

BOARD OF APPEALS
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
AUGUST 11, 2006

A regularly advertised hearing on the petitions filed by **ASSOCIATION OF APARTMENT OWNERS OF PUNAHELE PROFESSIONAL BUILDING (BOA 06-000020)**, **AJRN PARTNERS (BOA 06-000021)**, and **ASSOCIATION OF APARTMENT OWNERS OF PUNAHELE PROFESSIONAL BUILDING (BOA 06-000022)** was called to order at 10:05 a.m. in the County Building, Councilroom - Room 201, 25 Aupuni Street, Hilo, Hawai'i with Chairman Valta A. Cook presiding.

PRESENT: Valta A. Cook
Anson Chong
George Curtis
David Drury
Joel Gimpel
Peter Hendricks

ABSENT & EXCUSED: Diane Gentry

Patricia O'Toole, Counsel to the Board
Alice Kawaha, Staff to the Board

Sandra Song representing Appellants
Cheryl Reis representing Intervenors
Amy Self representing Planning Director

And six people from the public in attendance

PETITIONER: ASSOCIATION OF APARTMENT OWNERS OF PUNAHELE PROFESSIONAL BUILDING (BOA 06-000020) - Appeal of Decision by the Planning Director dated March 2, 2006 Notice of Violation and Order (ZCV 06-030E) relating to landscaping requirements as setforth in Ordinance No. 95 33 and Final Plan Approval. The subject property consists of approximately 59,108 square feet and is located on the makai side of Komohana Street at Puuhonu Place, Punahoa, South Hilo, Hawai'i, TMK: (3) 2-3-35:42.

PETITIONER: AJRN PARTNERS (BOA 06-000021) - Appeal of Decision by the Planning Director dated March 7, 2006 Notice of Violation and Order (ZCV 06-029E) relating to landscaping requirements as setforth in Ordinance No. 95 33. The subject property consists of approximately 17,569 square feet and is located on the makai side of Komohana Street at Puuhonu Place, Punahoa, South Hilo, Hawai'i, TMK: (3) 2-3-35:16.

PETITIONER: ASSOCIATION OF APARTMENT OWNERS OF PUNAHELE PROFESSIONAL BUILDING (BOA 06-000022) - Appeal of Decision by the Planning Director dated March 10, 2006 Notice of Violation and Order (ZCV 05-095E) relating to

operation of a vehicle parking lot in a Single Family Residential zoned district. The subject property consists of approximately 9,230 square feet and is located along the south side of Punahale Street, Punahoa, South Hilo, Hawai'i, TMK: (3) 2-3-35:18.

COOK: Good morning and welcome to the County of Hawai'i Planning Board of Appeals August meeting in Hilo; and we welcome everyone here. So the meeting will come to order.

We have one person who would like to make public comments, one of our Councilmen, Donald Ikeda. Donald, did you want to, we did receive your letter. And did you want to make a statement -?

IKEDA: Yes.

COOK: Yes, please do. The mike is down there. You need to get the mike. That's fine. You can appear there. Let me just comment that the hearing on the merits will be not held today because of, well, a couple of things. The Plaintiff's, the Appellant's counsel had previously indicated she may not be here, but we also have an intervention. And usually when we, if we allow the intervention then we don't have the hearing on the merits the same day because it'll give both parties a chance to prepare -. But you're certainly welcome to comment today. Or if you want come back next week, not next week, but two months from now, we can hear you. Okay, Mr. Ikeda, it's all yours.

IKEDA: Mr. Chairman, I'd like to comment today; and I request your indulgence because I wanted to take two of the subjects up at this time because of time restraints. I hope you don't mind; and that's the reason I made my written testimony.

COOK: Okay.

IKEDA: Okay, my name is Donald Ikeda and I'm providing testimony against the "Association of Apartment Owners of Punahale Professional Building's" request to reverse the decisions of the Planning Director, Chris Yuen.

First, I would like to comment on the failure to abide by the conditions that were made in order for the property to receive zoning reclassification.

The original applicants, subsequent title holders, and now the Association have failed to abide by Condition B which states that "... Plans shall also include the minimum 6 feet high privacy wall or landscaping buffer along the subject property's common boundaries with adjoining single family residential properties along Punahale Street for the purpose of mitigating any potential adverse noise and visual impact. Should the landscaping buffer be utilized for this purpose, it shall be provided to the extent that the continuous, unbroken heavy planting screen, no less than six feet in height, is established prior to the issuance of a certificate of occupancy for any portion of the commercial development."

I feel that it is a duty and the responsibility of the property owners to continue to uphold the conditions, and maintaining the buffer, not just until the desired rezoning and certificates are received. If this Board grants the Association's request, this will be setting a dangerous precedent for future rezoning requests. And this condition is in your, was issued in Ordinance 95-33 when this thing was issued.

Also, secondly, regarding the parking lot that has been established on the residential property, with certain exceptions that are not applicable in this case, a parking lot is not permitted use in a residential district. Plain and simple. To my knowledge, there has been no rezoning. TMK (3) 2-3-035-018 remains a residential property, and therefore is in violation of our zoning code.

Mr. Gimpel, it's another, there's two violations, they are two different issues.

GIMPEL: Yeah, I understand.

IKEDA: The thing is I won't have the time and I'm trying to put the two together. At first, I thought it was going to be taken up as one issue because it was the same owners.

COOK: Okay. Mr. Gimpel, you have questions?

GIMPEL: I have no questions now. I assure you that I have read the documents related to this, to these three cases which are now consolidated and I understand the issues that are involved. I was just making a note on your written testimony -.

IKEDA: On my comments, okay.

GIMPEL: For my own later research. Thank you.

CURTIS: I have one question.

COOK: Yes, go ahead, George.

CURTIS: Mr. Ikeda, are you testifying as a private interested citizen?

IKEDA: Yes, I am.

CURTIS: Just for the record.

IKEDA: Okay. I'll finish my testimony. I request that the Planning Commission Appeals Board uphold the Planning Director's Notices of Violation and Order, ZVC 06-030E and ZVC 05-095E. So, in other words, I'm hoping that you will uphold the Planning Director's conditions and not approve the appeal from the Association.

COOK: Okay. Thank you, Mr. Ikeda. I appreciate your coming and appearing before us.

IKEDA: Okay, thank you.

COOK: Okay, at this, I believe that's the only public comment that we have today. At least no one else requested to speak. I'm going to call the, we have three items on the agenda but they've been consolidated into one case. And these would be the Association of Apartment Owners of Punahale Professional Building, that's Board of Appeals 06-000020; the AJRN Partners, Board of Appeals 06-000021; and Association of Apartment Owners of Punahale Professional Building, Board of Appeals 06-000022. Do we have representatives here from the, representing the three Appellants? We do, do we not?

SONG: Yes, Mr. Chairman, I'm Sandra Song and I represent the Appellants in this case.

COOK: And the Planning Director?

SELF: Amy Self representing the Planning Department.

COOK: Okay. Now we have a Petition for Intervention today, and that's the first thing that we'll take on the calendar. And I would like each of the Petitioners for Intervention to identify themselves. Ms. Reis, would you identify yourself?

REIS: My name is Cheryl Reis, I live at 65 Punahale Street, and I am, the back of my property is the end of the Hilo Community Surgery Center's property and the makai side of my property is bounded by what I would call the prohibited parking lot.

COOK: And so you're impacted in two, for both of these issues?

REIS: Yes, sir.

COOK: Okay.

REIS: And may I just add one more thing? Normally, and this is a -.

COOK: Well, let's first identify and then we'll get to the merits. Okay?

REIS: It's part of the identification, Mr. Cook. It's part of the identification.

COOK: Okay, go ahead.

REIS: This is Adele Enomoto and her daughter, Lori Enomoto, who are here, and they're in the back there. I was not able to get a hold of Mrs. Enomoto nor Lori for the time I had to get the intervention documents together. And, normally, Mrs. Enomoto signs along with us whenever we do anything for this and, you know, she wants to join. But, I mean, you know, I can only ask that now, and she came forward to me yesterday.

