

PLANNING COMMISSION  
COUNTY OF HAWAII

HEARING TRANSCRIPT  
JANUARY 11, 2008

A regularly advertised hearing on the application of **KOHALA LLC (REZ 866)** was called to order at 6:06 p.m. at the King Kamehameha's Kona Beach Hotel, 75-5660 Palani Road, Kailua-Kona, Hawaii, with Chairman Rodney Watanabe presiding.

PRESENT: William Graham  
Takashi Domingo  
Shelly Ogata  
Alvin Rho  
Rodney Watanabe  
Rell Woodward

ABSENT & EXCUSED: C. Kimo Alameda  
Andrew Iwashita  
Rene' Siracusa

Ivan Torigoe, Deputy Corporation Counsel  
Norman Hayashi, Planning Program Manager  
Phyllis Fujimoto, Staff Planner  
Jeff Darrow, Staff Planner

Christopher Yuen, Planning Director  
Steven Lim, Attorney for Kohala LLC

And no one from the public in attendance.

**APPLICANT: KOHALA LLC (REZ 866)**

Continued hearing on an amendment to Condition C (time to secure final subdivision approval) of Change of Zone Ordinance No. 97-102, which rezoned 37.88 acres of land from an Agricultural 5-acre (A-5a) to a Single-Family Residential 15,000-square foot (RS-15) district. The property involved is located along the southwest (makai) side of Akoni Pule Highway and the Kohala Ranch Subdivision, Kahua 1<sup>st</sup>, North Kohala, Hawaii, TMK: 5-9-1:8.

WATANABE: Now we have Agenda Item 5 to deal with. I'd like to take five minutes. But, you know, before we take that five minutes I had indicated earlier that I do have some suggestions. It's based on I believe a neighboring SMA Permit that we did issue. I recall that particular incident. And if you don't mind this, I'm not trying to railroad anything, I would like to pass that out so that you all can review that. It's just a draft. It's one person's initial proposal. I thought I'd work on something like that so that, you know, we could proceed a little faster possibly; and so if you don't mind during the recess I'll hand that out or give a copy to staff, etc. Okay, thank you.

RECESSED The Chair called a short recess at 6:06 p.m.

RECONVENED The meeting reconvened at 6:17 p.m.

WATANABE: Okay, would the Planning Commission now return to order. I realize we had only a short time to look at this. Again, you know, I want to reiterate that I'm not trying to railroad anything. I'm just trying to get away from the procedures part arguments and go on to something towards more like mediation. And I'm also trying to establish for the record where the Commission or the majority of the Commission is coming from and whether the applicant's representative is agreeable to some of the revisions to the conditions. With that, maybe we can begin with Agenda Item No. 5, which is applicant's request for extension of time, Kohala LLC, REZ 866. Jeff, do you want to summarize? I don't know if we need to but -.

DARROW: We did them earlier; it was -.

WATANABE: Oh, you did on this. Okay, okay. Okay, Mr. Lim, as we stated earlier, you know, it's agreed that the applicant has an opportunity to extend the time. So it's up to you whether you would like to extend the time so that we can discuss this in conjunction with the March 20<sup>th</sup> meeting or -. But all the same for reasons I stated earlier, I would hope that the record would reflect some of the feelings here, and maybe some of the other Commissioners might also chime in. This is just one person's view. You care to comment on how we should proceed with this?

LIM: I've had a chance to review the submittal by Commissioner Watanabe just now, and I understand pretty much where he's going. There are some things in here that I haven't discussed with my clients so I really don't have the ability to agree to -. Some of them I have so I can agree to some of those; but some I haven't because, you know, I haven't seen this before today. The practical problem for us is I would like to accommodate the Commission but I also want to have our request for a time extension go up to the County Council at the same time that the Director's does, and so, you know, again, that's why I'm asking you. Maybe it doesn't have to go up in March with the other SMA hearings, but I would like to have the ability to get some authority from my client on these points that you've raised and then come back at maybe the next meeting with the Director's consent to then take action on Item No. 5 and send 4 and 5 up.

WATANABE: Mr. Director, timing wise, cause you've been pretty firm on the drop date as January 11<sup>th</sup>. And timing wise as far as this, Item No. 4 going up to the Council, when does that go up to the Council?

YUEN: It goes up, I mean we don't stall these things after -.

WATANABE: Yeah, yeah.

YUEN: You know, the actions that are taken by the Commission, they get typed up and they get, you know, whatever timeframe that takes and they get sent to Council, and then it's really up to Council to agendize the items.

LIM: I guess my request would be to ask the Director to stipulate to extend till the next Kona meeting for us to come back on Item Nos. 4 and 5; and we'll go ahead and, in the meantime, be able to review this with my clients so I can give you my position on it.

WATANABE: I'm inclined to think the Director would not agree to that, but I'll ask him to respond.

YUEN: Mr. Lim has filed a legal memo saying that the Director has no power to extend the 60-day timeframe, so I'm not sure what his argument is right now.

WATANABE: Okay.

YUEN: And, you know, I'm not trying to be difficult about this. There is also the, you know, the Commission can also review this and make a decision whether it likes it or not and take a vote on it today; and the Commission does not have to act with the consent of Mr. Lim and his client on something like this. At any rate, it's, I don't know what I can really, I don't know what I can do. It's up to the Commission and Mr. Lim as to what they want to do on this item.

WOODWARD: We might get a point of order -.

WATANABE: Commissioner Woodward.

WOODWARD: Mr. Chairman. And we've already decided Issue No. 4.

