

PLANNING COMMISSION
COUNTY OF HAWAII

HEARING TRANSCRIPT
SEPTEMBER 21, 2007

A regularly advertised hearing on the applications of **DANIEL IBBETSON (SPP 05-000015)** was called to order at 9:10 a.m. at the Waikoloa Beach Marriott, Alii I and II, 69-275 Waikoloa Beach Drive, Waikoloa, Hawaii, with Chairman William Graham presiding.

PRESENT: C. Kimo Alameda
Takashi Domingo
William Graham
Andrew Iwashita (from 9:36 a.m.)
Shelly Ogata
Alvin Rho
Rell Woodward

ABSENT & EXCUSED: Rene' Siracusa
Rodney Watanabe

Ivan Torigoe, Deputy Corporation Counsel
Norman Hayashi, Planning Program Manager
Phyllis Fujimoto, Staff Planner
Jeff Darrow, Staff Planner
Kiran Emler, Representative of Department of Public Works

Dennis Krueger representing Applicant
Dean Kaiawe, Intervenor
Michael Matsukawa representing Intervenor
Christopher Yuen, Planning Director

And six people from the public in attendance.

APPLICANT: DANIEL IBBETSON (SPP 05-000015)

Action on the application for a Special Permit to operate a 2-unit bed and breakfast establishment on 0.722 acre of land situated within the State Land Use Agricultural district. The property is located along the west (makai) side of the Mamalahoa Highway (Highway 11), approximately 120 feet south of the Kaohe Road-Mamalahoa Highway intersection, Kaohe 5th, South Kona, Hawaii, TMK: 8-7-9: 14.

GRAHAM: The first agenda item under Unfinished Business is a Special Permit application. The applicant is Daniel Ibbetson. It's an application to operate a 2-unit bed and breakfast establishment on 0.7 acre of land within the State Land Use Agricultural district. The property is located along the makai side of Mamalahoa Highway, approximately 120 feet south of the Kaohe Road-Mamalahoa Highway intersection in Kaohe 5th, South Kona, Hawaii. This is a long-standing agenda item, which landed before the Commission before as a contested case, also went to the court. Mr. Darrow, if you would just fill us in on what's involved here with the specifics of the application, and then I'll ask Mr. Torigoe to give us a little explanation of what we are headed for today.

DARROW: Thank you, Mr. Chairman. Good morning, Mr. Chairman and Members of the Planning Commission. This is a continued hearing. As you had mentioned, the applicant in this case, Daniel Ibbetson, has requested a Special Permit to allow a 2-bedroom bed and breakfast operation. This is within the South Kona District of Hawaii, just south of the Kona Paradise Subdivision. At our last hearing – let me back up a little – on January 20th, 2006, the Planning Commission voted to deny the request for the Special Permit. The applicant had appealed the decision to the Court, and the Court had remanded, had reversed the order; the Third Circuit Court reversed the decision back to the Planning Commission, and remanded the case back to the Planning Commission for further proceedings. At our last hearing on August 31st, there was a motion made to approve the request; the motion did not pass with four ayes and two noes. Since our last hearing we have received several correspondences. Two of them from attorney, Michael Matsukawa: one of them is dated September 13th, 2007, this is a letter to Mr. Ivan Torigoe, Corporation Counsel, and one letter dated September 14th to Chairman, William Graham. Additionally, we've received a response letter from attorney, Dennis Krueger, dated September 19th to Mr. Ivan Torigoe, Corporation Counsel.

GRAHAM: Jeff, I don't presume we need for you to describe the physical aspects of the application. All of that's in everybody's mind, all right? Okay?

DARROW: If you would like, I could, or if not -.

GRAHAM: What would the Commission like?

RHO: I'm okay.

GRAHAM: I think the Commission is okay. Thank you anyway. You mentioned in your presentation that we took this matter up at our last meeting on the West side here on August 31st; I also just want to point out we do have the transcript of those proceedings before us. All the Planning Commissioners have that. And at that meeting we did have a motion for approval of the application based on the Planning Director's proposed Findings of Fact, Conclusions of Law, Decision and Order along with a few modifications to that, which we can see in our transcript. The motion failed to achieve the five votes necessary for passage. And so the matter comes before us again today. Mr. Torigoe, could you give us a few words on the proper way to go forward here since we do have a couple of submissions from both the intervenor and the applicant?

TORIGOE: Thank you, Mr. Chairman. You know, you just mentioned that there was a fresh transcript, so I'm wondering if one of the things we need to take care of too is just for everybody to review the transcript, make sure that there's no corrections or additions that you want to make to it, and then perhaps approve that as one of the first things. Beyond that, as was mentioned, we do have a couple of, or three correspondences from the parties' attorneys. In substance, what these seem to be doing is that Mr. Matsukawa seems to be asking that the Commission and/or suggesting that the only vote that the Commission can take, or the motion that the Commission can make at this point is to deny based on Robert's Rules of Order's rules on reconsideration, and it also is asking that the Chairperson declare that the application would be denied. So in essence these are written requests I think as a way we should handle them under Rule 4-17, which allows for a response from Mr. Krueger, and Mr. Krueger did write back in response. So I would suggest that the Commission first of all take up Mr. Matsukawa's written

request by letter, considering Mr. Krueger's response. And if the Commission wants to allow these counsel to address the matter, and allow the Planning Director also to make any comment he wants on it, and then the Commission should dispose of the written request one way or another. If the Commission wants after hearing from the parties, I can also give you a little bit of guidance. And if necessary, we can also go into executive session to discuss what may be the best legal course of action on those. Assuming that, well, depending on how you dispose of the written request, if then you want to go ahead with the hearing and entertain a range of motions, then you would proceed on it to deliberation and try to come up with a dispositive motion to either deny or to approve the application.