COOK: Okay. So, in addition to, I think there were four intervenors. In addition you have one more person who wants to join but you don't, you have not gotten anything in writing from that person?

REIS: No. But she is here today in person.

COOK: She is here?

REIS: Yes. As is her daughter, who occupies the property now.

COOK: Okay. Her name again?

REIS: Adele Enomoto, E-n-o-m-o-t-o.

COOK: Okay. And she is one of the adjoining owners or she's in the general area?

REIS: Her property is at Komohana and Punahale Streets. So the back end of her property, which is toward the Puna side, bounds the Hilo Surgery Center's property.

COOK: Okay. And I see another lady here. Would you identify yourself?

GUSHIKEN: My name is Margie Gushiken, and I live at 51 Punahale Street, next to the property of that parking lot.

COOK: Okay. And I think there's another one of the Intervenor here. Can you get a microphone, please?

ANDRADE: Yes. My name is Kapuaokalani Andrade. I live at 44 Punahale Street, but my property is across of the street.

COOK: Okay.

YAMAUCHI: My name is Louisa Yamauchi and I live at 73 Punahale; and my property is next to Cheryl, next to Adele; and it's the back end of my property that's affected.

COOK: Okay. Thank you very much. I think we'll move on here. We have seen the Petition; and I think the Appellant in this case has taken no position on the Petition to Intervene. Is that correct, Ms. Pechter?

SONG: Mr. Chairman, that's correct. The only question I have is, this is one appeal or are they separate Appellants? Because for purposes of service and participation it's not clear to me, because it looks like there's only one Petition that's filed. And if these are all separate Appellants, then we have to serve everybody separately, and they have to participate separately.

COOK: Well, there's been no indication that they are an Association and I don't know that we have any rule that says an applicant, each applicant has to file a separate, we're pretty sort of loose on that as to file a separate Petition. But my assumption would be that we would have five separate Appellants since they aren't a Association. Is that your understanding, Ms. Reis? Or you haven't thought about that issue?

REIS: Not as separating us because we just think of ourselves as a neighborhood, and the neighborhood is impacted. So, therefore, even though we are separate TMK's, we just brought it as one, I would guess.

COOK: Well, I think, Ms. Pechter's concern is that if you are all acting as one, then, you know, she doesn't have to, you know, make separate answers and serve every individual as long as one person could act for the group. Is that your concern, Ms. Pechter?

SONG: Yes, Mr. Chairman. The other thing is the appeal requires a \$250 filing fee and it may also have impact if there is an appeal in Circuit Court, any further appeal in Circuit Court. So that's just my question. I mean, if these are separate Appellants, then I would think there should be a separate Petition and separate filing fees for each one. If it's a group, as Ms. Reis says, and Ms. Reis wants to be responsible for getting documents as the chair of this group, you know, I have no objection to that.

COOK: I think that -.

CURTIS: Better form a quick hui.

COOK: I'm sorry, George, you had a comment? I'm sorry?

CURTIS: This comment was Ms. Reis better form a quick hui here to avoid too much trouble.

COOK: I think this issue was raised by you in another case in Kona two months ago in one of the cases; and I think the Board pretty much decided at that point that only the one fee would be required, the \$100. I had the counsel look and I got a note here that says there's no fee for intervention. Is that right, Ms. Counsel?

O'TOOLE: The Petition to Intervene just had a date when it has to be filed. It doesn't say anything about a fee. The Planning Commission does require a fee but-. I don't know if Sandy is referring to if they appeal to Circuit Court from here, then they would be, maybe, I don't know. But there's no fee, so that's not an issue.

COOK: Well, Ms. Reis, you want to speak to the more central issue or you need a couple of minutes to get together with your people?

REIS: Mr. Chairman, may I please have a couple of minutes?

COOK: Yeah, we'll take a break in place for about, until you come back to your chair, as long as it's not more than five minutes.

REIS: Thank you.

RECESSED The Chair called a short recess at 10:20 a.m.

RECONVENED The meeting reconvened at 10:23 a.m.