WATANABE: We have and that is going to go up -.

WOODWARD: So that is going to Council.

WATANABE: Yeah, yeah.

WOODWARD: So now the question is what do we want to do with Agenda Item No. 5.

WATANABE: Exactly, exactly, and -.

WOODWARD: And my guess is that both are probably going to go with a negative recommendation. And then some revision, hopefully some mediation will occur in the meantime. But my guess is that both of these are probably going to go to Council with a negative recommendation.

WATANABE: Okay. Yes, Mr. Graham.

GRAHAM: What Mr. Woodward says sounds kind of correct to me, too. It seems like the other issue is that, Commissioner Watanabe you have put a lot of work into this recommendation; and it seems to me given that some of the Council, some of the Commission here feels, you know, towards keeping it as open as possible and others towards allowing the

developer to develop what he had originally that you found a, I would say, a very fair median ground to best sort of represent the Council (sic) as a whole. And I commend you on what you've come up with content-wise on that. So I'm just wondering if there's any way, given that we've followed what Commissioner Woodward suggested we're sort of likely to do, that this document which is not agendized in any way could sort of just kind of go along to the Council in some fashion just for their consideration. I don't know -.

WATANABE: Well, I'm wondering if we could discuss this to some degree because I agree I don't think we have the votes either way on this issue either; and maybe then the record will reflect where we were headed. And my only question to Mr. Lim was whether he would choose to continue this to the March 20<sup>th</sup>, or he'd want to work on it right now. He's kind of in a quandary in that he hasn't had the opportunity to discuss it with this client. On the other hand I didn't feel I had the liberty to share it with anyone else until we discussed Agenda Item 4 first. I mean it's not up to me. You know, it's really a Commission kind of issue. So with that, you know, I assume, Mr. Lim, that you still want to send this up to the Council at the same time as the negative recommendation for Agenda Item 4. And I suppose if we discussed this to some degree it will then in effect be entered into the record.

WOODWARD: If I might suggest, Mr. Chairman, maybe we can ask Mr. Torigoe what the best way to handle this would be. Because really this is either a revision or an unagendized item, depending on how you look at it; and I'd like to get his input as to what the best way to proceed would be, just take a vote on the issue that's before us or rehash this whole thing.

TORIGOE: Thank you, Mr. Chairman. Well, there's a couple of things you can do. Taking one step back, one thing you could do is you've attempted to take a vote on Item No. 4 which did not pass and the vote today seemed to indicate that you wouldn't be able to get a vote with five either way. And so it looks like that's going up with a default negative along with the entire record and all of the good discussion that you had on the record. You could let that go up but also with a notation that there is a complementary Item No. 5 that asks for an amendment to extend, an amendment to this Condition C to obtain, secure final subdivision approval, just to let the Council know that, you know, there's something else coming up that is the flip side of 4, so that they would not prejudge the matter I think as probably Mr. Lim and his client are concerned about. That's one way to handle it. And then you can continue this Item No. 5 to allow Mr. Lim and his client to discuss it and you all to take a better look at it, to look at the recommendation that the Chairman has created.

WATANABE: I apologize. I should have put "Draft" on there. I think I made it clear that was my intent. Yeah?

TORIGOE: Okay. So -.

WATANABE: So then what you're saying then is we could put, place a caveat that Agenda Item 5 has been continued, say to the February meeting, at which point Mr. Lim would have had a chance to consult with his client and also the other Commissioners would have had a chance to digest the material. And then we could agendize this for them and then send it up, subsequent to sending up Agenda Item 4, cause Agenda Item 4 is going up, irrespective.

TORIGOE: Right. And then you could, as I said, you might also add to the transmittal to No. 4 to the Council a notation that you are considering a time extension as requested and so they should be looking out for that to be coming up.

WATANABE: Yeah. We do not have, however, the authority. Only Mr. Lim has the authority, you know, as the applicant to extend the time, yeah. So, you know -

TORIGOE: Right.

WATANABE: You have to be in agreement. If you're not in agreement with what was just discussed then we would act upon this. If there's a question as to whether it's an unagendized item, we can just discuss the Ramsayered portions and then send it up, because we do regularly discuss revisions to conditions on previously agendized items. And that way, you know, some of the discussion would be forwarded. But like I had said and like it is pretty obvious none of it is going to pass tonight anyway, I don't think so.

TORIGOE: You know, actually I look at this recommendation and it's, well, your draft recommendation, and I see it as really kind of a form of discussion on the agendized item. And this being an advisory matter too, I wouldn't have a problem if you decided to enter this into the record as -.

WATANABE: Draft?

TORIGOE: A draft for discussion. And then if you decided, if you wanted even to take a vote on it you know, and if you can't come to a consensus or five votes one way or another then it goes, you could send that up as well this way. But there are some options there.

LIM: In terms of the applicant's position is I do need client authority cause there's some issues in here, especially the 100-foot setback from the ocean and a 150-foot setback proposed from the highway. You know, I don't know how big or how wide the property is so I can't make an assessment at this time.

WATANABE: Yeah.

LIM: But for purposes of just the procedural aspect, I think if the Commission, you know, we're not consenting to it, but if the Commission decides to send the recommendation on Items 4.a. and 4.b. of the agenda today to the County Council, we would ask that you do that with a special note that you are taking time to review Agenda Item 5 with the applicant and coming back at the next Kona meeting to address that.

WATANABE: Okay, that will require you authorizing an extension to agendize to the next Kona meeting.