GRAHAM: Thank you, Mr. Torigoe. So first of all it looks like we have two things that you suggested need to be handled early: One is Mr. Matsukawa's request in his correspondence indicating how he believed our action should be limited, and also you brought up approval of the minutes. Do you suggest we do either of these first?

TORIGOE: I think if there is a, you know, the minutes basically are going to be part of the basis of any decision you make, so I suggest that you take that up, and perhaps if the parties have any other procedural suggestions or issues at this point.

GRAHAM: Okay. And my understanding is that the hearing is closed from before, so that's what we are really dealing with is the procedural issues.

TORIGOE: Correct.

GRAHAM: So would the Commissioners like to spend about five minutes going over the transcript, so we'll get all refreshed, and we'll just take a recess for five minutes?

ALAMEDA: Sure.

RECESSED The Chair called a short recess at 9:18 a.m.

RECONVENED The meeting reconvened at 9:26 a.m.

GRAHAM: Will the Planning Commission come back to order, please? We are on the first agenda item, which is a Special Permit application by Daniel Ibbetson. We've just been going over the minutes of our last West Hawaii hearing where we – the minutes are pertain to this agenda item – where we took up the item but failed to reach a definitive decision. We do not have approval of these minutes as one of our agenda items today, so rather than taking any formal action on it, I just would like to invite any of the Commissioners who were at the last meeting, if they had any changes or they saw anything that we should change in the minutes. Is there anything? Does anyone have anything? All right, thank you. So I presume that we are okay to go with the understanding that these minutes do reflect what went on at our last meeting. Mr. Torigoe has suggested that we next move to the consideration of the correspondence received from Mr. Matsukawa and sort of a rebuttal correspondence from Mr. Krueger, the applicant's attorney. But maybe I could first just call on the parties a minute, and ask if there's any other procedural issues that they think we should be dealing with at this time. Mr. Krueger -. Could I swear all of you in please first now, probably that's best? Do you all swear and affirm to tell the truth on this matter today before the Hawaii County Planning Commission?

PARTIES: I do.

GRAHAM: Thank you. Mr. Krueger, you may begin, if you would. And the specific question is just whether there are any other procedural matters before we start on the specific one that you'd like at least to bring to our attention. And give name and address when you begin, please.

KRUEGER: Sure. My name is Dennis Krueger. My address is 75-5722 Kuakini Highway, Suite 208, Kailua-Kona 96740. My client couldn't be here today, but he asked me to show up and to allow the matter to proceed. I have no other procedural matters, Mr. Chairman, that I think should be addressed by the Commission.

GRAHAM: Thank you, Mr. Krueger. Mr. Matsukawa, would you respond to that, to my question, and give name and address, please?

MATSUKAWA: My name is Michael Matsukawa. My address is 75-5751 Kuakini Highway, Kailua-Kona. I represent the intervenor. We have nothing to add procedurally. Thank you.

GRAHAM: Thank you, Mr. Matsukawa. And Mr. Yuen, on behalf of the County, do you have any comment to make on what's before us now?

YUEN: Nothing to add, no.

GRAHAM: Thank you. Okay. So we have this motion before us, not this motion, we have this correspondence before us where Mr. Matsukawa -, my understanding of the gist of the correspondence is at the last meeting, since we failed to approve, since we failed to get a majority vote on a motion to approve the application, that the gist of what he is saying is we sort of disposed of that motion and we cannot bring an essentially identical motion before us again today, which would be to approve the application; that really only what's within our purview to do might be to deny the application. Mr. Matsukawa, could you give us a few words in support of what you wrote, please?

MATSUKAWA: Yes. Unlike the Legislature, this body is in continual session throughout the year; so it's a body that meets in continuous session. So under the rules of procedure, as I noted, once a motion is brought to the floor and is not successful, only those who were on the prevailing side, which was Commissioners Alameda and Iwashita, could move to bring that back to the floor by way of a motion to reconsider. So in absence of such a motion – and I think the time to make the motion may have expired – but in any event, if such a motion is not made, then that would leave the only action available is a motion to deny. I'm not going to speculate as to how the vote comes out, but our position is that would be the only motion that is in order today. Thank you.

GRAHAM: Thank you, Mr. Matsukawa. Mr. Krueger, we also have written correspondence from you on this matter. Would you care to add some words at this time in regard to Mr. Matsukawa's correspondence?

KRUEGER: Yes, thank you, Mr. Chairman, Members of the Commission. I'm not quite certain what Mr. Matsukawa means by this body being in continuous session. I don't know if he's implying by that that there is one single meeting throughout the year that's continued from date to date to date, because in my way of reading the Robert's Rules of Order, that would be the only way in which a motion which was made at one meeting and not passed would not be able to be raised at a subsequent meeting. I'm not sure if it would even apply under those circumstances, but Robert's Rules of Order is clear that the only time that you can't bring up the same motion again is at the same session. In other words, if you have a motion which does not pass, at the last meeting on August 31st, somebody who was not in the – I wouldn't say the majority – but in the prevailing party which, I think Mr. Matsukawa is correct, would be Commissioner Iwashita or Commissioner Alameda, unless one of those two raised the issue and asked for it to be reconsidered at the last meeting, absent a couple of other exceptions, you wouldn't be able to readdress that matter at that meeting. But Robert's Rules of Order is very clear that at a subsequent meeting you can bring up that same motion, identical motion, again and it can be considered again. And I quoted from another source called Webster's New World Robert's Rules of Order, but the official Robert's Rules of Order also says the same thing. At Page 329, actually Page 329 of Robert's Rules of Order says, referring to the second general principle stated on Page 326, "A main motion that was introduced but not adopted during one session can, except as noted in this paragraph, be renewed at any later session, unless it has become absurd. Such exceptions occur only through one of the four processes by which from one session to another a main motion can remain within the control of the assembly that is temporarily but not finally disposed of;" so that the same motion can be considered at the later session. Then they have three procedural reasons why that can't be, and they are not really applicable to this: if the motion was laid on the table, if the motion was voted to be reconsidered, and then it came up at a subsequent meeting because it wasn't taken care of at the original meeting. They are not really applicable. But I think that Robert's Rules of Order is very clear that the same motion can be raised at a subsequent meeting such as this, and I don't think there is any doubt about that.