COOK: Will the Board of Appeals meeting come back to order. Ms. Reis, you have met with, I believe, the other Petitioners for Intervention and you want to tell us what your general agreement is, or understanding?

REIS: We thank you for the time, Mr. Chair, to meet on that. And we've decided that we'll consolidate and, 'cause we don't see anybody spending any more money than they have to, either side, and -.

COOK: Yeah, I guess to clarify, and my legal counsel clarified that. I think if you were to appeal to the Circuit Court, that would be the issue as to whether each of you would have to do \$100, whatever the filing fee is down there, or one of you. Okay, so just so it's clear, so all five people are requesting to consolidate. And so the Petition is for the five together?

REIS: Yes. And following Mr. Curtis' lead, we'll call ourselves "The Hui."

COOK: The Hui, okay. All right. Do we have any discussion here? I'd like a motion for the intervention.

DRURY: I move that the Petition for Intervention be accepted.

CURTIS: I second.

COOK: Okay. It has been moved and seconded that the Petition for Intervention be granted. Do we have any discussion? I would ask the clerk to call the roll, please.

KAWAHA: Mr. Curtis?

CURTIS: Aye.

KAWAHA: Mr. Drury?

DRURY: Aye.

KAWAHA: Mr. Chong?

CHONG: Yes.

KAWAHA: Mr. Gimpel?

GIMPEL: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Chair Cook?

COOK: Yes.

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

COOK: All right. Now we have another, I guess, it would be a motion since the Intervenors have, you are now Intervenors. There was a motion to disqualify the Corporation Counsel from appearing, and it wasn't exactly clear. Was that appearing on behalf of the Planning Director and appearing as counsel for the Board? Or, do you understand the distinction I'm making there?

REIS: I would guess that -. Mr. Cook, my intent was that we look at it as representing -. Well, the Planning Director, because actually nothing has been done as far as the Planning Director is concerned, other than when Robert, well, I beg your indulgence, please. I'm not an attorney and I just, you know, I can only just say what I want -.

COOK: Well, let me just make a comment here. We did receive a letter, a response, from Mr. Ashida basically saying he didn't think that there would be any problem; but to be super careful, he was going to appoint or ask counsel from the Maui County Council, Corporation Counsel to come over. But he was very specific in his

letter to state that that person would be representing the Board. We have Ms. O'Toole here who sits as counsel for the Board, so he has voluntarily, he says, okay, we will have separate counsel for the Board. But I don't know that he specifically addressed the other issue and just sort of left it up there. And I think, being an attorney, I sort of look at, you know, split the hairs there; and there is that question about whether or not the Planning Director's attorney would be disqualified. But you understand that the Planning Director basically has sided, come out on your side, and the Corp. Counsel would be representing that position. Is it your feeling that maybe because Mr. Takase is over there that that might have some effect and they wouldn't be as aggressive in, of trying to uphold it? Is that where you're coming from?

REIS: That's part of it. But the other thing is if Corp. Counsel represents both Planning and the Board of Appeals, it would seem to me that there would be some kind of conflict there. Because how would they take an opposite side or opposing sides?

COOK: Well, we do that all the time. And I can assure you that my counsel here, and very often the Board does vote against the Director. He probably doesn't like that sometimes but that sort of happens that way; and I have not noted any, you know, any problem with that. But, in this particular instance, we are already going to have Corp. Counsel from Maui. You know, we felt today it was pretty much a procedural thing and we didn't, you know, we weren't going to fool with bringing someone over today to represent us. So we've already made that one decision. So, I guess, if you're pushing the other, then we'll have to vote on that, you know, that the Corp. Counsel would be disqualified from representing the Director in this case.

REIS: May I ask a question?

COOK: Of course.

REIS: Would, I have nothing against Ms. O'Toole at all, you know. I mean we've known each other for years. But I would wonder in a decision like, in a decision such as this, or other, say, for instance, the citation. When Robert Usagawa went out, the zoning inspector went out, and cited these, the three entities for the violations, would he have necessarily or would Chris Yuen have necessarily contacted Corporation Counsel's office to ask them whether they should do this?

O'TOOLE: I don't believe that's the practice. I think they go ahead and cite on their own.

