

BOARD OF APPEALS
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
MAY 8, 2009

A regularly advertised hearing regarding the appeal of **DAVID OWENS (BOA 08-000072)** was called to order at 10:03 a.m. in the County of Hawaii, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i, with Vice-Chairman Peter Hendricks presiding.

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

ABSENT & EXCUSED: Joel Gimpel

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

David Owens, Petitioner
Brooks Bancroft, Attorney representing the Director of Public Works
Mark Jacobson representing the Department of Public Works, Building Division
Brian Kajikawa representing the Department of Public Works, Building Division
And six people from the public in attendance.

HENDRICKS: Next item under Unfinished Business, PETITIONER: DAVID OWENS (BOA 08-000072) - Continued hearing on the Petition for Variance from the Building Code requirements relating to doors, fire wall, and projection and clearance. The subject property is bordered by Keawe Street, Mamo Street and Kilauea Street, adjacent to the Garden Exchange commercial building, Downtown Hilo, South Hilo, Hawai'i, TMK: (3) 2-3-11:16. Please state your name for the record.

OWENS: My name is David Owens. Also, I must, I know David. From the last meeting we mentioned I know David. Also, last night, we were at the same meeting also. We didn't talk to each other, just to clarify that.

HENDRICKS: Thank you.

DRURY: Yeah, just for the record - I made a disclosure in the last meeting saying that Mr. Owens was briefly my tenant in 2005, but I thought that would make no difference to my opinions in the case.

BANCROFT: Good morning, Mr. Chair and Board Members. I'm Deputy Corporation Counsel Brooks Bancroft. With me here today is Mark Jacobson from the Building Division, Department of Public Works.

JACOBSON: And it's Mark Jacobson. I'm with the County and Building Inspection on the project. I've been with the County since '05.

HENDRICKS: Thank you. I understand Mr. Owens wants to submit an exhibit. Is that correct?

OWENS: Those are the, it says the Uniform Building Code.

HENDRICKS: Thank you, the Building Code of 1949.

OWENS: In the last meeting the Chairman asked me if it's possible to find one; and we located it. It really wasn't much help but we brought it.

HENDRICKS: Thank you. Mr. Brooks, any objections?

BROOKS: I just note for the record that we did receive the exhibit just prior to the hearing and we haven't had a chance to thoroughly review it. That being said, I also believe the construction of the building was in 1948, so I'm not sure of the relevance of the Building Code for 1949. We just raise those comments.

HENDRICKS: Mr. Owens?

OWENS: It's pretty much what we discussed the last meeting we met. Our argument on this is that we didn't go over 50 percent and we shouldn't be held to the new standards. We should get the 1948 standard which the building was built under. Those pictures show the building the way it was when I purchased it. The awnings were hanging over, oh, actually not over the curb but about 4 inches from the curb; and that's what we'd like to do, is put it back the way we found it. If we would have left the awning, it was dangerous the way it was; and I don't think we should be held to the new standard for just removing it.

HENDRICKS: I think there was a request to demonstrate the value of the project compared to the value of the property, to come within a certain guideline.

OWENS: We did that last time, I think it was \$80,000. We were already into it. I brought the receipts for that. It's in the packet from the last time. Also we had the appraisal and the insurance valuation on it too last time. I thought we got through that part of it. I wasn't sure if we need to redo that again.

DRURY: Are you asking for questions?

HENDRICKS: Pardon?

DRURY: Are you asking for questions?

HENDRICKS: Questions or comments from the Board.

DRURY: I do have a question. If I understand correctly, the intent of the Board was that you would sit down with the Building Department, you would bring up your cost figures and an estimate for the value of the building, and that you would demonstrate to the Building Department that you've complied with the 25 percent rule. If I understand right, what you want is for the improvements to be under the Code at the time of building, presumably 1948, and that the mark that you would like to hit, again, if I understand right, is 25 percent. Were you able to sit down with folks from the Building Department and demonstrate that to their satisfaction? That's what we were hoping would happen.

OWENS: We submitted, we redrew the plans. We also have an electrical engineer and the mechanical engineer. We want to submit these complete, that's why we kept extending. And when we submit them, we want them completely ready to go. They were, we first took them in in March. We had a bit of a problem. We had an architect that was left on the job, had to be taken off before the new architect could come on. We didn't understand how that worked but we got that sorted out. We got them back to the Building Department on the second of April, went through the process of sewer, all the different departments, came back, we submitted them back in again on the 14th April. And that's where we are. That's when we expected a dialogue with the Department. Couple of days ago I mentioned it to Brian Kajikawa let's sit down and discuss this thing since the plans were there. He didn't know where they sat in the Building Department so it had been there roughly 3 ½ weeks. So that's where we're waiting for them to look at them and give us a comment on it. I would like to solve this but it doesn't seem to be forthcoming over there.

HENDRICKS: Okay.

BANCROFT: If I could add something. In the time period since the prior meeting, my understanding is that the original architect had withdrawn from the project. Mr. Owens had withdrawn his original plans. He has resubmitted new plans which haven't gone through the approval process at this time. So at this point my understanding is construction is continuing without any sort of approval process being completed. My other understanding is that he has been, Mr. Owens has been issued stop work orders because of that and construction appears to, you know, keep continuing. So I'm not sure if the Board even has authority to issue a variance or variances if construction is going on without any sort of approval, approved plans at this point anyway.

HENDRICKS: Yeah, we had hoped that there would be consultation seriously between the appellant and the Department of Public Works, in Building, on this matter; and it sounds like for various reasons it hasn't happened yet.

DRURY: And just to follow up on the original question, there are two somewhat separate things going on. One is the resubmitting of your plans. The other is to make sure that those plans are applicable; and that has to do with the 25 percent rule. That's County Code

Section 5-1.O.2. It would seem, offhand not knowing the process in detail, that you need to establish that you meet those requirements so that whatever things that are in your plans in terms of new construction do qualify under the old code rather than the new code. I think that's something we definitely wanted to see happen. So that has not happened yet?

OWENS: No. The plans are, it has been over three weeks.

DRURY: So it was your idea to do the, establishing that the old code is applicable in the context of talking about the new plans? Where was that going to come in?

OWENS: It was so large, the difference. It was \$80,000 in costs compared to \$1,080,000, I think was the number on that for the valuation. It doesn't, it's so far removed from that. I don't think we have a problem. I think even the Board commented on that last time. The difference was so high that we're not going to come in close to 25.

DRURY: And it's clear from your reading of the law that the components of that estimate, for example, your tenants are going to build out the bathrooms, kitchens, etc.

OWENS: Right.

DRURY: So you're content and hopefully the Building Department is content that the way that estimate is constructed is in accordance with the law?

OWENS: Yes. The difference is so high. We couldn't spend that much money on the inside to do this, and so I wasn't concerned with that. I was waiting for the Building Department to come back to me. They've had them for three weeks now. And when I asked Brian about it, he didn't know where they sat; and that was on Wednesday.

BANCROFT: If I could add something once again.

HENDRICKS: Go ahead, Mr. Brooks.

BANCROFT: You know, Mr. Owens is essentially complaining that the Building Department has had these revised plans for three weeks, yet the prior meeting was held over five months ago, I believe. So, I mean, I believe the burden really should be on Mr. Owens to come to the Department. And the Department is willing to work with Mr. Owens, but Mr. Owens needs to comply with the procedures and the process before the Building Department can enter into some kind of discussion with Mr. Owens.

HENDRICKS: It seems that the Board has a quandary here. We don't have jurisdiction over the procedural aspects and the operations of the Department of Public Works and the building permit process. We have before us a request for a variance but there are some missing items in the process, and it remains to be seen whether we can do anything at this point. There are a couple of options. We could just deny the variance, but that wouldn't solve the problem and Mr. Owens could come back later and start all over. I wonder if we could hear from Mr. Kajikawa.

