

BOARD OF APPEALS
COUNTY OF HAWAII

HEARING TRANSCRIPT
NOVEMBER 9, 2007

A regularly advertised meeting regarding the appeal of **PACIFIC HORIZONS DEVELOPMENT CO. LP (BOA 07-000049)** was called to order at 10:10 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

Randy Vitousek representing Pacific Horizons Development Co. LP
Steven Whittaker representing Bernard McClean & Christopher Coonen
Amy Self representing the Planning Director

And seven people from the public in attendance

PETITIONER: PACIFIC HORIZONS DEVELOPMENT CO. LP (BOA 07-000049) - Appeal of Decision by the Planning Director dated May 29, 2007 Denial of the Variance Application (VAR 07-028) relating to minimum water supply requirements of Chapter 23, Subdivision Code, for a proposed 6-lot subdivision. The subject property consists of approximately 47.906 acres and is located on the west (mauka) side of Mamalahoa Highway at approximately the 96 mile marker, Kukuiopeae 1st, South Kona, Hawai'i, TMK: (3) 8-7-10:9.

COOK: We have the same parties here for the next case, as well as an Intervenor. This is in the matter of the petitioner Pacific Horizons Development Co., that's Board of Appeals No. 07-000049. Mr. Whittaker, would you come forward, too, cause I think the way we're going to do this is we're going to have your petition for intervention. So, we have the same parties here. Okay, I'm going to ask first the appellant to introduce himself and if his clients are here introduce them; and then the County, County's representative; and then the Intervenor's attorney and his clients. Okay, Mr. Vitousek.

VITOUSEK: Yeah, good morning. Randy Vitousek on behalf of the Appellant, Pacific Horizons. With me is Jeff Roth and -.

MACK: My name is Mack.

VITOUSEK: Mack on behalf of, they're representatives of Pacific Horizons.

COOK: Ms. Self.

SELF: Amy Self, Deputy Corporation Counsel representing the Planning Director and the Planning Department.

COOK: Mr. Whittaker.

WHITTAKER: Good morning, Mr. Cook and Members of the Board of Appeals, my name is Steven Whittaker and I am here today with my clients, Bernard Red McClean and Chameron Coonen, Christopher Coonen's wife and the owner of the adjacent property. And we have filed this, as you know, a petition to intervene.

COOK: Okay, thank you very much. As I indicated we will first take up the Petitioner for Intervention. I note that Mr. Vitousek on behalf of the Appellant has filed an objection to the intervention. Ms. Self, what position is the Planning Director taking?

SELF: The Planning Director has no objection to the Intervenor becoming a part of the hearings.

COOK: Okay. All right, there's, before we have further arguments on this matter or presentation, I want to note that I have asked my legal counsel to look into this issue of an easement, because it seems to be a title question; and that has come before the Board before in other cases. So we're not going to necessarily consider that right now but I wanted to let the parties know what we're concerned about on the legal issues. Mr. Brooks, would you let us know what, maybe you can just sort of state what the issues appear to be and the research that you've done; and we probably will be inviting additional arguments or maybe briefs from counsels.

BROOKS: Well, I just think this case is a little unique in that it involves sort of some ancillary issues involving claimed property rights dealing with the subject property. And I think in my reading of the Board's rules, specifically Rule 2-7(b), it sets forth the circumstances in which a person can intervene. And what I'm going to do is basically read to the Board what those rules are so that it has a framework to determine whether or not to grant this Petition to Intervene. I think two of the subsections in 2-7 apply here.

The first is 2-7(b)(2). That states, "Any person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that that person will be so directly and immediately affected by the Board's decision that that person's interest in the

proceeding is clearly distinguishable from that of the general public shall be admitted as a party upon timely application for intervention.”

There’s also 2-7(b)(3) which states, “Any other person may be admitted as a party upon a timely application, when the Board finds there is just cause for intervention.”