GRAHAM: Thank you, Mr. Krueger. I think going forward I probably will go to the Commissioners for any input and also come to Mr. Torigoe, but before that I'd like to ask Mr. Yuen if he has anything to add.

YUEN: Yes, thank you, Mr. Chair. Just really briefly. As on all procedural matters, we recommend that you finally take the advice of your Corporation Counsel, your legal counsel, who is appointed to advise you on these things. But to state the Department's position on this, we disagree with Mr. Matsukawa. Robert's Rules of Order simply don't apply to a decision by the Commission to approve or deny an application. Robert's Rules of Order are based on a principle that a decision is made by a majority of a quorum – if you go back to the very beginning of Robert's Rules of Order – that is a majority of the people who were there at the meeting. So you don't have this issue that we encounter all the time in the Planning Commission of not having a majority of the full membership; you'll always have a majority of the quorum. If you have a tie, in Robert's that's when the Chair rules. Now going -, so, and a reason, the majority of the full membership comes from the Charter. For that reason, a failure to, on a Special Permit, a failure to obtain a majority of the full membership is neither an approval nor a denial. Under Mr. Matsukawa's argument, it would be a denial unless there was a successful motion to reconsider that decision. There is a slightly different rule in the Planning Commission's Rules on how we handle SMA Permits; that rule calls for one revote. There's no

such rules with Special Permits, so you will continue to revote until you have five votes favorable or five votes unfavorable.

GRAHAM: Thank you, Mr. Yuen. We're going to hear from Mr. Torigoe before long, but I'd like to just ask the Commissioners first if they have any comments on what they've heard or any understandings that they'd like clarified or questions to those who spoke before us about the specific issue of whether we are precluded from entertaining another motion to approve this application today. Commissioners? Yes, Commissioner Domingo?

DOMINGO: No. No comment.

GRAHAM: No comment. Mr. Matsukawa, since you did hear the other two parties speak after your depiction of what's your correspondence was, do you have any rebuttal you want to make for what you heard to them?

MATSUKAWA: I would only emphasize that the parties have relied upon the Commission's Rules, and they are entitled to the protections given to them by those Rules. Thank you.

GRAHAM: Thank you, Mr. Matsukawa. Commissioner Iwashita just arrived. I'd like to just fill him in on where we've gone so far.

IWASHITA: Okay.

GRAHAM: Okay. So we are taking up the Ibbetson Special Permit application. And basically we have copies of the minutes from the last meeting in West Hawaii, which dealt with Ibbetson's application, so we all kind of took a minute and read them over just to refresh ourselves in them, and they seem to be acceptable as written to the Commission as a representation of what took place. Then I went to the parties of the hearing here today, and asked them to specifically comment in regard to Mr. Matsukawa's correspondence with us, which suggested that it's not correct for us to entertain another motion to approve after we failed to approve that motion at the last hearing. So we've heard from all the parties in regard to that. And then I just asked the Commissioners if they had any further comments they would like to make from what they heard from the parties. And so from here I was going to ask Mr. Torigoe, our Corp. Counsel, for his word on how we should deal, how he feels we should deal with this consideration put to us by Mr. Matsukawa of being restricted from entertaining another motion to approve the application today. Mr. Torigoe? Did you want to say anything first, Commissioner Iwashita?

IWASHITA: I apologize for my late arrival. No, I understand what you just explained.

GRAHAM: Thank you. Mr. Torigoe?

TORIGOE: Thank you, Mr. Chairman. I'm going to try and be very concise and simple about what can become a real hairball, you know, when you let lawyers play with Robert's Rules and things like that. Basically, starting with the impact of Robert's Rules, even if it does apply -. And I'm basically going to just real simply state what I would end up saying if this matter gets up on appeal; and so I'm going to say something that, nothing that I wouldn't,

you know, say in public to the Court. But if there are more detailed questions that the Commission would want to ask about any of this, any of this that may bear on the likelihood of, you know, you'll be overturned, we should go into executive session for that.

But my general impressions of this is, number one, with respect to the application of Robert's Rules, it does form the basis for your general meeting procedure; but as has been mentioned, when you are dealing with a contested case, it's a little different from, in fact it's a lot different from, you know, just a meeting where you are dealing with the interests of the members; you are dealing with the interests of the applicant and third parties. So the Hawaii Law is basically geared to allow for contested case procedures where you allow evidence to come in, and you make a decision based on that record evidence. And the Hawaii Law also, both the Case Law and the Statute, and the Charter require your decisions to be made by five votes, up or down, not by default, generally speaking. Having said that, what is the role of Robert's Rules in this kind of situation, basically, if you go back to the rules themselves, I think generally when you look at all of these rules in context, Robert's does allow for renewals of a motion at a later session, and does allow for different motions, new motions. And the rules that limit reconsideration are basically designed to prevent a loosing party from kind of filibustering things by bringing up the same motion again and again at the same session or meeting. And so overall I would have to say that even if Robert's Rules did apply, that it would still allow for a motion either to deny or to approve to be brought up again. It would not make sense to apply Robert's Rules in a way that would say that, well, you know, you failed to pass one motion, therefore you cannot bring up that motion ever again, when you still have time under your Rules. Again, the purpose of your contested case procedure is to allow for an informed decision made on the record with five votes one way or the other. So I think that is the gist of what I would say. And so again if you have specific questions that you need to ask regarding the likelihood of success or failure on appeal, then we should go into executive session for that. Thank you.

GRAHAM: Thank you, Mr. Torigoe. I might also ask you as far as what's our order of business right now, do we proceed on the merits of the application and by the manner in which we proceed essentially abide by or not abide by Mr. Matsukawa's contention, or do we sort of making an official decision on our own whether we think that contention is valid?

TORIGOE: Right. If we are considering this as a written request, then there should be some kind of disposition by the Commission. If you basically follow what I have just said, you would have a motion that would deny the request; and the request being basically to limit the motions in order to, a denial of the application or to table or postpone. So that's basically what I would recommend as a motion at this point to deny the request to limit the motions that are in order to denial of the application or to table or postpone.

GRAHAM: Okay. Commissioner Iwashita, do you have a comment?

IWASHITA: I have a procedural concern and that is, I guess one of the, given the vote last time, one of the possible outcomes today is that the application may be denied either by a vote or by failure to, for five votes to go forward. And because it's a contested matter, my concern is that, and I'm not – I'm trying to think here. Have we met the statutory requirements for proposed Findings of Fact on a denial? If the result of this is a denial, and it's not by vote but by the fact that there can't be five votes, you know, for an approval, I'm wondering if we need to have proposed Findings of Fact, Conclusions of Law prepared and submitted, and then have the

parties be able to object or comment on those before we proceed. Because my understanding, I guess now under the contested case procedure, is that the parties should have that and make their objections or comments of record before we actually vote, and so, not after the fact. That's my lesson from the D-Bar case.

GRAHAM: All right. Commissioner Iwashita, let me try to state in a concise form what I think is before us from what you've suggested. Maybe there's two parts to it: One part is I think you are suggesting that even if we don't affirmatively vote to deny, if we fail to have the votes to approve today, your sense is that the application will thereby be denied; and the second part of what you're saying is that if that should occur, is there other background and supporting material that we should have before us today before that occurs. Is that correct?

IWASHITA: No.

GRAHAM: Okay.

IWASHITA: I'm just concerned, and maybe we should have an agreement on, with the parties, on how this proceeds in terms of compliance with the contested case procedure, because you know, that whole D-Bar case, I mean the law is, you know, what the judge cited. And to me it's better to make sure that there are no technical kinds of problems, essentially, that we ran into in that case. And so, you know, this case has gone up and come back down once. And I just don't want that to happen again just on a technical thing here. And you know, that's what we are talking about is what rules that we are following. And the main one is the contested case statutory procedure that we want to make sure that, you know, the parties have the full opportunity to present the case and objections and so forth. And so I just want to make sure that maybe if the parties' representatives can say that they have had enough opportunity to set off their whole position and they don't require proposed Findings of Fact, Conclusions of Law at this time in order to proceed further, then fine, so that, you know, still on the record we have an agreement that the contested case procedure has been complied with. If not, then we ought to fix it, or make sure it is otherwise complied with.

GRAHAM: All right, I'll pass directly to Mr. Torigoe here for his understanding of your comments and how we should proceed.

TORIGOE: Okay. Thank you, Mr. Chairman. First, regarding the timing, I think Commissioner Iwashita properly reminded me once that under Rule 4 there is a 90-day timeframe actually that applies. So I think we still have some time to make a decision, you know, if we can't come up with a decision today. Number two, with respect to the requirements of 91-11, in this case we already allowed the parties to file proposed findings and conclusions and decisions, and to have exceptions; and I think the parties pretty much agree that that takes care of the 91-11 issue. If there is anybody who disagrees with that, I'd like to hear right now. But I think that's, that pretty thoroughly has dealt with that.

GRAHAM: Is that acceptable interpretation by the parties? Does any of the parties have anything they wish to say further on that? Thank you.

IWASHITA: Mr. Chair, I want a clear record, not nodding of the heads.

GRAHAM: All right. Mr. Matsukawa?

MATSUKAWA: Yes. Intervenor's position is that the record is closed. The proposed Findings had been submitted earlier, and whatever is on the floor is just a procedural matter not covered by the 91-11.

GRAHAM: Thank you, Mr. Matsukawa. Mr. Krueger?

KRUEGER: I would agree, Mr. Chairman.

GRAHAM: Thank you. And Mr. Yuen?

YUEN: Agree that the Findings are before the Commission, and the Commission can adopt either Findings favorable or unfavorable, and make a decision today. I did want to say, though, on the pending procedural question, I could be wrong and perhaps we should check the Rules, but I believe the Rules say that procedural questions during a contested case are decided by the Chair.

GRAHAM: Thank you, Mr. Yuen. Yes, Mr. Torigoe?

TORIGOE: Yeah, that's an interesting question. Basically Rule 4-7 (e) says – I'm sorry, hold on a second here – 4-5 speaks of the presiding officer controlling the course of hearings, rules upon all objections or motions which do not involve a final determination of the proceeding. So in that sense, the Chairperson would have the right to determine any procedural motions. On the other hand, in some sense, what Mr. Matsukawa is asking for is really dispositive, isn't it? Because he is saying that you have no choice but to deny. So you know, it kind of straddles both of those, and in some sense it will be safer if you can have a motion that everybody agrees one way or the other.