KAJIKAWA: Morning, Brian Kajikawa, Building Division Chief. As mentioned by our attorney, Mr. Owens has not made an attempt to talk to the Building Division about the requirements that were set upon him at the time of the last hearing that we had. We were waiting but nothing came through. As far as the drawings coming three weeks ago, that's fine to show -. But basically he needs to do that because basically his original architect pulled out of the project, which means that he had no legitimate building permit that time. However, he came back three weeks ago with the understanding, feeling that this would resolve all of his problems, but that's not the problem that we're encountering. The fact, what we needed to have was the discussion that you folks had put upon him, but that had never had done, that never had come to be.

OWENS: Excuse me, is it possible to separate the two? The main issue here is the awning. That's why we're here. The plans and, that's not really this Board's kuleana. Basically we're looking at this awning, the roll doors and the parapet. If we could separate that from all the rest of this -. This could take years if we keep submitting plans and architect's -. If we could just keep going. If we could just separate those three items; and it's what I applied for actually. You know, that's the only reason I'm having this Board look at it. Those are the three items that are going to be in question. The rest of it is just going to muddy it up. And we could, I'll be back again in three months to try to solve it. The position of the Building Department is very straight. It's not a secret. They do not want this overhang to proceed, it's the Code to them. And that's their thing, that's why I'm here. So if we could separate those three items from the rest of this, that would be very helpful.

HENDRICKS: Ms. Tavares.

TAVARES: Thank you. Well, I'm thinking that the question that you're asking us is to overlook the Code on those three items. I think what we need first is, what was pointed out at the last meeting, that we need to get a denial or something on your plans.

OWENS: Yes.

TAVARES: The last time you put in the plans they told you it was okay as long as you changed the awnings, so that wasn't a denial. And I think that's the problem we're having, is everything is kind of out of order. And so to mix it up a little bit more, I'm curious if you've got a response from DLNR as far as the historical building. What do they say about the awnings?

OWENS: I got a clearance. It came, I think it was about the first of January. Since then they've repealed that law. So there was a lot of people who got caught up in that, I was one of them. They've repealed it. Is that correct?

DRURY: I'm sorry, could you clarify, what was the law that they repealed?

OWENS: There was a, what you're discussing is Department of Land and Natural Resources, Historical Building Division, had to review your plans. We talked quite a bit about this actually at the last meeting. They did it and it came back with no action to be taken on this building. It's over 50 years old, that's why. So that's what happened there. Since then, I guess,

it has been overridden. It didn't affect me. I've already been through the process and it's cleared. But I guess it was such a tough law for people to work with, it has been removed. Do you understand that, Brian? Is that true?

KAJIKAWA: I think we were talking about two different things on this historic preservation thing. But, yeah, the Governor has appealed the law on that one.

TAVARES: So that would, what would that mean, that you can or cannot -?

OWENS: Again, it's, I got the clearance, it was about two weeks after the last meeting. I had applied for it during the meeting time; and about a couple of weeks later it showed up. So, but now it's inapplicable. They've repealed it and -. But now I know that I'm covered so I've got a certificate.

TAVARES: Okay, thank you.

DRURY: It seems that Ms. Tavares brought up an important point that I'm still a little confused about; and perhaps our counsel could help us. The Board is supposed to look at appeals from final decisions. I don't know if we have a decision that can be appealed. I'm not sure if we are in a position procedurally to grant a variance. That is a question. Do you have any comments on that?