So I think that the Board needs to use those two subsections as a framework in determining whether or not it wants to grant the Petition to Intervene. But at the same time I just want to remind the Board that it is limited in the scope of authority on what it can decide; and it shouldn’t take the ancillary matters, the property issues, into consideration, or make any kind of determination on those property interests. The Board’s jurisdiction and my reading of its rules is limited to, or basically it must base its decision on the general standards of appeals as set forth in its rules, in Board of Appeals Rule 8-15. So I just hope the Board keeps that in mind as it listens to the arguments of the parties.

COOK: Further, in my reading of the petition here is that there’s basically two grounds that Mr. Whittaker is asserting. One has to do, and the bulk of his argument and the responsive objection had to do with the easement question. But the second matter is he’s asserting that, as I understand it and I’ll try to paraphrase it, that they’re in the general vicinity and would be impacted by the subdivision in any event. So it seems to me there are two grounds that he’s seeking. So with that as a background, I’m going to ask Mr. Whittaker if he could just make a brief argument. We’ve seen your brief, and we appreciate it. It’s very thorough I think. But if you have anything you would like to add after having heard our comments here -.

WHITTAKER: I would.

COOK: And then I’ll give Mr. Vitousek a chance; and if Ms. Self wants to add something she can, but apparently she’s going to let you guys duke it out. So Mr. Whittaker, you want to go ahead and make your statements?

WHITTAKER: Well, I think a little bit of background may be helpful for the Board to understand why we’re appearing -.

GENTRY: Use the microphone.

WHITTAKER: Usually my voice works well enough without one of these.

HENDRICKS: You’re being recorded.

COOK: But they have to record it back there. I have the same problem. They’re always having me pick up the microphone. Go ahead.

WHITTAKER: All right. I appreciate the instructions. I will hold the microphone dear and near.

The petition to intervene springs from a history that goes back about 14 months of relations between these neighbors and in connection with this property in what we understand is a subdivision now. I confess to some confusion as we filed the petition about all of the details of the appeal on the water issue because we have multiple and varied interests in the property that Pacific Horizons Development proposes to subdivide. It is correct that the petition focuses largely on the easement, and that is because the easement has been the major focus of discussion between the appellant Pacific Horizons

and my clients, Mr. McClean and the Coonens. Fourteen months ago Mr. McClean visited Mr. Raup in Connecticut on the subject of a grant of easement to clarify the status of Mr. McClean's and Mr. Coonen's access to and from their properties over an easement that runs across the subject property that they've been using for more than ten years. It may be the exact same easement that is described in the email that was sent by Arai, Daryn Arai, to Pacific Horizons pointing out this subject property was burden by an easement and that that easement is now, I think, a part of whatever subdivision proposal may be percolating by this applicant. We're not aware of the subdivision proposal that's pending. We are aware that a promise for a grant of easement was made then rejected and now my clients observed this water appeal proceeding in the newspaper by the persons who had promised him an easement, them an easement. We began to look into what was going on with respect to both the grant of easement and the water and we had moved to intervene. Indeed the petition focuses on the grant of easement and our rights across the subject property, but the water is -. And Mr. Vitousek in his opposition speaks as though it's not clear when I wrote that our interest in the water are self-evident. I rather thought that the Board, like a court, would have a certain breadth of judicial or administrative notice. And you need to understand that neighbors in Hawaii on Agricultural or Conservation land out in the country without water have a vital interest in their neighbor's activities, clearing of land, knocking down of trees, whether it's connecting to a water system or just adding more people on the roads. My clients live in the neighborhood, they have a vital interest in whether or not there are going to be 6, or 10, or 20 more lots and more neighbors. They have already had a reduction of water rainfall as a consequence of development that has gone in. I have in my hands records of rainfall for the last three years, maintained by Phillip Gallinger, a neighbor to the developer's property. Water, the rain is going down.

We have moved to intervene because, not because we object so strenuously to this Board granting the appeal. We don't know enough about it to intelligently comment on it. We can only state from what we were able to uncover before the petition to intervene was filed that, yes, we have concerns about water. But even more important we have concerns about these developers. They made promises to us about grants of easement, they've withdrawn them. And on this Board's consideration of a Petition to Intervene, I think you need to look at the question of standing with a fairly broad eye and the language of the rule that Corporation Counsel just read pointing out that anybody that lives on the land, that has property interest in the land and can demonstrate that they have a position different from the general public which my clients as neighbors to Pacific Horizon's proposed development clearly meet. I think that we're entitled to intervene under 2-7-(b)(2). And independent of our interest in the water which is the primary basis for intervention in this particular proceeding, we have rights under Section (b)(3) as any person who can show just cause. And our just cause would be that this developer has shown by its conduct toward my clients to date that it is not honorable in following through on its representations with respect to the easement; and, therefore, we have no reason to have any confidence in how they're going to proceed *visa vi* water or any other requests to the County for subdivision, or any other license, or permit that requires the exercise of discretion on the matter. That I recognize is troubling because the petition for I mean, my interest, my clients' interest and need for an easement is not something I'm asking this Board on this petition to intervene, to get involved in; and I respect and recognize that as Mr. Vitousek argues in his opposition that, yeah, there's a remedy in court. My answer to that is, gosh, why after 20 years of using the same road that we have to go to court? Gosh, darn it, let's just make an agreement about using this. But I recognize it and my clients recognize it, and that's where it will go if we must. We had come to our neighbors in the sense, with an idea of trying to make agreements. We failed. We now assert we have standing. We think that the test you must apply is a board rule. We think we clearly fit it; and we think the petition must be granted.

COOK: Okay, Mr. Vitousek, you want to state your position?

VITOUSEK: Sure. Yeah, you know, we've filed a memo in terms of where we feel that the absence of any connection between the issues raised by the potential intervenor and an actual, you know, water variance appeal in the sense that they have not alleged that they have any interest that's clearly distinguishable from that of the general public as it relates to whether or not the applicants should get a water variance. You know, it's pretty clear that the State of Hawaii has a right over the road. That's what the decision of the courts said, that's what the deed says. And that is not disputed by our clients, in other words, that the road, that there's a 20-foot wide easement that was created by the partition action that benefits the State of Hawaii. So, really, Mr. Whittaker's client's issue is with the State, not with the applicant.

If you'll indulge me a very brief story, though. You know, I was the attorney for Nansay in the Kohanaiki SMA Permit application. And on November 7, 1990, the County Planning Commission granted the SMA Permit. I wasn't there because that was my daughter's birthday. She was born on that day and we were in Honolulu having her delivered. The Planning Commission denied standing to the applicants and did not allow them to intervene in that action. They appealed and I argued the appeal in the Hawaii Supreme Court in November of 1997. And so I felt very much like bringing my daughter up, a seven-year old girl, and holding her in my arms as I made the argument just to make it clear that a lot of time can go by when there's an absence of certainty because of appealing appeal from a denied intervention. And so I'll point out that my daughter was 17 about two days ago and I don't want to be arguing eight years from now that Mr. Whittaker's clients shouldn't have had standing. So with that background, you know, my inclination is to state that our objection to their standing is there for the record but that as a practical matter it's more cost effective to go forward to grant the intervention and go forward and to, you now, have them participate and make a decision because that's a lot better than leaving the issue out there for, the denial of standing issue out there for appeal.

I would say, Mr. Chair, that based on Mr. Whittaker's argument here, I really hope that we can keep this appeal limited to the issue that's before the Board, which is whether or not it's appropriate to grant or to reverse the Director's decision denying a catchment water variance. The issue of whether they have an easement right or not is not relevant to the appeal.

COOK: Ms. Self, do you have any comments?

SELF: None.

COOK: Before I have a motion, does any of the Board Members wish to question any of the parties here?

DRURY: Yeah, just for one more clear statement from -.

COOK: Yeah, Dave.

DRURY: One more clear statement from Mr. Whittaker. Please explain how the water catchment variance issue materially affects your clients, as directly as you can.

WHITTAKER: The water variance issue is intimately connected with the subdivision proposed for the property to my understanding, which started as a 10-lot

subdivision request and it became presently a 6-lot subdivision request. The multiplication of humanity and the clearing of trees which commenced already years ago directly impacts the rainfall and the catchment systems of my clients which live in the neighborhood. They have had, as I've demonstrated or as I've offered to show the Board, a reduction of rainfall over the three years that this has been tracked; and those years are the years that tree cutting and land clearing has commenced. So I think there's not only a theoretical but an actual provable direct impact from the activities of the appellant already in the neighborhood. And that means less rainfall in Red's and Cameron's catchment tanks. That's as clear as it gets, I think. I'm sorry if that's not enough.

GIMPEL: Do I understand you correctly that you're suggesting that more catchment tanks and more catchment area in the vicinity will reduce the amount of rainfall?

WHITTAKER: No sir, no sir, Mr. Gimpel. I am saying that people moving into the area in clearing trees to build homes and yards reduces the rainfall. Tree clearing reduces rainfall, not the people merely being there. The tree clearing does; and it has.

GIMPEL: Okay, so then your objection then is to the subdivision in the first place rather than to grant it a water variance?

WHITTAKER: The objection that I speak to that deals with the issue that is before the Board that is intervention in a water variance appeal is the impact on the water rights. On the grandeur scale, sir, yes, we do have concerns about the subdivision as a whole.

COOK: Okay. I just want to -.

VITOUSEK: One brief comment? I'm sorry, I just think it's to be a really interesting, you know, I think Mr. Whittaker is going to make a very interesting record in the event his clients eventually decide to request a water variance. So I hope that they understand what implications these arguments are having on the value of their own property.

COOK: I just want to clarify one thing, Mr. Whittaker. Are you saying then that you are not asserting that this Board should consider as part of the, assuming that you are allowed to intervene, as part of this case the question of your, the legal question of your client's assertion of the easement?

WHITTAKER: Yeah, I acknowledge that we're here on a petition to intervene for a water appeal, and I answered Mr. Drury specifically on the water issue; and I will not be urging this Board to do anything *visa vi* that easement. I acknowledge that if Mr. Vitousek's clients insist that we've got to go to court, so be it. You have an issue before you, we have standing, and for the reasons stated.

COOK: Well, it seems to me that Mr. Vitousek while he didn't come right out and say so appears to be saying that he doesn't have any objection to your intervention. Could I have a motion here.

HENDRICKS: Question. Are you entertaining two motions, one for the intervention and one for the appeal variance, or -?

COOK: No, the only thing I think before us is this motion to intervene. I think that's the only issue that's actually before us.

HENDRICKS: Understood.

COOK: Did someone else have, did I hear something down this end? All right, could I have a motion then on this motion to intervene?

DRURY: Mr. Chairman, I move that the petition be allowed, that this party be allowed to intervene, with the understanding that their intervention be limited to issues concerning the water variance.

GENTRY: Second.

COOK: Okay, I have a second. Do I have any discussion? All right, would the clerk call the roll, please.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Gentry?

GENTRY: Aye.

KAWAHA: Mr. Gimpel?

GIMPEL: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Chair Cook?

COOK: Yes.

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

COOK: Okay, Mr. Whittaker, your client is now a party to the action. This will be moved to the, on the merits to the January hearing before the Board. Okay.

GIMPEL: What date is that?

COOK: Do we have a date for the January hearing yet?

KAWAHA: January 25th.

COOK: Twenty -?

KAWAHA: Fifth.

GIMPEL: Five.

KAWAHA: Twenty-five.

COOK: Twenty-five, okay.

WHITTAKER: Is there some place that I can be directed to get the paperwork associated with the appeal, so I can -?

COOK: Well I would assume it's the Planning Department; and probably you should check with the, I'm sorry, you're talking about the subdivision portion itself? Is that what you're asking us about?

WHITTAKER: No, I'll take care of it. Thank you.

COOK: All right. Okay.

SELF: Alice, he should contact Alice in order to get anything from what the Board -.

COOK: Yeah, anything relating to the Board you could contact Alice Kawaha. Okay, thank you very much.

VITOUSEK: Thank you.

The discussion ended at 10:33 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary