirely in preservation, cause then you create a situation where the County is going to be sued for a taking -- you've allowed this lot to be created and we can't make any use of it. So that just sort of highlights the importance of getting all this information ahead of time.

SELF: I'd like to point out that we don't have the Planning Director here today. They have information, they've been in touch with SHPD, there may be a preservation plan already.

FRANKEL: There's not.

SELF: Well, that's according to you.

FRANKEL: And it's in the record. It's in the, you know, the documents show it.

GIMPEL: This discussion is focused on the motion to continue -.

SELF: That's correct.

GIMPEL: Not on the issues of the case. Is there any further discussion on the motion to continue? I have one question. The case in the Circuit Court that was filed in January was filed by Kako'o, right, and the appellant in this case is not Kako'o, it's Maika'i?

FRANKEL: Yes. Although we have filed to intervene in that case, just for full disclosure.

GIMPEL: All right, thank you. So we're dealing with different parties. That motion to intervene has not yet been accepted in the Circuit Court, is that correct?

FRANKEL: That's correct.

GIMPEL: Thank you. So we're dealing with separate parties. And I think that therefore what the Circuit Court might decide in that case, absent the granting of the motion to intervene, would bind Kako'o but not Maika'i.

FRANKEL: I think it's pretty safe to say that whatever the Court decides is going to affect all parties here at the table as well as Kako'o. Whether we intervene or not, it's going to affect us.

GIMPEL: Okay. Regardless, Maika'i's, in my view, rights to further action, whether before this Board or before an Appellate Court following the Circuit Court's decision, would not be compromised by our moving forward today to hear this case. Any other comments? Then can I have a roll call on the motion to continue.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Maedo?

MAEDO: No.

KAWAHA: Mr. Drury?

DRURY: No.

KAWAHA: Ms. Hart?

HART: No.

KAWAHA: Mr. Hendricks?

GIMPEL: He's not -.

KAWAHA: Oh, sorry, recused.

KAWAHA: Chair Gimpel?

GIMPEL: No.

KAWAHA: Chair, there are two -.

GIMPEL: There's, I counted one no -.

SCHOEN: One yes.

GIMPEL: I'm sorry -.

KAWAHA: I'm sorry, Mr. Drury was a -?

DRURY: No.

KAWAHA: No. One aye and four noes.

GIMPEL: Correct. All right, so the motion to continue fails. Thank you. We will now continue discussion of the motion before us. Is there a motion before us? I forget -.

DRURY: No.

GIMPEL: No. We need another motion now to, regarding the motion that has been filed to dismiss the case. Can I have a motion on that for discussion?

TAVARES: So moved.

GIMPEL: To what?

DRURY: To what?

TAVARES: Oh, to accept your motion as you stated.

GIMPEL: It's not my motion. It's your motion if you want to make it whatever way, to either accept or deny the motion to dismiss.

TAVARES: Oh, okay, then I'll make a motion to dismiss this -.

GIMPEL: To dismiss the appeal?

TAVARES: To dismiss the appeal, period.

GIMPEL: Can we make that in the positive, make that a motion to grant the motion to dismiss? It's the same effect. But it's a motion to grant the motion to dismiss?

TAVARES: Yes.

GIMPEL: All right. Is there a second to the motion to grant the motion to dismiss?

MAEDO: Maedo second.

GIMPEL: There is a second. All in favor aye? Well, let's have discussion first.

DRURY: Nice try, Chair Gimpel.

GIMPEL: Sorry. All right. Mover, Madam Movant, would you have any comments on your motion to grant the motion to dismiss.

TAVARES: I have a comment, just because the last motion died basically and I think we can bring this back up again at another date if the issue comes up around. I think, I mean it will come out as a new, as a new motion or something. But for now I'm still stuck on we have to resolve it. We can't do Step 2 before we do Step 1, so we have to figure out what's going on in the first one.

GIMPEL: Any other comments or discussion?

FRANKEL: I think you have people who are understanding the motion in different ways; and I think, I think there needs to be some clarification. I don't think it's pretty clear -.

GIMPEL: I'll attempt to clarify. If I don't clarify it to your satisfaction I'll welcome your satisfaction. As I understand the motion it is to accept the motion to dismiss this appeal. Does everybody understand that?

FRANKEL: So that means it would not come up before this Board again?

GIMPEL: Unless, unless there is a decision of the Circuit Court which has the effect of making effective the November letter, or something like that, in saying that the planning, that we were wrong. And then you could file an appeal to that and we can consider that at the time. That's my understanding of it. Now are there any further questions or comments on the pending motion to accept the motion to dismiss?

DRURY: I have concerns about environmental protection, etc. What I have not been convinced is that if the case is dismissed that there will be any difference in how those concerns are carried out, that whether or not the November letter is in effect seems to make difference to the protections that should be necessary for the site. And if that's not the case, I haven't been explained and convinced of it.

GIMPEL: Any other comments? And I have just a couple. I believe that the concern here is that the appellant is not really a person aggrieved because the approval of the application for tentative subdivision approval or preliminary subdivision approval was, as we determined in

January pursuant to Statute which occurred then in June because of the running of the 45-day time frame. That determination that we made was actually as a result, I believe, of the Planning Director's withdrawal of opposition to the running of the Statute and its effect on the preliminary approval. If we were to accept this appellant's position then we would in effect be saying that the Statute didn't operate. We don't have the authority to do that. I think the Statute says if it's not decided within 45 days of the application it's deemed approved. We can't change that. And, therefore, I'm going to vote in favor of the motion to dismiss. Are there any other comments, questions, concerns? Hearing none, would you call the roll, please.

KAWAHA: Sure. Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Yes.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: I'm sorry, that's a yes?

DRURY: Yes.

KAWAHA: Ms. Hart?

HART: Yes.

KAWAHA: And Chair Gimpel?

GIMPEL: Yes.

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

GIMPEL: Thank you. Thank you for all of your hard work.

At 11:43 a.m. the Board took up minutes and administrative matters; and at 11:45 a.m. the Board again took this item up.

GIMPEL: I inadvertently neglected to ask counsel to prepare Findings of Fact regarding the motion that we just approved on the motion to dismiss.

SCHOEN: Mr. Frankel is still here so if he doesn't have any objections I would suggest that the Board direct me to ask Mr. Kam to prepare the order.

GIMPEL: That's fine. Thank you.

The discussion ended at 11:46 a.m.

Respectfully submitted,

Sharon M. Nomura
East Hawai'i Secretary