LIM: And I think that I'm saying that I will authorize the continuance of Item 5 to the next Kona meeting, with the proviso that we would like the Commission, if Items 4.a. and

4.b. go up to the County Council that you add a caveat that you are, that something else is coming so, you know, you would like them to review those together.

WATANABE: Okay. With that, Mr. Torigoe, earlier you indicated that this could be, if labeled as a draft, be presented as a discussion item; and I think the minutes would clearly indicate that we haven't approved it, it was continued. And I'm wondering if that can occur. Do you feel comfortable with that occurring? Cause they will know that we haven't approved, we haven't acted on it, obviously, cause we've continued. Or if we should just, as you suggested earlier, place, you know, a simple caveat that we are currently, we have continued Item 5 and we're working on revised conditions to Item 5. For me I don't particularly care how we handle it as long as, you know, we're abiding by the rules. Mr. Director, you have some comments?

YUEN: You know, we can certainly put a note, a sentence or two in the letter that we forward the recommendation on 4.a. and 4.b., we can include a statement that the applicant has a request for a time extension that is still pending at the Planning Commission and it would be expected to come to the Council shortly.

LIM: We would ask that the Commission indicate your request that the matters be heard together at the County Council. I mean what I'm trying to accomplish is the -.

WATANABE: Well, in a round-about way I know what you're trying to accomplish. On the other hand, you know, I'm trying to be fair too. Okay? So, you know, I think if the record is clear that there's further discussion, they will, let's leave it up to them to come to that conclusion.

LIM: Hopefully, yeah, what my -.

WATANABE: Otherwise, you know, then I have to show respect for the Director also, right?

LIM: What I'd like to do is submit comments to this proposal; and that's why I need the extra time.

WATANABE: No, that's fine. For your information, Mr. Lim, you know, I would refer to the, there was a flood study or something about the shoreline and I believe the elevations there up to 140 feet from the shoreline was about 25 feet; and so if you refer to your own exhibits in there, it's generally not recommended that you build that close to the shoreline anyway. So it may not really represent a taking. I don't think the 20-foot setback that we're talking about is consistent with the Belt Collins setback which is, I believe, adjoining this parcel. And, you know, most of the rest of the conditions you had previously agreed to, with the exception of the height limitations on the house.

LIM: Can I ask some clarifying questions so that when I -?

WATANABE: Sure.

LIM: Take it to the client -. Okay, I'll go through it really quickly. I'm sorry it's very late. I think you have a small thing. It's a typographical error in D, the third to the last line should state "approved covenant(s) shall be recited in an instrument..." Condition M, when you say "A new Data Recovery Plan and Preservation Plan consistent with the proposed Development Plan shall be prepared," I'm not sure that a new Data Recovery and Preservation Plan needs to be prepared, because I believe, and I'm just doing this from memory, but I believe that the existing plan covered the entire acreage; and I think it was only a site preservation plan at the end of the day that was approved for a single-family dwelling. So I've got to go check that. So I'd like to make it clear -.

WATANABE: Well, again, this was only intended as a draft so -.

LIM: That is not -.

WATANABE: And if we're not going to deliberate on this then -.

LIM: Right. I think it would be just -.

WATANABE: I would, you know, welcome your corrections at the, I assume we're going to continue this to the January, I mean, February meeting and, you know, by then you would have, how should I put it, authority from your client, yeah, to -.

LIM: Yeah, perhaps, you know, my client is sometimes hard to reach; and since I'm going to come back for the March hearing on March 20<sup>th</sup> I believe it was on the SMA, maybe I'll go ahead and just continue to that date. And if the Council takes it up ahead of time, then they take it up ahead of time on Items 4 and 5, 4.a. and 4.b., excuse me.

WATANABE: So you would prefer then to continue to the date we have set, agendized for the SMA on March 20<sup>th</sup>?

LIM: Yes. In part I'm trying to think about the cost of -.

WATANABE: The logistics.

LIM: Coming, you know, twice, yeah.

WATANABE: Yeah, okay.

LIM: Condition O regarding the public access is -.

WATANABE: Please, give me a second please, Mr. Lim.

LIM: Yeah.

WATANABE: Mr. Hayashi, how is the schedule looking on the March 20<sup>th</sup>? Do we have room to extend this to the March 20<sup>th</sup>?

HAYASHI: Yes.

WATANABE: Oh, okay. Thank you. So then that's, assuming the Commission is agreeable that's open then.

LIM: The Condition O is that from a particular permit?

WATANABE: O, this was from the SMA. And actually, but I couldn't, normally we would not include something like this, I don't believe, in a zoning type of ordinance. But the SMA was not agendized for this meeting and so to make sure that it was in there, basically it's the same thing as was contained in the SMA condition, with the exception that the lateral public access was increased from 10 feet to 20 feet which is consistent with the Belt Collins. And I believe in your response that you said you would comply with this, aside from the change from 10 feet to 20 feet, as well as the change from the 40 feet to 100 feet on the setback.

LIM: Okay, when you speak about the 20-foot wide lateral public access walkway, is that an improved walkway like a roadway or something?

WATANABE: It's the exact wording that was in the existing SMA; and I'm not suggesting that you put any sidewalks or anything there, you know. It's a trail, right, in my mind. But -.

LIM: I would think, I'll probably come back with amendments to Condition P to increase the fair share contribution numbers to the current numbers.

WATANABE: Yeah, I wasn't aware of the current numbers so I just took, Condition P is exactly the same as it was in the original. And if you are willing to increase it to the current numbers that's, you know, obviously better for the community.