GRAHAM: Thank you, Mr. Torigoe. So my inclination upon hearing that is that I would entertain a motion from one of the Commissioners to handle the correspondence that we got from Mr. Matsukawa, the intervenor, which is proposing to restrict our action to motions today of denial or continuous postponement. And if the Commission comes to a clear record on that, a clear majority, then I am willing as Chairman to go with that. Otherwise, I'll have to make my own decision. So could I have a motion from one of the Commissioners?

IWASHITA: Mr. Chair?

GRAHAM: Commissioner Iwashita?

IWASHITA: Just procedurally, I guess my thought was maybe we should just have a -, I would make a motion to deny the application, and we can have that discussion, have a vote, and then deal with proceeding further after that.

GRAHAM: Thank you for your thought. We did I think discuss that maybe slightly before you came about whether we should deal with the application and then have Mr. Matsukawa's contention come into play as we deal with it, or whether we should sort of take action and dispose of his allegations first before we deal with the content and the substance of

this application; and Mr. Torigoe was kind of clear that he felt that it was appropriate because of the nature of the correspondence that we deal with the correspondence specifically. So that's what I intend to do right now.

IWASHITA: I understand that position, Mr. Chair. I guess as a practical matter, there were two votes at the last meeting that, you know, basically can be interpreted as in favor of a denial, and if three others today joined, then all of this discussion is moot. I mean if the application in fact is denied, then the whole procedural question disappears.

GRAHAM: I understand that.

IWASHITA: So my preference would be, you know, to at least make the motion, make it part of the record; if the motion fails, then we can deal with this procedural issue.

GRAHAM: All right. Thank you for your thoughts. I'd prefer to deal with Mr. Matsukawa's correspondence directly as sort of a specific topic before us right now. Does one of the Commissioners choose to make a motion in regards to what we received from Mr. Matsukawa? Commissioner Domingo?

DOMINGO: Chairman, since it comes to us after the close of a hearing -. Is that right?

GRAHAM: Correct.

DOMINGO: I think we should accept both letters and submit that into the records, the record of the proceedings on this specific issue, and just leave it at that, and then consider the issue of the bed and breakfast application as a new issue, not a new issue before us but an issue which we can address either for or denial of that application.

GRAHAM: All right, thank you. It sounds to me like you are speaking in general the same tone as Commissioner Iwashita who would like to do that. And also the question whether this needs to be admitted into evidence is another question. Mr. Torigoe, maybe you can speak to that?

TORIGOE: Thank you, Mr. Chairman. The correspondence basically again is like a written request, and so it wouldn't necessarily be considered evidence; it's just part of the record. I think if the parties again have any other position on that, we should get that on record. But I don't think it needs to be formally entered into evidence.

GRAHAM: Thank you, Mr. Torigoe. Could I ask the parties, go through one more time, if they have any further commentary on what we are saying right now? Mr. Matsukawa?

MATSUKAWA: No.

GRAHAM: Mr. Krueger?

KRUEGER: No, I don't.

GRAHAM: Mr. Yuen?

YUEN: No.

GRAHAM: All right. Thank you all. So I'm perhaps in a position to have to make a ruling on the procedural situation, if none of the Commissioners wants to make a motion. Do any of the Commissioners want to make a motion?

IWASHITA: What you're asking for, the motion you are asking for?

GRAHAM: The motion that I'm asking for is a disposition of the request we got from Mr. Matsukawa.

RHO: I move -.

GRAHAM: Yes, Commissioner Rho?

RHO: I move that we deny the intervenor's request to declare the application denied based on Robert's reconsideration rules.

GRAHAM: Mr. Rho, just for clarification, my sense was that Mr. Matsukawa wasn't asking it be denied because of those rules, but just asking that we not be able to entertain a motion for approval -.

RHO: Right.

GRAHAM: At today's meeting.

RHO: Yes.

GRAHAM: Is that the gist of what you are saying?

RHO: Yes.

GRAHAM: Thank you. Do I have a second?

WOODWARD: Second.

GRAHAM: Seconded by Commissioner Woodward. Any further discussion by anyone? Commissioner Iwashita?

IWASHITA: The intent of - I'm just trying to - the intent of the motion is to say that if we want to, we will still consider a motion to approve the application?

GRAHAM: I believe that's correct.

IWASHITA: It analytically -. I'm not sure if that's a proper motion because it's not actually accomplishing anything. And a motion has to accomplish something. And, you know, Mr. Matsukawa has stated a legal position under our Rules, and I'm not, you know, whether we

accept it or not is based on our actions. And so I'm not really clear in my mind that this is a proper motion, and that's just my main concern.

GRAHAM: Thank you. Commissioner Woodward?

WOODWARD: The way I look at it, we spent a lot of time talking about procedural issues and this is likely to be decided by the Court anyway. All we are trying to do is to get passed this stumbling block and come up with a decision, which is really what we are here to do, not to talk about the legal issues, which we've already spent way too much time on. I mean that's going to be readdressed, I think, however this thing goes. So I think we've just got to move on with it. We are doing best we can. And I would say, you know, we need to get this procedural question behind us and make a vote.

GRAHAM: Thank you, Commissioner Woodward. Any further comments from the Commissioners? Mr. Darrow, would you like to take a roll call vote on this motion by Commissioner Rho?

DARROW: Thank you, Mr. Chairman. Commissioner Rho?

RHO: Aye.

DARROW: Commissioner Woodward?

WOODWARD: Aye.