COOK: Yeah, they never ask us, "Do you think that this is a violation and should we cite?" We don't get involved there. We only get involved after there has been an action taken by the Planning Department or the, what is it, the Building Department -.

O'TOOLE: Yes, Public Works also, but I think -.

COOK: Or the Public Works. And they make a decision; and then if there's an appeal of that decision, then we get involved. But we are not involved in the initial process of the Planning Department.

O'TOOLE: I think maybe, I don't know if I'm wrong, but you're asking whether before the zoning inspector cited, whether he contacted maybe Amy because she represents the Director?

REIS: Yes.

O'TOOLE: And I believe that is not the usual practice.

COOK: Oh, I see.

SELF: No.

O'TOOLE: No.

SELF: No, I'm never -. If sometimes if they may have question, they will maybe call me first. But the usual practice is they know where there's a violation or not, and they go out and they do the investigation, and then based of what the inspector finds, then he will notice the person. So I don't really get involved until there's an appeal of that decision. The Director makes the decision to cite the property owner; and then once that's done, then it comes to my office, comes to me to represent the Planning Director's decision. So that's how it comes to me.

REIS: Okay, so -.

COOK: Ms. Reis, do you want to, again, confer with your other four people, or do you just want to go ahead?

REIS: Go ahead.

COOK: Okay. So what's your position? You want us to vote on that particular issue, or you're going to withdraw that request?

REIS: I don't know. I think that I, if I understand it correctly, there's really, it's kind of a moot question because they don't consult Corp. Counsel at all before they do the violation.

COOK: No, they don't -.

REIS: No.

COOK: But the Planning Director is represented in this hearing by the Corporation Counsel; and, of course, he will confer on legal issues relating, I assume,

relating to the issues that are brought before us. So that would be your contention, is because Mr. Gerald Takase works in the Corporation Counsel's office and is second in command, I guess, that maybe he would have some influence on Ms. Self?

REIS: Ms. Self, yes.

CURTIS: I have a question. When decisions from this Board have been appealed to the Circuit Court, has this ever been presented as a problem?

O'TOOLE: You know, no. I mean, if you're talking generally about two Corp. Counsels representing -.

CURTIS: Yes.

O'TOOLE: No. It's done in Liquor Commission, Liquor Adjudication Board, Planning Commission. We just try to keep it separate.

CURTIS: So you wouldn't expect it to be a problem on appeal to the court?

O'TOOLE: No, I wouldn't.

SELF: If I may comment that -.

COOK: Yes, Ms. Self.

SELF: Although Gerald Takase is second in command in our office, I have not spoken to him about this, he has not spoken to me about this, and I'm sure the same with Ms. O'Toole. We have very strict guidelines with things like these. We do not, it would be, first of all, we could lose our license to practice law because there's definitely that conflict. But I have not had any discussions with Mr. Takase whatsoever about this.

COOK: Yes, Ms. Reis?

REIS: Mr. Chair and the Board, my concern with the Takase's is, is the fact that Hilo is a small town and I don't think anybody doesn't know anybody's business and what they do, and especially if they're in business.

COOK: Can you speak up a little bit?

REIS: Hilo is a really small town and I don't believe that anybody doesn't know anybody's else business, unless they're new here. And if anybody is in business, everybody knows their business; and if you're in the County, everybody knows your business. Okay? 'Cause I was part of the County, I know everybody's business. But if Ms. Self is representing the Planning Director and his action, that means that she is for the action that he took.

COOK: That's exactly right.

REIS: So I, that's why I said I kind of think it's moot because, as Mr. Curtis expressed, there has never been a question of anything down the line, say, if we go to the Circuit Court and appeal it. There has not been a question as to that representation. And maybe I'm naïve but I still like to believe that there's some justice yet so. I don't know, I -. Do you, could I ask, do you have any objection?

COOK: I was going to offer you that opportunity awhile ago, so why don't we take a short break in place here a couple of minutes. We don't have very much on our calendar today so we can afford it.

RECESSED The Chair called a short recess at 10:34 a.m.

RECONVENED The meeting reconvened at 10:38 a.m.