LIM: That's what the County Council will do in any event. Condition Q, this is something that we'd like to retain. You crossed it out. This is the ability of the developer to bond the improvements rather than have to build them out; and this is a fairly standard condition.

WATANABE: I think I left that in one of the conditions for the flood mitigation, I think it was. But I guess what I'm saying is I was looking at this as, because I believe you had agreed already, if you review your notes, that you were going to build a number of the, oh, wait, Condition Q?

LIM: Yes, yes. It's just the bonding condition which is kind of standard.

WATANABE: Yeah, but, okay. Let's look at the conditions then. That was to E, F, H, J and O, yeah?

LIM: Yes.

WATANABE: And E is related to – “In conjunction with Final ... the Department of Water Supply.” – the fire hydrants and all that. You’re not going to bond that, right?

LIM: I think these are, I think, you know, I’ll suggest some more language but there’s a standard condition the Planning Department uses that says that instead of building all these improvements -.

WATANABE: Right, right.

LIM: For final subdivision approval you can file a bond. And so I’ll change that language.

WATANABE: Okay.

LIM: I just wanted to see why you did that. Okay. And I see the height limit and the setback requirements.

WATANABE: The height limit was an exact replica of what we had approved in the SMA Permit for Belt Collins.

LIM: The Belt Collins’ one you’re talking about is the one for Kohala Makai?

WATANABE: Belt Collins is, I had thought Belt Collins was an acre or one-acre Ag, but in actuality the Director was being consistent when he said 5-acre Ag.

LIM: That was the next door property?

WATANABE: I’m not exactly sure if it’s next, immediately adjoining. However, I do know that it was in the immediate vicinity and I believe that’s the same one the Director was referring to with regard to an SMA Permit. That was not a change of zone. It was just simply an SMA Permit.

LIM: Okay, I understand what you’re getting at now. So I can take that to the client.

WATANABE: I’m trying to create as much consistency and send a message that we are trying to be consistent. But in this event you already had vested rights, and so we’re trying to make a compromise. I’m just trying to act as a mediator. But that does not suggest that this is the final language. I’m just trying to jump-start something so maybe we can get to some amicable solution.

RHO: Mr. Chairman?

WATANABE: Yes.

RHO: Today we had a, I guess a definite timeline for 4.a. and b.

WATANABE: We already decided on 4.a. and b; and that is going to go up.

RHO: But that timeline, was today the absolute deadline or could the Director and the applicant have agreed to extending it further to, let's say, March 20<sup>th</sup>?

WATANABE: That was debated at the previous meetings -.

RHO: Right, and they agreed -.

WATANABE: There's some -.

RHO: Not agreed but -.

WATANABE: Well they agreed to extend -.

RHO: One or both parties would not extend past today.

WATANABE: The maximum to January 11<sup>th</sup>, which is -.

RHO: Which is today -.

WATANABE: This meeting today. There's some question as to whether even that is allowable.

RHO: Right.

WATANABE: The Director took the liberty and said, look, I'll extend as far as January 11<sup>th</sup>.

RHO: Okay, so how about Item No. 5?

WATANABE: Item No. 5 is an applicant-initiated request for a time extension; and the rules are clear on that one, the applicant has the ability to request an extension.

RHO: So that was extended from a previous meeting's -?

WATANABE: Right, right. It was continued; and at some point I think it was even the July or maybe even the August meeting where even the Commission requested that it be continued.

RHO: There's no, I guess I'm looking for an absolute deadline and I won't find one, right?

WATANABE: On this, as long as the Commission is willing to agree with the applicant -.

RHO: Okay, so the Commission actually -.

WATANABE: No.

RHO: In the end, by the end of tonight we'll actually have to vote on -.

WATANABE: No, we would -.

RHO: Moving this to the next meeting?

WATANABE: No, to the March 20<sup>th</sup>.

RHO: To the March 20<sup>th</sup>.

WATANABE: The applicant's representative is requesting a continuance to the March 20<sup>th</sup>. He's vacating the desire to have both -.

RHO: Cause I'm going to tell you right now that I'm not inclined to do that. I only have one vote, but I'm not inclined to postpone this to March 20<sup>th</sup>. Because in my view my previous vote will be inconsistent if I do that. I mean, I guess I kind of agree that all of this thing should have been taken up all at one time, because it's like we're going backwards to the back door now and doing something to -. And I understand what the vote was in our previous motion and vote. But it's like we're going back through the back door to bring that subject all the way back up again with modification. And if that was the case then we should have done that from the very beginning and not take a vote then, which again, you know, I understand that vote. But now to bring it up again, it just doesn't seem -.

WATANABE: Okay. And in all fairness to you then maybe we should entertain whether the Commission is agreeable to extending it to the March 20<sup>th</sup> deadline as indicated by the applicant. And so if we could have a motion to that effect then we can determine whether the Commission as a whole, whether we have the votes to continue it to the March 20<sup>th</sup> meeting; and if we don't, then we will deliberate on this now and we more than likely will wind up with no consensus vote so it will go up with a negative recommendation on both. And that's, like I said, either way is fine with me. I was just trying to, you know -. So Mr. Domingo, I'll entertain a motion.

DOMINGO: Mr. Chairman, I don't have a motion but I would like to make a few comments if I may.

WATANABE: Sure.

DOMINGO: Mr. Torigoe, is a proposed amendment to the zoning bill appropriate when you're considering a time extension?