DARROW: Commissioner Alameda?

ALAMEDA: Aye.

DARROW: Commissioner Domingo?

DOMINGO: Aye.

DARROW: Commissioner Iwashita?

IWASHITA: No.

DARROW: Commissioner Ogata?

OGATA: Aye.

DARROW: And Mr. Chairman?

GRAHAM: Aye.

DARROW: The motion passes, six to one.

GRAHAM: Thank you, so the motion is approved. And the motion essentially states that we've ruled on Mr. Matsukawa's correspondence, and the motion tells us that the ruling that we made makes us free to, leaves us free to entertain a motion for approval today. And I'd also like to say in my role as Chairman, I concur with that ruling also. So I think we'll go forward from that point to the substance of the issue before us today, as Mr. Woodward would like to see us address. The hearing is closed. I have no public testimony signed up. If anybody from the public wants to come and speak, please come forward right now. All right, thank you. We have no one from the public. So I believe the motion, excuse me, the item is before us for action today; the item being the Special Permit application of Mr. Ibbetson. And I'll open it to the Commissioners. Commissioners, do you have any motions, comments, anything you like?

WOODWARD: I'd like to make a comment, if I could, Mr. Chairman.

GRAHAM: Commissioner Woodward?

WOODWARD: This is basically rephrasing what I said at the last meeting. We've been caught up here in what really would be a very simple issue. And as Director Yuen said, if it wasn't for the question of gravesites on this property, there is no reason not to grant a Special Permit. The Third Circuit Court ruled that the undisputed facts – this was Judge Strance's decision on December 22, 2006 – “the undisputed facts are that Mr. Ibbetson applied for and was granted building permits for the home and swimming pool on the subject property consistent with the requirements of the law. Thus, the ‘essential character’ of the subject property was established prior to Mr. Ibbetson's application for a Special Permit. --- without any regulation, Mr. Ibbetson could put the property to the following uses: crop production, fertilizer yards utilizing only manure and soil, for commercial uses, group living facilities, livestock production, telecommunication antennas. --- it is clear from these Findings of Fact that the presence of the burial sites on the subject property is what drove the Planning Commission's determination of the ‘essential character of the land and the present use of the property.’ This determination appears to have been made without consideration of the current residential nature of the property derived from Mr. Ibbetson's construction of his home and associated structures on the property. --- Mr. Ibbetson's deed does not contain a use restriction. It reserves rights of third persons to enter the property to visit certain identified gravesites on the property. There is an absence of evidence of any intent to maintain the character of the property as a cemetery. Thus, the Planning Commission's reliance on an undetermined legal issue – a characterization of the property as ‘cemetery use’ after conveyance to Mr. Ibbetson – and its disregard of the current residential character and use of the property were all clearly erroneous.” And as I said, if it wasn't for this question of the gravesites – and we've heard nothing but testimony to the fact that nobody has ever been restricted from visiting those gravesites; Mr. Ibbetson has allowed them access – if it wasn't for that question, this would have been a very simple issue. We spent way too much time on it, and I see no legal reason not to grant Mr. Ibbetson the right to use this as a bed and breakfast.

GRAHAM: Thank you, Commissioner Woodward. Commissioner Domingo?

DOMINGO: Just one question for clarification. I don't know if I read someplace in the transcript. But is the issue of the interpretation of the deed still in question and that it is in Court at the present time?

GRAHAM: Mr. Torigoe, would you have a comment to make on that question?

WOODWARD: If I might, Mr. Chairman, I do have a little quote from the Court decision in that regard.

GRAHAM: All right. Can I hear from Mr. Torigoe first?

WOODWARD: Oh, yeah, sure.

TORIGOE: Thank you, Mr. Chairman. Yeah, my understanding is that that matter is still before the Court, and has not been decided. I mean basically that's something that is outside of the jurisdiction of this body to consider.

DOMINGO: But upon decision by the Court and that decision is contradictory to the use of the intended property, then the permit would have to, if we approve, would then be withdrawn and considered null and void because of the Court's decision, in fact, stating that that particular parcel is intended for a cemetery.

GRAHAM: I'd also just like to point that on Page 6 of the transcript right at the top from our last hearing, the Planning Director, Mr. Yuen, spoke directly to this issue; you might want to review that. But Mr. Torigoe, you want to respond directly also?

TORIGOE: Well, basically if the Circuit Court says that a use cannot continue whether it's supported by a Special Permit or not, the use will have to stop. If you wanted to put something into an approval of the permit that specifically says that it's subject to any contrary ruling by the Third Circuit Court, that's also something that you could do.

GRAHAM: Thank you, Mr. Torigoe.

IWASHITA: Mr. Chair?

GRAHAM: Commissioner Iwashita?

IWASHITA: I just wanted to reiterate my view at this point that, you know, the portion of the Judge's decision that was read that's what the Judge said, it's clear on the record that we have before us, though, that the issue that the Judge spoke about as far as Mr. Ibbetson's deed and whether or not there is a specific restriction in his deed; on this record that's not the issue that is before, that specific issue is not the one before the present Third Circuit Court. And my understanding of the record is that the present case pending in Third Circuit Court is for the Judge to decide the effect of the original restriction on the conveyance to the church that says it's for cemetery purposes, is to be used for cemetery purposes. That's the issue that is pending before the Court right now, and to be decided. And I agree with the Director that, you know, if the Court finds that that restriction does not allow the applicant to conduct a bed and breakfast, that's going to be definitive on that point. I don't agree with the Director, you know, that because of that maybe that we should close our eyes to the fact that that in fact may be a result here, and just go ahead and approve it. You know, we have jurisdiction over certain things; the Court has jurisdiction over certain things. I don't think that the Commission should take an action that ultimately, you know, to me the first decision that should be made should be the

Court's decision. If the Court says you can have a bed and breakfast even with this restriction, fine, then we can act. But we shouldn't usurp in a way, right, the Court's authority. Essentially what we are doing, if we say, go ahead, do the bed and breakfast, and whatever happens in Court happens in Court, that's not an effective way for us to proceed. I just don't think, frankly, I don't think once this deed restriction became – well, had, and I'm not really clear now but – if this deed restriction was made known to the Department, you know, at the time of the application, I don't think the application should have been submitted to the Commission.

One of the possible outcomes of this is that, in Court in this pending Third Circuit case, the Court may very well say, well, it restricts the use for cemetery purposes. Mr. Ibbetson was able to build a house on the property, that's a dwelling, that's, you know, it can be a cemetery caretaker's dwelling, right? That's not an inconsistent use with the restriction. But extending that use to a bed and breakfast, that would be, you know, going beyond the restriction. So Mr. Ibbetson is fully entitled to use the property as he is now, and we are not telling him he can't. But what he is asking for is basically an additional use, entitlement, for this property, which we have to find it's unusual and it doesn't -, all those other considerations that we have. But I think before we get there, you know, frankly I think, well -. That's essentially it.

The point, as far as the Court's decision is concerned, is it's clear to me that the decision remanding this case back to us does not dispose of this issue, it doesn't, in no way. It's real clear that it doesn't, and because it doesn't, I believe, you know, it's my position that we ought not to take an action here; where, in effect, the Court can wipe out whatever, if we do approve it. So I think we should deny it. And you know, if Mr. Ibbetson is successful in Court, then he can reapply.

GRAHAM: Thank you. Commissioner Woodward?

WOODWARD: Well, I have two problems. One is we are anticipating Court decisions that may or may not ever occur. And we were brought this issue by the intervenor's attorney at the last time we discussed this, well, sometime there's going to be a suit filed and this and that and so on and so forth. We can't anticipate Court's decisions; we have to act on the information that we have available. And the information we have available from Judge Strance's ruling from the Third District Court in December of 2006 says, "the Planning Commission's reliance on the 1915 deal appears to have ignored the deed to Mr. Ibbetson's property. Mr. Ibbetson's deed contains the following easement:" – and basically it grants rights to visit the gravesites – "Mr. Ibbetson's deed does not contain a use restriction. It reserves rights of third persons to enter the property to visit certain identified gravesites ---. There is an absence of evidence of any intent to maintain the character of the property as a cemetery. Thus, the Planning Commission's reliance on an undetermined legal issue – a characterization of the property as 'cemetery use' after conveyance to Mr. Ibbetson – and its disregard of the current residential character and use of the property were all clearly erroneous." So I think it's clear that the Court feels that we should act on this on the merits, and not based on our assessment of what future legal entanglements might be.

GRAHAM: Thank you, Commissioner Woodward. I'd like to have a motion that we can take some action here today. Do I have a motion from any of the Commissioners? Commissioner Domingo?

DOMINGO: So move that we go forward and take action on this issue.

GRAHAM: Would you like to, I mean I'm looking for an action motion. Do you have a motion for approval or denial that you would like to make?

DOMINGO: I move for the denial of the application.

GRAHAM: You move that we deny this application for a Special Permit?

DOMINGO: Yes.

IWASHITA: Second.

GRAHAM: Okay. And when you move for denial, since this is a contested case hearing, generally we have Findings of Fact, Conclusions of Law, like that. So we have three of them before us: the Planning Director's and the intervenor's and the applicant's. So the one of the three, which is the intervenor's one, is asking for denial. So would you, are you including in your motion that we follow the Findings of Fact, Conclusions of Law, Decision and Order proposed by the intervenor?

DOMINGO: I would agree to that.

GRAHAM: Does that sound correct to you, Commissioner Iwashita?

IWASHITA: Yes.

GRAHAM: All right, thank you. Mr. Torigoe, any comment?

TORIGOE: No.

GRAHAM: Thanks. Okay, so we do have a motion before us. And do the Commissioners like to speak on that motion? Commissioner Iwashita?

IWASHITA: Just clarification on a procedural point. Because we all had gone through what Mr. Matsukawa submitted, I just want to make clear that one of the basis for denial is that there is a pending, on the record in this case, there is a pending Third Circuit Court case to determine whether or not the use asked for here is allowed under all of the deed restrictions that apply to this property, and so this matter essentially should be deferred; and that's the basis of denial.

GRAHAM: All right. Thank you, Commissioner Iwashita. Any other comments from Commissioners?

ALAMEDA: Sure.

GRAHAM: Commissioner Alameda?

ALAMEDA: Thank you, Mr. Chair. I just got finished building my house, so I'll use a house analogy. After I poured my slab, we had an inspector come and make sure that the foundation is real solid, so that we could continue building. And it seems to me right now that we are trying to make a decision on the roof. We're trying to get approval or come to terms what we are going to do with the roof when the foundation to me is still unstable. The foundation is not stable to me; and so until we settle that matter, like Commissioner Iwashita and I think Commissioner Domingo have suggested, I don't feel comfortable approving this application. So I'll vote in favor of the motion.

GRAHAM: Thank you, Commissioner Alameda. Commissioner Domingo?

DOMINGO: Mr. Chairman, aside from knowing that this issue is still pending, an issue connecting with this use is still pending in Court, you know, I thought about the whole procedure and the intent and the reasons for the intervenor coming into the picture; and having stated his case to Mr. Matsukawa, it was plain, clear and evident at that time that the Commissioners felt that there was merit in granting a standing to the intervenor. And that having been concluded, they went through the procedures, the various procedures of the hearings, and now we are here at this time. I look, you know, as a layperson and I'm no way in any way professional in respect with anything that you can think of, but as an individual with a family, and I think many of us can relate to this: when someone in our family passes away and when they're buried, you know, that particular spot where the grave stands, to the family, to me, is a sacred ground because it houses one of my deceased relative or my family. For instance, for me, you know, my wife who passed away is buried in Kukuihaele County Cemetery. Every time when I go down and visit my other families, I always make it a point to go there and then visit, and you know, you seem to want to make a connection with the deceased person whom you care very much for. And I think the intervenor in this case had that same feeling, you know. And I believe that the Commissioners also at that time realized what the intervenor was trying to say and how he felt, so therefore at that time they granted him standing, you know, for him to be able to relate his concern and to argue the point and the merits of this. It goes beyond the laws that we have in our books, you know. It comes on right to here, right here, in your heart and in your mind as to how much you feel. It becomes something spiritual for an individual, and I think every one of us can realize that. You know, because we have somebody who have passed away, and have been buried at certain place, and we know as we look around and witness places in our State – we look at the Punchbowl, we look at those cemeteries, especially in Washington D.C. Arlington Memorial Cemetery – those are all sacred grounds which have a strong meaning. And I think, for the intervenor, that same feeling is in him, and that's why he has stayed with this and fought diligently and seen what can be done. And for that reason alone, you know, I can, I don't think that it would be proper to have a bed and breakfast on this particular parcel. Because then if it's only one home and the person who owns it, lives in there, and enjoys the property because, you know, he has bought it, then he has built on it, and it's a sacred place. But when you turn it into a use that is commercial in nature, I have a problem. And for that reason, I speak strongly for the motion to deny.

GRAHAM: Thank you, Commissioner Domingo. Any other comments from the Commissioners? I might just, before we vote, I might just put in my own two cents on where I am coming from. When this was originally brought before us – I know some of the Commissioners here today were not there and some of the Commissioners were there – I was one who was there and I in fact voted to approve the Special Permit at that time even though I was in

the minority and it got denied at that time. And I believe I carried into the proceedings much of the same feelings that Commissioner Domingo expressed; and I think Commissioner Hannah Springer also carried those feelings. But over the course of the contested case hearing, after hearing about the applicant Mr. Ibbetson's how he had dealt with and handled and cared and allowed entry and whatever to the cemetery plots in the past, and also considering that there was on the part of the intervenor's attorney we didn't, in my opinion, receive any demonstrable evidence that the bed and breakfast would really be prejudicial to them carrying on the same kind of visits and reverence and feelings for their ancestors after, if we should grant a Special Permit; so because of that lack of any evidence showing that it would be prejudicial, I voted to approve. And I still, because we're going on the record, I still feel that way. Any other Commissioner comments?

KAIawe: Mr. Graham.

GRAHAM: Hold on a second. The hearing is closed on this matter of content of approval or not. So Mr. Darrow, I think we are ready for a roll call vote.

DARROW: Thank you, Mr. Chairman. The motion before us is to deny the application and to adopt the intervenor's proposed Findings of Fact, Conclusions of Law, Decision and Order. With that, I'll take the roll call. Commissioner Domingo?

DOMINGO: Aye.

DARROW: Commissioner Iwashita?

IWASHITA: Aye.

DARROW: Commissioner Alameda?

ALAMEDA: Aye.

DARROW: Commissioner Ogata?

OGATA: Aye.

DARROW: Commissioner Rho?

RHO: No.

DARROW: Commissioner Woodward?

WOODWARD: No.

DARROW: And Mr. Chairman?

GRAHAM: No.

DARROW: The motion does not pass, four to three.

GRAHAM: All right. Mr. Torigoe, could you give us a little procedural look-see as to where we stand?

TORIGOE: Well, you still have the option of someone trying to come up with another motion that, you know, five votes might be garnered for. As far as time goes, if you are not able to come up with five votes up or down today, then I think under Rule 4 you have 90 days from the close of the hearing, so that will take us -. Mr. Darrow, can you tell us when that will take us to?

DARROW: Sorry, one more time?

TORIGOE: What will be 90 days from the close of the hearing which I think was -?

DARROW: From today?

TORIGOE: No, from the last, we closed the hearing, I think -. Wasn't it at the -?

GRAHAM: Yeah, we reopened the hearing, and then closed it again last time. So it was August 31st. So we still would have 90 days from August 31st. So presumably if no one has a different motion to make at this point, then we can let this matter go to the next hearing. Jeff?

DARROW: Mr. Chairman, I've been informed our October Kona meeting is cancelled, and so our next Kona meeting will be in November. And it should be within 90 days from August 31st.

KRUEGER: November 29th.

GRAHAM: All right, thank you.

DOMINGO: Mr. Chairman?

GRAHAM: Commissioner Domingo, I have a couple of comments from the parties. Would you want to hold on a second?

DOMINGO: Yeah.

GRAHAM: Okay. Mr. Krueger?

KRUEGER: Thank you, Mr. Chairman. I was just going to try to assist the Commission. In my responsive letter to Mr. Matsukawa, I did make a determination of what 90 days was from August 31st, and it will be November 29th.

GRAHAM: Thank you. Okay. So if nobody else has anything further to say, I think we can conclude this agenda item today. All right, thanks.

The discussion ended at 10:25 a.m.

Respectfully submitted,

Noriko Sauer
West Hawaii Secretary