COOK: Okay, everybody is back in their place here. Ms. Reis?

REIS: Mr. Cook, respectfully, we request that the Office of the Corp. Counsel not represent Planning Department as well.

COOK: Okay. I've check with legal counsel up here; and I don't know that the Board, her opinion is that the Board probably doesn't have the authority to, 'cause they're a party to the action, to tell them who can and cannot be their counsel. I think what we can do, however, is we can make a recommendation. But I don't think we have the authority to tell them they cannot have Corp. Counsel. So, anyway, so I understand your position is you want to push that. So could I have a motion from the Board at least for a recommendation to the Corporation Counsel on that issue?

O'TOOLE: Cheryl wants to, she wants to say something.

COOK: Oh, I'm sorry, you want to say something there?

REIS: May I ask a question?

COOK: Yes.

REIS: I received a letter from Mr. Ashida indicating that they had talked or discussed the matter with Maui Corp. Counsel. In my opinion, in my very humble opinion, I don't really think that, as far as we're concerned, that we would like to have any Corp. Counsel, any County Corp. Counsel, represent you folks. And the reason for that is because all Corp. Counsels, in one way or another, within the counties, work on projects together, they socialize together, they have meetings together, they work on each other's projects, they testify before the Legislature as a single body. And, you know, do they, do they have connections to the Takase's? I don't know. And this is nothing

against individual attorneys, or individual staff, or any of these faces. I'm not trying to make your lives difficult but what it is, is I just want to have the clearest line of chance for us as possible. And, you know, I beg your forbearance on this but, I mean, I have to ask.

COOK: Okay, but we don't take it personally and, you know, we understand your position on that. But I think first what we'll do is take the, we'll come back to that issue; but first we will have them -.

GIMPEL: Okay, let me phrase a motion in this way. I'll move that we inform Corporation Counsel of the Intervenor's concerns regarding representation of not only the Planning Director but counsel advising this Board.

O'TOOLE: Let me say, I'm already out. I guess her new objection now she doesn't want any Corp. Counsels from any jurisdiction involved in the matter.

GIMPEL: All I'm saying is of the concerns regarding, that the Intervenor's have regarding representation of not only this Board but, also, of the Planning Director; and that's the motion. And the reason I'm making that motion in that way is because now the concern includes that no County Corporation Counsel from any of the four counties in Hawai'i represent either the Planning Director or advise this Board.

COOK: I believe though that, okay, I understand the first part of your motion which would be to just express to the Corp. Counsel that there has been a concern -.

GIMPEL: And the nature of the concern -.

COOK: But we don't take a position on that Okay, I understand that. But the second part, I think we do have the authority; and I think they can request that we have different counsel. So I think that would be an issue that we can take up and not throw that back to Corp. Counsel, 'cause -.

GIMPEL: Can we get a second to the motion and then I think we can discuss it.

COOK: The whole motion, okay. The motion as I understand is that we send a letter or otherwise inform the Corporation Counsel that Intervenor's in this case have expressed a concern about the Corporation Counsel, or any Corporation Counsel, advising either the Planning Director or the Board in this matter. That's your motion?

GIMPEL: Well said.

COOK: Can I have a second on that?

DRURY: I'll second that.

COOK: Okay. Let's discuss that motion.

CHONG: Yeah, discuss it. Short question. That question may already, the issue may be moot, seems to me, since we don't have any budget to go out and hire an independent lawyer. That's my impression. Is that correct, Mr. Chairman?

COOK: You're asking the wrong person. I -.

GIMPEL: If I may respond -?

COOK: I would imagine that if we found that we, you know, we generally needed outside counsel, we probably could find the money. I don't, that would be my guess.

O'TOOLE: Well, Special Counsel, under the Charter, has to be recommended by the Corporation Counsel, and then you needed a two-thirds vote of the County Council to hire a Special Counsel. You have hired Hearings Officers and gotten the budget from the Planning Department, but I think in my mind that's different from actually hiring a Special Counsel attorney for you.

COOK: Okay. We -.