TORIGOE: Okay, I think you're asking basically, the agenda item is a time extension and you're asking if we can do these other changes including the limitation on the number of -?

DOMINGO: Yes. You know, when you cut the number of stated residential lots practically into half, that certainly has an impact on a project. And when you mentioned, you know, with regards to the possibility of having a channelization of the highway and other conditions you're changing the ordinance. You know, you're changing the ordinance. I'm totally against this. You know, this makes a project unfeasible.

TORIGOE: Well, Commissioner Domingo, it's just a draft for discussion.

DOMINGO: Well, I'm just making my feelings known -.

TORIGOE: Right.

DOMINGO: That should this come up as written then I'll surely fight against this. I mean if we're going to consider an extension of time, let's consider extension of time. And I don't think it would be proper for us to go into the rezoning bill and change what was in there already to begin with and what was approved by the ordinance.

TORIGOE: Well, I think all that's being attempted is to stimulate some discussion that may lead to an amicable solution; and I think a number of you, including yourself, Commissioner Domingo, have noted the preferability of having some kind of a win-win; and I think this is trying to go in that direction. And that's all it is at this point.

WATANABE: To comment, Mr. Domingo, it's kind of like what I expected to occur if we were compro -, you know, when we asked them to find some compromise with -.

DOMINGO: You know, in deference to you, Mr. Chairman, with the ordinance going up with the negative recommendation there is no indication as to whether the Council will go along with the recommendation to deny or to approve, to override the Commission's denial and approve the rezoning, you know. When you consider the mood and the, the mood of the Council, you know, the applicant will have a hard time even to have them consider rezoning, go through the rezoning. And when you have people who go to the Commission and say that we have here an issue which has been brought up many years ago, over ten years ago, with regards to the preservation of the ocean front and with no further development along the shoreline, tell me how those Council people will react to it?

You know, I cannot accept this as written. If we're going to consider an extension, let's consider the extension and leave the ordinance as is. That's it. And if we, and then when we consider the SMA Permit, you know, then we can deal with the finer things of the project. The zoning is broad right now as written. The zoning is broad. But when you come down to the SMA Permit, it brings into a more finer detail and it's confined within a smaller area, a developable area, in which we can consider all impacts. But that's written, you know.

WATANABE: Okay. And that's fine. You have a right to an opinion. As I stated earlier we are not able to discuss the SMA requirements; and I did not think that we could gain any

consensus if we didn't bring in any finer -, and so I proposed that. Again, it was proposed as a draft. If you're against it, that's fine, you know. Commissioner Graham.

GRAHAM: Yeah, I think I understand Commissioner Domingo's point, and I also generally agree with Commissioner Rho that I feel like we ought to take action on 5 also today. And my intent when I spoke before was just that, you know, this document could be forwarded up to the County Council in some way for them, when they go forward. And I think Commissioner Domingo is right, the particulars in this document do feel more appropriate to an SMA than to a rezoning. However, I think what you were feeling was that once the rezoning gets acted upon by the Council then it may preclude some things, and so you kind of wanted to have this in play for them to think about at rezoning time. So, anyway, that's all my thoughts.

WOODWARD: Mr. Chairman?

WATANABE: Commissioner Woodward.

WOODWARD: I think it may be is cleaner from a legal standpoint to have a, I want to ask Mr. Torigoe if I'm right in that regard, to go ahead and vote on this issue and have this in the works; and then if Mr. Kim wants to resubmit a proposal, amended proposal -.

TORIGOE: Mr. Lim.

WOODWARD: Lim, yeah. Isn't that what I said?

TORIGOE: You said Kim.

WOODWARD: Lim, oh, okay, sorry - wants to submit a revised proposal then that can be addressed? Yes, no, maybe?

TORIGOE: I'm sorry, I got a little lost there.

WOODWARD: Okay. Well, I was just saying, and it sounds to me like people want to vote on this issue. And I think what's going to happen is there's going to be a negative recommendation for both 4 and 5 that goes to Council, which leads everybody sort of in limbo; and there's still time to discuss this. And if the, you know, the applicant wants to resubmit an application -.

TORIGOE: Well, I suppose, off the top of my head I can't recall what the timeframes would be for resubmittal. I suppose that the applicant or anyone could at the Council level, even if both of these went up with default negative recommendations, I suppose that a draft such as the Chairperson has created could be brought up for discussion with the Council.

LIM: For purposes of the record, the applicant is willing to waive the 90-day period in the Planning Commission Rules that the action by the Commission should occur within, and like I said we would be willing to waive to the March 20<sup>th</sup> hearing. My intent and my goal would be to come up with something like the recommendation that was passed out today

by Commissioner Watanabe with conditions of approval addressing density, setbacks, and those types of issues. Because I would rather have on the record a determination by the Planning -, at least try to get a determination by the Planning Department that these are the conditions under which you feel comfortable having the project go forward and present that to the County Council, rather than to have essentially nothing that was forwarded up by you as a recommendation. So that was going to be my intent, to try to work with my client and see if we can come up with conditions that are acceptable to us that you would adopt, hopefully.

WATANABE: Yeah. I understand that. But it seems that we're at an impasse and that a number of the Commissioners want to decide on this today. And, you know, judging from the prior vote on Agenda Item No. 4, this is not going to fly anyway. So at this point I'm inclined to entertain a motion to entertain Agenda Item 5 today; and, you know, if the Commissioners so desire, then let's do it. Yes, Mr. Graham.