SCHOEN: Sure. Mr. Chair, if I may, my understanding is, and I'm looking at the minutes from our last hearing dated December 12th where the Board continued this matter and I'm quoting, "... to allow Mr. Owens, time to go to the Building Department with evidence indicating what your costs are for the past year and, two, what the appraised value of the property is, to demonstrate that the '48 Building Codes do apply." So I think that's what the Board was waiting for today. And the reason that was requested of Mr. Owens was so that it could be very well that if that Code applied you wouldn't need to grant the variance in the first place. So, you know, that's why you were asked to go ahead and do that. So I believe that at this point the Board has two options; and that would be to either dismiss the appeal or, again, to continue the matter. But you folks might want to have discussion on that.

OWENS: Excuse me. That appraisal was in the packet that I handed out last time, also my costs were also -.

SCHOEN: I believe the problem was you were coming to the Board and submitting it to the Board to review, first off, without going to the Building Department. But I may be wrong, but that's my recollection of what happened.

OWENS: Okay, I gave everybody a copy. Just like today, everybody received a copy of the packet and that was part of the packet that they had too. So it's not like it's you don't have it, I don't have it, and you don't have it. I made 15 copies. So I don't know how to do it again. I can just photo copy and give it back to him, you know.

HENDRICKS: When could we expect the plans to be checked and some meeting to be held between the applicant and the Building Department on the permit process?

BANCROFT: Maybe I should direct that question to Mr. Kajikawa.

KAJIKAWA: The reason for the question it being while -? The reason you're asking that is for -? I want to understand why you're asking that question.

HENDRICKS: Just to give us an idea of the next step in the process. Because we have an option to continue it and -.

KAJIKAWA: Okay. You also have to remember that presently he has no building permit. So basically when he came for the variance he had an actual building permit. Since then his architect pulled out of the project, so basically right now he is building without a building permit.

OWENS: The question was when can we expect this thing to be rejected or accepted?

KAJIKAWA: Well, it all depends on the plan review process, how long it's going to be taking. I haven't gone through this means to look at what's the status of the, on where they are on the plan review on the project.

HENDRICKS: I guess my question related more to if the plan submittal process is successful there would be another building permit issued and then the project would be able to proceed?

KAJIKAWA: Right.

HENDRICKS: And this Board doesn't have jurisdiction over the Department of Public Works in the permit process. That's your control, so -. We're interested in eventually getting to this variance question.

KAJIKAWA: Okay, then the question is if this variance would, because we don't have a legitimate building permit, is this variance -?

BANCROFT: It's difficult to know what the variance being requested is if there's no approved plans. I mean, that's the initial step in terms of the Building Department being able to determine what it needs to do, or what its decision will be, or what the discussions will entail. I mean the onus really is on Mr. Owens to, you know, do what he needs to do to comply with the process.

OWENS: When I submitted the first time it was. Just because an architect has pulled on and another one is pulled off has not changed this. We can have little points of law in changing, I guess. But in essence this is exactly the same thing we discussed in December. All we're asking is when will the building permit be accepted or rejected. It's very simple, I think.

HENDRICKS: Was there any substantial change in the plans between Architect No. 1 and Architect No. 2 in this process?

OWENS: It's fairly close. It should be no reason it should be, it's not that big of a change. There have been sets of plans. There was a demolition permit issued. There was a beam replacement permit issued. The one now has the upstairs apartments, or part of the new set; and the awnings, and the roll doors were included in that. Instead of having five, or six, or seven separate permits, the decision was being made to put everything under one complete thing and submit it; and that's why it's there now. But all we just need to know is it going to be rejected; and if it is then we'll make a decision.

HENDRICKS: Thanks to counsel, I think this is a good time to ask for a position at this point for clarification by the applicant and by the Department of, Building Division. So I'll let the applicant go first. Just, what's your position right now? Are you intending to meet with Building Department and follow this process through or -?

OWENS: I fully expect the Building Department to reject the application. We wouldn't all be here right now if they didn't. So that's what I fully expect. And then once they reject it, like they did the last time, then we'll come to the Board and ask for a review of that and a variance to continue -. And we're only looking at the awning, the roll door, and the parapet. I'm trying to keep those three things -- and that's your jurisdiction too -- separate from all the rest of this permit. The problem is this is going to keep going, the taxes, the insurance. The mortgage keeps running, too. This could take a year or two. I'm very close to finishing the exterior of this building, which is the awning; and I could find a tenant and get going. This could probably take three or four more months and it's going to -. This is an undue hardship, and it's just not necessary.