GIMPEL: My response to that is that would be the Corporation Counsel's concern initially, what are the issues that the Corporation Counsel would have to consider. All we're doing is relaying, all my motion was that we would be relaying the Intervenor's concerns specifically regarding representation of both the Board and the Planning Director; and how he respond to that is up to him.

COOK: Well, do we have, George, you have a comment?

CURTIS: Yeah, one is -. And going over the material yesterday I saw this concern in writing, already a letter, already saw a letter on that subject of the concern for Mr. Takase's position. Secondly, if we carry this too far, why, you'd have to rule out members of the State Bar, and then where would you be?

COOK: I'm sorry, what was that question? What was that comment about State Bar?

CURTIS: If you carry this too far about ruling out the different attorneys from other counties and things like that, you'd have to end up ruling out members of the State Bar.

COOK: Well, I'm not sure I'd go that far but -.

CURTIS: I wouldn't, either.

COOK: But it would be difficult for us to get an outside counsel. Anybody else have any comments for -?

DRURY: Yeah, one thing I liked about Mr. Gimpel's proposal was that it conveys the information but it doesn't convey any sense that we are approving or disapproving it. It's simply a neutral stance on the part of the Board. Or maybe that's begging the question later on. But this sounds like this is logistically going to be complicated.

COOK: Anybody else have any comments? My comment is I'm not, it seems like we'd be punting. And I think we might have a responsibility, I think we do have a responsibility to address at least this portion of the motion that relates to the Corporation Counsel advising us. Because let's say Mr., let's take it one step further and say that Mr. Takase was involved directly with the Corporation Counsel that was representing us, I think that'd be a clear conflict of interest; and, under those circumstances, I don't think we could have the Corp. Counsel advising us.

GIMPEL: Can I respond to that?

COOK: Yeah, go ahead.

GIMPEL: That would be then the responsibility of the particular Corporation Counsel to recuse him or herself from the proceeding. The designation of attorney for this Board is not the prerogative of this Board. It is the prerogative of the Corporation Counsel. The designation of the attorney for the Planning Director is not the prerogative of this Board, it is the prerogative of the Planning Director. So, therefore, my motion was merely to convey the concerns expressed by the Intervenor regarding the counsel that has been appointed to represent us and to represent the Planning Director that has been voiced by the Intervenor; and that's as far as I think we can go.

COOK: Well, first of all, I think that Corp. Counsel already has a concern because they have received a copy of the Petition to Disqualify. So, clearly, the Corp. Counsel already knows and the Corp. Counsel has already responded to that concern by saying, okay, I'll disqualify my local counsel but I'm going to take the, I'm going to appoint one from Maui. But by inference they're saying we don't believe there's any, you know, we're going to keep our counsel, or at least the Planning Director is going to keep his counsel.

GIMPEL: But the Corporation Counsel does not know yet of the Intervenor's concern that was expressed today or recommendation that no Corporation Counsel from any of the counties be appointed to represent this Board. So that is something new that Mr. Ashida does not know yet.

COOK: That's true.

GIMPEL: So I think merely conveying those concerns to the Corporation Counsel is all we are empowered to do. We're not empowered to select our counsel.

CURTIS: Joe, would you clarify your motion with mentioning that?

GIMPEL: In so many words, it is to notify the Corporation Counsel of the concerns expressed by the Intervenor and those, namely, are that, one, we not be represented or advised by Corporation Counsel from any of the counties and, two, that the Planning Director not be represented by counsel from the Corporation Counsel's office. Is that correct?

COOK: Well, that's your motion.

GIMPEL: That's how I understand it. Yeah, that's how I understand the motion.

COOK: And let's see, we got a second. You understood that to be the motion?

DRURY: I already seconded the motion. This is a slight -.

COOK: I mean, yeah, and you agree that that's the motion?

DRURY: Yes.

COOK: And he re-stated it, so you agree your second is out there, right?

DRURY: Fundamentally, that's true.

COOK: Okay. Yes, Ms. Self?

SELF: I have a question about your motion. Did the second part of it where it's concerning me, was that they wouldn't, I wouldn't be able to, or they'd be unable to appoint somebody from another Corp. Counsel of another island or another county? Because -.