GRAHAM: All right, I am willing to make a motion. So I would make a motion then on Agenda Item 5, Applicant Kohala LLC, that's Rezoning 866 on our agenda, I move that the Planning Commission send an unfavorable recommendation to the County Council on this application.

RHO: Second.

WATANABE: Okay, it has been moved and seconded. Any discussion on this?  
Mr. Darrow.

DARROW: Thank you, Mr. Chairman. The motion before us is to send an unfavorable recommendation to the Hawaii County Council. With that I'll take the roll.

WATANABE: So that would be an unfavorable recommendation on the extension of time, right?

DARROW: Correct.

WATANABE: I'm trying to make this clear so that people don't get confused and think they're voting on this.

DARROW: Yeah, on Agenda Item No. 5.

WATANABE: We're saying an unfavorable recommendation on the extension of time.

GRAHAM: That's correct.

WATANABE: All right, okay.

DARROW: With that I'll take the roll. Commissioner Graham.

GRAHAM: Aye.

DARROW: Commissioner Rho?

RHO: Aye.

DARROW: Commissioner Domingo?

DOMINGO: No.

DARROW: Commissioner Ogata?

OGATA: No.

DARROW: Commissioner Woodward?

WOODWARD: No.

DARROW: And Mr. Chairman?

WATANABE: No.

DARROW: The motion does not pass four to two.

TORIGOE: Mr. Chairman?

WATANABE: Mr. Torigoe.

TORIGOE: Yeah. This is a little different from the previous one of the Planning Director. Since the applicant has indicated a willingness to extend the time, you probably should take a motion to continue in line with the applicant's indications. And it sounds like that will get voted down; and that'll close it up.

WATANABE: Well, actually, that was the motion I was looking for but instead they jumped ahead to the motion, yeah, to decide. And I was looking for a motion that, it's kind of like moot now because the motion you're proposing is that we will decide on this.

TORIGOE: No, I'm just -.

WATANABE: Yeah, and if we want to do it for the record for formality that's fine. But I -.

WOODWARD: Point of order.

WATANABE: Mr. Woodward.

WOODWARD: We really didn't decide the issue. There was not a majority vote. Now the Director's recommendation has to go because there's a time limit on it.

WATANABE: Right.

WOODWARD: This one we didn't decide. So it makes sense, in fact I think we're almost obligated to continue it till we get a decision.

TORIGOE: Well, not necessarily.

WATANABE: No, I believe there's a, what, 90-day and -.

TORIGOE: Yeah, but the thing is that, as Commissioner Woodward was saying, that with the Planning Director's previous one it was clear that if you didn't get five votes today then that would be the end of it. It would go up with a default negative recommendation. But this one you have the applicant saying, you know, I'm willing to extend it, in fact I want to extend it to the next meeting. So to close that out, I think you should take a motion to extend it or not; or if nobody makes a motion to extend, then that's it. Then you're done here.

YUEN: Well, can I jump in for just a minute here. I think the applicant has the right to extend the time on their, on the bill that they initiate when the Commission has not come to a definitive vote.

WATANABE: Right, well -.

YUEN: In other words even if the Commission had a vote on whether to defer action and did not reach five to defer action, if the applicant does not want the matter to go to the Council with a default negative recommendation but would rather have it stay at the Commission to try to get five favorable votes, then the applicant should be able to do that.

TORIGOE: So you're saying that it should just stay on the agenda as long as the applicant wants it to stay on?

YUEN: It's the applicant's request. You see, this is their request for a time extension. And if the applicant is content -. And I think that, you know, you get into a point of reasonableness. And typically the applicants have wanted to have their matter at some point go up to the County Council when it's clear that they're not going to get five votes at the Planning Commission or if they're just tired of having it voted on the Planning Commission. But otherwise you're forcing it to go up to the Council with a negative recommendation. And if the applicant does not want to do that, then it seems to me that the applicant should be able to keep the matter at the Planning Commission.

TORIGOE: Okay, I think there's an ambiguity in the rule because the way it reads it says unless a longer period is agreed to by the applicant, you know, and that sort of, it doesn't say until, unless a longer, unless the applicant, or to the extent that the applicant requested or, you know -. It doesn't make it clear that the applicant has the power to keep it with the

Commission forever. It seems to me that clearly the applicant has 90 days and then to the extent that the Commission will agree to extend it and the applicant agrees to extend it, then it can stay. But I think there's some ambiguity there. So, I don't know -. If the applicant wants to keep it till the next meeting and nobody has a big objection to that, then I'm not going to stand in the way of that.

LIM: That is our request, to the March 20<sup>th</sup> meeting.

YUEN: I understand what Mr. Torigoe is saying about the wording. But I do think that because of the consequences of an unfavorable recommendation that in the normal course if the applicant does not, wants to keep their request at the Planning Commission in the hope of getting a favorable recommendation, they should be able to do that. I mean it's subject to reason. If it's something that stalls matters at the Planning Commission over and over and it's not going anywhere, I can see the Planning Commission sending it up. But I think generally we ought to honor the applicant's request if they want to keep the matter at the Commission.

WOODWARD: Mr. Chairman?

WATANABE: Mr. Woodward.

WOODWARD: Since we were unable to reach a decision and given Mr. Yuen's advice, I would move that we continue Item No. 5 until the March 20<sup>th</sup> meeting.

WATANABE: Okay, we have a motion. Is there any second?

DOMINGO: Second.

WATANABE: You second, Mr. -?

DOMINGO: Second.

WATANABE: Yes, okay, Mr. Domingo seconds. Yes, comment, Mr. Rho?

RHO: I have a question.

WATANABE: Yes.

RHO: So there's a motion, there's a second. And if we can't, we don't have five votes, and then what happens? We're going to stay here all night?

WATANABE: Yeah -.

TORIGOE: You know, what I would suggest is that I think given the ambiguity that we seem to have encountered here, I think, my recommendation would be to go ahead, and if the applicant is requesting one more continuance, my recommendation would be just to say that at

this point as a matter of the rules and of law that we will go ahead and continue it to the next meeting and then, you know -.

WATANABE: No, it's March 20<sup>th</sup>.

TORIGOE: I'm sorry, the March 20<sup>th</sup> meeting.

WATANABE: Comment -?

RHO: Which doesn't then require a vote?

TORIGOE: Right.

RHO: Is that what you're saying?

TORIGOE: Right.

RHO: Okay. I have a question. You know, we have written records now of what we each said and discussed, etc. etc. What actually goes up to the Council if, in fact, this thing, this Item Agenda 5 gets continued to March 20<sup>th</sup>? Does anything dealing with Item No. 5 besides maybe the minutes go up to the Council?

TORIGOE: Yeah, the whole transcript basically would be going up at this point, everything you've discussed.

RHO: How about the notation that we were in discussions about this draft?

TORIGOE: It's all in the transcript.

RHO: It's all in the transcript. But not necessarily in a specific cover memo to the decision that was made for No. 4? I mean I don't know what the form is. I mean you guys do a special thing for No. 4, and No. 5 just gets included in the minutes and sent up?

WATANABE: I'm lost. What do you mean by special thing for No. 4?

RHO: I'm not sure because I'm not sure what exactly happens at the Council level -.

WATANABE: I think if any -.

RHO: But I guess my problem is that these two issues are so interrelated -. I agree that if we could have gotten the parties together, and you guys encouraged them three times at least in my presence, to actually reach a compromise, that's what we wanted but we couldn't get it. All No. 5 does, and what to me this does, is try to reach a compromise for them after we voted inconclusively, but we voted and we're going to send up a negative

recommendation on this rezoning thing. So if the Council votes in favor of the Director's recommended rezoning, all of this becomes moot, right?

WATANABE: Exactly.

RHO: So what I want to know is what actually and how it gets sent up to the Council, because I think what would happen is you're going to just make them even more confused as to what we as a body either agreed to or disagreed to do.

WATANABE: Well, for the record, we never agreed to do anything. We couldn't agree.

TORIGOE: At this point basically if we just say that, all right, we think that the rules allow for the applicant to request at least one more continuance to March 20<sup>th</sup>, one of the things we were talking about doing if there were a continuance was adding a notation to the transmittal of the default negative recommendation on 4.a. and 4.b., adding to that notation that there is a request for extension still being considered before the Planning Commission, just to inform them that the story is still going on and they can expect more.

RHO: Okay, I would personally prefer that we actually had a vote on extending the timeline to March 20<sup>th</sup> instead of as you are recommending -.

WATANABE: Well, yeah, there was a motion and it was seconded, but then you wanted to comment so we didn't vote.

RHO: I know, but then our counsel though is recommending that you just decree that -.

WATANABE: Well, because you brought up the probability that we would have no outcome out of the vote -.

RHO: Right.

WATANABE: Which is a real probability; and that's how we got to this point. So if -.

RHO: Well, I think that probability has lessened because I need to put this to bed, or we need to put this to bed. But I don't want this to be put to bed by you just flat out decreeing that this is extended. I think that the Commission should take a vote to extend or not extend.

WATANABE: You meaning counsel?

RHO: Huh?

WATANABE: You meaning counsel?

RHO: No, no, this Commission needs to vote instead of the Chairman extending it by decree, I guess I -.

WATANABE: I didn't extend by decree.

RHO: No, no -.

TORIGOE Okay, well -.

RHO: As he's suggesting though that you do that, that you just say that that's extended without -.

WATANABE: Okay, okay. Mr. Graham.

GRAHAM: Yeah, we do have a motion before us. And I think Mr. Torigoe was suggesting that we could extend it sort of administratively instead of with a motion; and you're preferring that we have the motion and that we act on our, or affirm as to whether to extend or not. And in my own case, especially given Mr. Yuen's comments about fairness to the applicant, you know, I'm willing to support the motion to continue.

WATANABE: Okay. So let's have the vote, Mr. Darrow.

DARROW: Thank you, Mr. Chairman. The motion before us is to continue Agenda Item No. 5, the time extension amendment request by Kohala LLC until March 20, 2008. With that I'll take the roll. Commissioner Woodward?

WOODWARD: Aye.

DARROW: Commissioner Domingo?

DOMINGO: Aye.

DARROW: Commissioner Graham?

GRAHAM: Aye.

DARROW: Commissioner Ogata?

OGATA: Aye.

DARROW: Commissioner Rho?

RHO: Aye.

DARROW: And Mr. Chairman?

WATANABE: Aye.

DARROW: The motion passes six to zero.

TORIGOE: Okay.

WATANABE: Okay.

WOODWARD: He was just tweaking us.

WATANABE: Okay. Is it all right? So we have extended then to March 20<sup>th</sup>, and I note staff will place a note that we are considering this, for the benefit of the Council; and, you know, I welcome your comments for, and revisions and discussion at the March 20<sup>th</sup> meeting.

LIM: With regard to that March 20<sup>th</sup> meeting, I'm going to be still following the SMA submittal of Findings of Fact, Conclusions of Law, and Decision and Order that we talked about at the last meeting on December 12<sup>th</sup>, which basically contemplates that we will file our proposed Findings of Fact, Conclusions of Law and Decision and Order and any legal memoranda by February 8, 2008. The Planning Director can respond by February 29<sup>th</sup> if he wishes. We would be able to rebut by March 3<sup>rd</sup>; and then we would come back for the hearing on March 20<sup>th</sup>. And all Commissioners would have read the record and hear us argue, and that way we would satisfy the requirements of Chapter 91 so all of you could vote.

WATANABE: Good, thank you. So everything will go as previously agreed.

DOMINGO: Mr. Chairman?

WATANABE: Yes.

DOMINGO: What is to become of the recommendations that you've submitted for the extension of time? You -.

WATANABE: We already continued that, the extension of time, to the March 20<sup>th</sup> meeting.

DOMINGO: Okay, now what of the recommendation that you submitted?

WATANABE: These are not recommendations. This is a draft for discussion purposes. This is, nothing was approved. So -.

DOMINGO: So -.

WATANABE: If you're concerned whether this was approved or not, it's not.

DOMINGO: No, no. I'm not concerned about that was approved. I'm concerned if that would be agendized for that meeting because we had not officially approved that and included that as an agenda for today's meeting.

WATANABE: Well, Mr. Lim is going to come up with some suggested stuff, yeah.

DOMINGO: Only because we submitted for the Commission's consideration. He had no choice but to say give me some time so I can go back to my clients and see whether or not they would accept or they have any amendments to it. That's how I understand it.

WATANABE: Well, he's perfectly capable of coming up and saying I want to stick with the 50 and bring that up and all I want to do is just the time extension. And if he gets the votes, he gets the votes. That's fine.

DOMINGO: Well, you know, technically we had not approved or accepted that recommendation as part of today's agenda for us to effectuate any legal, legal avenue to which we can consider that in the next meeting. That's what I'm saying.

WOODWARD: Mr. Chairman, if I might -.

WATANABE: Yes.

WOODARD: I think, Commissioner Domingo, that these were just talking points. These were ideas that might help come to a change in the applicant's proposal that perhaps the Commission can agree on; but it's up to them. These are not things we can dictate to them. These are things they have to look over, see if they can revise their proposal to a point that the Commission can come up with an approval. So these are really talking points not -.

DOMINGO: Yeah. I appreciate that, Mr. Woodward. It's talking points. But when we surface it and give it to the applicant for its consideration we are in essence saying consider this as amendment to the zoning bill. Now his presentation at the next meeting would be based on what's in that recommendation. And what I'm saying is that to begin with in the very beginning, is that within the purview of a recommendation for extension of time? Can we go through the whole ordinance and pick and choose what we want to change?

WATANABE: Mr. Director?

YUEN: Yeah, I understand, I -.

DOMINGO: In fact, can we amend, can we amend the ordinance? I think I heard earlier part of the day that we cannot amend the ordinance.

YUEN: Well, I think you cannot, you can't introduce an entirely new bill. For example, the Commission cannot introduce an ordinance to rezone the property to A-1a. All right? But I understand exactly what you're saying about agendizing an item and there's an application in. We receive an application, it's strictly an application for a time extension

typically from the applicant. I can tell you though that in practice, you know, we have to be pragmatic about this, and it has happened that when the Department, the Department takes in an application for a time extension and finds conditions that need to be modified in the bill; and we have added conditions and brought them to the Planning Commission, and changed them in the course of the time extension. We have done that. And then, now then we have to be real careful because when it goes to Council, and usually we don't have a bill prepared, well, we'll have a draft, you know, changes before the Commission. But when we send the bill to Council we have to be real careful about the title of the bill reflecting all the changes that are made. But this, again, you have to be practical about this because the applicant will know, oh, I need a time extension; and the Department will process, you know, just do an initial review of the bill when it comes in and will say, yeah, that's right, you need a time extension. We'll start to process the time extension. As we go through it we'll say, oh, this condition needs to be changed. Even things that are really simple, like this was done already so we're going to take it out and we'll make all these changes and bring it to the Commission. So I think you can modify bills that are pending, that are just time extensions that are, and you can modify them pending going up to the Council at the Commission stage.

WOODWARD: If I might, Mr. Chairman.

WATANABE: Mr. Woodward.

WOODWARD: I think, the way I look at this, this is Commissioner Watanabe's suggestions; and we do this all the time if we're discussing an SMA Permit or anything, is we suggest we change this condition, we change the way this is done. It's generally done verbally. It just so happened that Commissioner Watanabe took the time to write this out to try and make some suggestions to achieve a consensus. So I think it's the same as the suggestions we all make, although most of the time they're made verbally here. This just happens to be in writing.

WATANABE: Mr. Domingo, well -?

DOMINGO: I rest my case.

WATANABE: Well, -.

DOMINGO: I yield to the judge.

WATANABE: Well, that's what I was hoping we wouldn't have to go to, but we're probably going to wind up there anyway if we're not going to decide on any of this -. So, anyway, Mr. Lim, then we will see you again on March 20<sup>th</sup> and I guess we'll get your information prior to that. Yeah?

LIM: That's correct. Thank you.

WATANABE: Thank you, thank you.

The discussion ended at 7:18 p.m.

Respectfully submitted,

Sharon M. Nomura, East Hawai'i Secretary

A T T E S T:

Noriko Sauer, West Hawai'i Secretary