HENDRICKS: Thank you. Mr. Brooks.

BANCROFT: You know, with all due respect to Mr. Owens's position, we were here five months ago. The burden was on and is on Mr. Owens to comply with the procedures and processes. There was sufficient time between the previous meeting and this meeting to provide the information that was requested by the Board. And, at this point, I mean if we continue to continue the hearing, it could be another five months. At that point who knows if it will be completed by then? So our position is that this Board should dismiss the appeal. We really think that Mr. Owens had enough time. You know, the Building Department, contrary to what Mr. Owens has said, has not been trying to, you know, stop his application in any way. The burden is on him to comply with what he needs to do, and he hasn't done it up until this point. And so, once again, we would request the Board dismiss the appeal at this time or dismiss the request.

DRURY: Could I ask Mr. Owens, why do you think the Building Department is going to reject your application?

OWENS: It doesn't comply. The awning is 30 inches in, that's the law, that's the rule. So I'm asking to have the awning put out 4 inches from the curb. So what I'm asking for my building permit is not correct. It's just not going to happen.

DRURY: Well, let's step back to five months ago where, and it's pretty clear from the transcript, what we said was let's try to find -- because we do support good design in Downtown Hilo, I think that's clear -- let's find a way that the Building Department can comply with the law and you can get an awning that works. That's what we said five months ago. So I don't understand, and we outlined a process where this looks like it can happen. So I don't understand why you think they're going to reject your application if it's done in the way that was suggested, that you come in under the 1948 Code. I'm confused.

OWENS: During that meeting I gave everybody the valuations, those two insurance and the appraiser. They received the same thing. And now they said they don't have it. We all had those. I made 15 copies. They mentioned they don't have a copy of that appraisal. We're looking at value here and they're saying they don't have it. I can give it to them today. But for the last few months they said they haven't had it, it has been up to me to give it to them. I gave it to them on the 15th of December. I gave them also my list of costs, too.

DRURY: I just wanted to underscore that our intent was that you reach a settlement with the Building Department. And as the Chair has said several times it's not our kuleana to micromanage that process. It's between you and them.

OWENS: Can we continue it on and let's, to the next meeting; and we'll sit down and try to sort this out. Hopefully within the next week or two this application can be looked at, I'm not sure where it is in the process, and we get involved in it. But this is an important thing for Downtown Hilo. And the support is for myself too, but I'm not the one that wants to drag this on. Like I said this is a financial burden, this thing. And so to think that I've tried to slow it down is not working.

TAVARES: I have a question for the Building Department. What is it that you're expecting to get from Mr. Owens that he hasn't submitted yet?

FUJIKAWA: Basically we haven't seen the comparison between what the actual cost is and what the appraised value is. The cost that he had submitted earlier was only a receipt of materials only. When you're using construction costs, it costs labor; it costs labor and materials of total construction. If he's just giving me material cost, that's not a true construction cost. And we're looking at the true construction cost. Also, all work that's being done by him needs to be done by a licensed contractor. It's State law. It's not a County law. You know, if he's not going to abide by that, then something is terribly wrong. So we need to see the actual cost of construction. And this would be certified by a licensed general contractor. That's what we're looking at.

TAVARES: Okay, thank you. Mr. Owens, do you have any problem getting that to the Building Department within the next month or before another meeting?

OWENS: Okay, by next week it will be there.

TAVARES: Okay.

HENDRICKS: Could we have a discussion among the Board here on the possibility of continuing or not?

DRURY: Do we need a motion for executive session or we're going to do this in public?

HENDRICKS: Open session is okay with me, but if you'd rather -. Your pleasure, the rest of the Board.

SCHOEN: If any of the Board Members, just for the record, need to consult with me regarding questions or issues pertaining to your powers, duties, privileges and immunities and liabilities, we can go in executive session, if you want, pursuant to 92, HRS 92-5. It's entirely up to you.

DRURY: I would say in case the discussion does involve that kind of consultation I'll move that we go into a short executive session to prepare a thoughtful motion.

HENDRICKS: Thank you, Mr. Drury. A second?

TAVARES: Second.

HENDRICKS: Discussion on that? There being none, all in favor?

MEMBERS: Aye.

HENDRICKS: Thank you. We'll go into executive session for a very short time.

EXECUTIVE
SESSION

The Board went into executive session at 10:35 a.m.
At 11:01 a.m., the Board came out of executive session by a motion made by Ms. Tavares, seconded by Ms. Maedo, and unanimously carried by a voice vote of all members in attendance.

HENDRICKS: We're back in general session. We had a serious discussion about what was covered in the earlier part of the meeting and what our options were, and we already mentioned that in open session. Our options are to continue or to deny the appeal; and we felt that there are some undone things on both sides, in particular for Mr. Owens to give a better reading on the cost of the project as compared to the value of the property. And even though there's labor included, that labor has value so that has to be included, even if it's volunteer it has to be included in the project. And we all agree that we want to encourage the historic preservation and architecture of Downtown Hilo, and we sense the frustration among people about running into road blocks and getting things done. But on the other hand we have to follow procedures, too. So we would hope that you will come in with, Mr. Owens, with that information. We can't order you to do that, we don't have the jurisdiction. And, on the other hand, we would hope that the Building Department would process this building permit and expedite the program. And we don't want to be in the business of doing the Department of Public Works' work because we're not allowed to do that either. And I'd like some comments from the Board before we ask for a motion.

MAEDO: I guess my frustration has been I feel like I'm sitting here asking to be made a mediator of some sort, and that's not our role either. Our role is to represent the public. And when I think about where Mr. Owens is coming from, I think I have been there myself. I certainly can relate to that. On the other hand, I've been an administrator, I have to interpret rules and I may not like it, but that's part of my job as well. But meanwhile we have this venue for people to come to to appeal decisions. In this case there was no decision made. We have, maybe we wove this tangle, we added to this tangled web by continuing to listen. But because we want to advocate for the public that we represent, we give this forum to people. So my feedback is please quit making us mediators. We ain't.

HENDRICKS: We'll entertain a motion for continuance or denial.

DRURY: Okay, I would just first like to say that I think the Board like much of East Hawai'i cares very much about Downtown Hilo; and we would love to see some kind of working out of this that preserves the integrity of Downtown Hilo and complies with the law. That's really what we want. Okay, along those lines, I would move that we continue to the next Hilo meeting, roughly sixty days from now. During that time, we strongly encourage Mr. Owens to present information that is acceptable to the Building Department on actual cost and valuation of the building. We also encourage the Building Department to expedite review of the revised plans and to decide which Building Codes are applicable to the case; and please do it quickly if possible.

HENDRICKS: Is there a second to the motion?

TAVARES: I'll second that.

HENDRICKS: Discussion?

MAEDO: I'm sorry, did your motion state a timeline, a continuance for how long?

DRURY: Until the next Hilo meeting.

MAEDO: Oh, I'm sorry. I missed it, my mistake.

HENDRICKS: There being no further discussion? Call for the question.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Hart?

HART: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: And Chair Hendricks?

HENDRICKS: Aye.

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

HENDRICKS: Thank you very much.

KAWAHA: Mr. Chair, if I may, the next Hilo meeting is July 10th.

HENDRICKS: Next Hilo meeting is July 10th.

The discussion ended at 11:04 a.m.

Respectfully submitted,

Sharon M. Nomura, East Hawai'i Secretary

A T T E S T:

Pete Hendricks, Vice-Chairman
Board of Appeals