GIMPEL: Yes.

SELF: Okay, it's no Corp. Counsels from -?

GIMPEL: Yeah.

SELF: From our office or any county for the Planning Director?

COOK: Well, that's, but we're not making a decision on that.

SELF: I know that. I'm just clarifying the motion.

GIMPEL: Yeah, but the concern to be expressed was that no Corp. Counsel be appointed, be from any county to represent either the Planning Director or this Board.

SELF: Okay.

COOK: Okay. Ms. Reis, you wanted to say something earlier and I sort of waved you off. Did you, I didn't mean to cut you off if you had anything to say.

REIS: The only thing that I wanted to say is that often the Attorney General's office has been called in to represent counties where there is a question of conflict. Would that be possible in this case? I don't know. And that would not necessitate any hiring of a separate attorney, a private attorney, as counsel.

GIMPEL: But the Attorney General or the Assistant Attorney General that might be appointed might know the parties. It's a small town.

REIS: It's a small State, yes it is. But I would imagine that given the concern for the conflict, that the General Attorney's office is a little bit further removed than any of the other County Corporation Counsels would be.

GIMPEL: Well, I don't wish to argue with you but they go to the same conferences together and they all meet at the State Bar Association; and some of them live on this island, too. So -.

REIS: Mr. Gimpel, with all due respect -.

GIMPEL: Yeah, but that's getting into the substance of it. We're not talking about the substance right now. We're just talking about our recommendation of the concern that you've expressed to Corporation Counsel, period.

REIS: With all due respect, whatever you decide we'll have to live with it; and that's, we've made our concerns known.

CURTIS: I call the question.

COOK: I'm sorry?

CURTIS: I would like to call the question, call for the vote.

COOK: Okay. Let me just ask Mr. Gimpel, what will be the effect if we adopt your motion? What effect will that have on the motion by the Intervenors to disqualify?

GIMPEL: It will merely, it will not decide that motion. What it will do is agree that we will refer that concern and the recommendations that have been made by the Intervenors to Mr. Ashida. Because the decision is his, not ours.

COOK: Okay, so what you're basically, the result of that would be that we're saying that we don't have the jurisdiction or the authority to decide that motion, is that it?

GIMPEL: Correct.

O'TOOLE: You know, Mr. Cook, I think, you know, that's the motion. But then if the Intervenors have any actual evidence when we know who will be representing, then they can always bring another motion saying, "You know, I found out that this guy is in business with -." That would always, I think, be open. But now it's just sort of maybe they know each other or maybe they, you know, something like that. So that's just my thought for if in the future whoever's name is unacceptable that -.

COOK: Okay. Then we have a motion on the floor and a second, and we've had discussion. So I guess I'll call for the question. Would you poll the Board, please?

KAWAHA: Mr. Gimpel?

GIMPEL: Aye.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Mr. Chong?

CHONG: Yes.

KAWAHA: Mr. Curtis?

CURTIS: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Chair Cook?

COOK: I'm going to vote no. So it'll carry.

KAWAHA: No?

COOK: Yes.

KAWAHA: Chair, there are five ayes and one no. Motion is carried.

COOK: Okay, so where it stands is that the, well, let's see where it does stand. I think where it stands right now is the Corp. Counsel, unless he changes his mind, is still going to represent the Planning Director and Maui Counsel, Corp. Counsel, is going to represent us. So that's the way it stands now. And according to my legal counsel, which I think I'm going to go with here, if the Intervenors find some evidence, direct evidence, that one or both of these counsels would not be fair and equitable and there's some grounds for disqualifying them, then they can file another motion.

Okay, I think that takes care of the first three items on the agenda, and I want to thank everyone for coming. And we will have the hearing on the merits of this matter set for the next hearing in Hilo which will be two months from now, October 13th. And I would ask the Intervenors if they have, there are rules for submitting exhibits and giving notice to people and that type of thing, so be sure you're familiar with that since you don't have counsel. Anyone else have any comments before I close this, on these three? Okay, well, thank you very much.

The discussion ended at 10:57 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary