

PLANNING COMMISSION
COUNTY OF HAWAII

HEARING TRANSCRIPT
NOVEMBER 16, 2007

A regularly advertised hearing on the application of **DANIEL IBBETSON (SPP 05-000015)** was called to order at 9:06 a.m. at the King Kamehameha's Kona Beach Hotel, 75-5660 Palani Road, Kailua-Kona, Hawaii, with 2nd Vice Chairman Rodney Watanabe presiding.

PRESENT: Takashi Domingo
Andrew Iwashita
Shelly Ogata
Alvin Rho
Rodney Watanabe

ABSENT & EXCUSED: C. Kimo Alameda
William Graham
Rene' Siracusa
Rell Woodward

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

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

And 5 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.

WATANABE: Our first agenda item is, shall we say old business, Daniel Ibbetson, which is a Special Permit No. 05-000015. And with that I think I'll turn it over to Jeff.

DARROW: Thank you, Mr. Chairman. Good morning, Members of the Planning Commission. This is a continued hearing on the matter of Daniel Ibbetson. Mr. Ibbetson had requested originally a Special Permit request for a 2-bedroom bed and breakfast in Kaohe, South Kona, just south of the Kona Palisades (sic) Subdivision along the Mamalahoa Highway. On January 20, 2006, the Planning Commission denied the request for the Special Permit. The decision of the Planning Commission was appealed by the applicant to the Third Circuit Court at which time the Third Circuit Court had reversed the decision and remanded it back to the Planning Commission for further proceedings. This is a continued hearing to discuss this order from the Third Circuit Court. At our last hearing on September 21, 2007, a motion was made to deny the request and adopt the intervenor's proposed Findings of Fact, Conclusions of Law, Decision and Order. This motion did not pass for a vote of four ayes and three nays.

WATANABE: Thank you, Jeff. We have one testifier from the public on this. So could I call up Lani Ng, please?

DARROW: Mr. Chairman, if I could make a comment. It was just brought to my attention that this is not a continued hearing, that the hearing actually has been closed.

WATANABE: Thank you. Ms. Ng, may I swear you in? You may have a seat. Please raise your right hand. Do you swear or affirm to tell the truth now before the Planning Commission?

NG: Yes, I do.

WATANABE: Would you, for the record, would you please state your name and address?

NG: My name is Lani Ng. My mailing address is P. O. Box 398, Kealahou, Hawaii. My physical address is 79-7452 Mamalahou Highway, Kealahou.

WATANABE: Thank you. You may proceed with your testimony.

NG: Good morning, Mr. Chairman and Members of the Commission. My name is Lani Ng. I am Dean Kaiawe's sister and a great-granddaughter of Mikala Kaiawe who is the original grantor of this property.

The subject property is known as the "Hoikeya Cemetery." On February 2, 1915, Mikala deeded this property to the Hawaiian Evangelical Association, and in her deed, which was in Hawaiian and then later translated into English, states that the property may be used as a cemetery. Thereafter on October 11, 1983, the Hawaii Conference of the United Church of Christ, formerly known as the Board of Hawaii Evangelical Association, deeded the same property to its successor, the Hawaii Conference Foundation. In that deed, the language, it's very strong words; it says that the property is to be used for cemetery purposes only forever. On March 17, 2003, the Hawaii Conference Foundation deeded the said property to Mr. Ibbetson. In that deed, there are restrictions that state, "restrictions imposed by law regarding the sale and disposition of said land or place within any mausoleum or columbarium erected thereon resulting from the use or dedication of said land for cemetery purposes." This property was dedicated as a cemetery, and that designation has not been removed. HRS 441-15 says the "Property dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes unless and until the dedication is removed from all or any part of it by an order and decree of the circuit court of the judicial circuit in which the property is located and the decree is filed in the bureau of conveyances or land court in a proceeding brought by the cemetery authority for that purpose and upon notice of hearing and proof satisfactory to the court." A status report received from Title Guaranty of Hawaii dated June 1, 2007, still shows that this property is a cemetery lot, and the restrictions regarding the cemetery use still remains.

At the last hearing I was here when Mr. Woodward made a comment about the family being able to go and visit the property or visit the graves. And I just wanted to state for the record that that is not possible; that we have not been able or allowed to go and visit the graves. When this application was first made to the Planning Commission and the application was denied, my

brothers and my mom and members of our family went down to the property, which resulted in Mr. Ibbetson calling the police, filing a police report, making criminal charges against my brother, Dean, not against any other member of the family but just against Dean. He then filed a lawsuit in the Circuit Court, and there is a restraining order in place right now that prohibits anyone from going to visit these grave sites. I'm here to support my brother Dean's position as well as that of my family, and ask that you deny Mr. Ibbetson's application at this time. Thank you.

WATANABE: Thank you. Fellow Commissioners, do any of you have any questions for Ms. Ng?

DOMINGO: Mr. Chairman. So what you are saying is the only reason, the only thing that prevents any of the family from visiting the grave sites is the fact there is a restraining order?

NG: That is correct.

DOMINGO: Okay.

NG: Because Mr. Ibbetson did file a lawsuit prohibiting my brother and members of the family from going onto the property to visit the graves.

DOMINGO: Do you know of any agreement or any statement made personally or through the deed that family members will always be permitted to visit the grave?

NG: There is an easement on the property to the graves to allow family members to go and visit. However, Mr. Ibbetson has planted areca palms in that area that prevent the access to the graves. When my brother went down to visit the graves – there was an agreement that he would call Mr. Ibbetson, that he would give him so many hours notice, and that only one vehicle could go down to the grave site; and they did that – but while they were there, Mr. Ibbetson called the police and charged my brother with trespassing.

DOMINGO: Okay, thank you.

WATANABE: Are there any other questions for the testifier? Mr. Iwashita?

IWASHITA: I guess I have a procedural concern because the Chair stated that the hearing was closed at the last time it came up.

WATANABE: Yeah, it's my understanding that we do, while a hearing is closed, we do have to take or accept public testimony. In fact, I, after this testimony, because the situation is so convoluted, I'm going to suggest that we move into executive session so that we can clear up some of the procedural issues. 'Cause it's my understanding we are also up against a 90-day timeframe issue.

IWASHITA: Okay. I guess my other thought I had was whether the applicant had any objection to this public testimony today, if we can clarify that.

WATANABE: Dennis, Mr. Krueger, may I swear you in? Do you swear or affirm to tell the truth now before the Planning Commission?

KRUEGER: I do.

WATANABE: Would you please state your name and address for the record?

KRUEGER: Yes. My name is Dennis Krueger. I'm the attorney for the applicant, Daniel Ibbetson. My address is 75-5722 Kuakini Highway, Kailua-Kona.

WATANABE: Thank you. You may proceed.

KRUEGER: Thank you. I do object to the testimony today. I think it's improper after the public hearing has been closed. I also believe it misstates the facts just for the record with respect to the restraining order that Ms. Ng is talking about. This restraining order is in effect because it was stipulated by Mr. Kaiawe as well as Mr. Ibbetson, and it's been in effect because of the stipulation. So this was requested by Mr. Kaiawe the facts of the case are before the Circuit Court, they are not to be argued here today before the Commission. And I don't want to get into that, but the stipulation that is in effect is the reason why nobody has visited the grave sites. But I do believe it's improper testimony, especially given Ms. Ng's relationship to Mr. Kaiawe, the intervenor, and I don't believe it should be considered by the Commission.

WATANABE: Thank you. Do we have any questions from the Commissioners for Mr. Krueger? Thank you, Mr. Krueger. Mr. Matsukawa, in all fairness I believe we should allow you to make some comments also, seeing that you are representing the -.

MATSUKAWA: Yes. My name is Michael Matsukawa. My address is 75-5751, Kuakini Highway, Kailua-Kona. I represent Dean Kaiawe, the intervenor. Briefly -.

WATANABE: May I swear you in first?

MATSUKAWA: Oh, sure.

WATANABE: Do you swear or affirm to tell the truth now before the Planning Commission?

MATSUKAWA: I do. Essentially, the sunshine law is what's governing here. The sunshine law allows any person from the public to make a statement on any item that's on the agenda. And you know, you have to deal with the reality that the sunshine law operates in parallel to your Rules. So I think the testimony is in order. Thank you.

WATANABE: So then it's your position that testimony should be allowed?

MATSUKAWA: Yes. It's part of the record by virtue of the State Law.

WATANABE: Thank you. Do we have any questions, Fellow Commissioners, of Mr. Matsukawa? No? Okay. As I stated earlier, we do have some procedural issues that we need to consider. We are up against a 90-day timeframe, which is rapidly approaching. This is

an application that we have been dealing with for quite some time now, and emotions obviously are running quite high in this. And so the Chair would entertain a motion to move into executive session, so that we can confer with counsel on how to proceed from here.

IWASHITA: I just, given Mr. Matsukawa's position, Mr. Chair, I would like to ask if Mr. Krueger had a response to that and what your position is under the sunshine law.

WATANABE: Okay. I'll allow that. Mr. Krueger?

KRUEGER: Thank you, Mr. Chairman. I don't have response specifically on the sunshine law; I would defer to Mr. Torigoe. But I believe the reason for my objection, if it was a member of the general public who simply had a comment to make, I might be less inclined to object. But because it's Dean Kaiawe's sister and she has a direct, the same relationship that he does to the property as an intervenor, I think that in my opinion her testimony would be more objectionable because we tend to favor one party over another, and not just be a general statement from the public. So that's my comment.

WATANABE: Any follow-up?

IWASHITA: No.

WATANABE: Okay. Once again, then -. This one? I guess we have a request for further testimony from another individual. I'm not aware of the relationships here, so -. You know what? (Chair had discussion with Mr. Torigoe.) Okay, once again, it seems the Rules are clear that prior to public -, we should take this public testimony. So may I call up Nancietta Haalilio? Ms. Haalilio, may I swear you in, please? Would you raise your right hand? Do you swear or affirm to tell the truth now before the Planning Commission?

HAALILIO: I swear to you.

WATANABE: Thank you. Would you then state your name and address for the record, please?

HAALILIO: My first name is Nancietta, last name Haalilio. And my interest regarding the Kaohe property has to do with a majority of my in-laws; my family are buried there. The last burial was my mother-in-law, and that was an agreement or condition that she should be buried on the property, and that turned out well. My concern regarding Mr. Ibbetson's request for a bed and breakfast, several hearings ago, I mentioned my contesting toward that request because it's a business in a private dwelling, and I didn't elaborate on it. I do question the validity of having a "mini motel" service that's unlicensed unless the approval by this body provides that license. But I still would question the appropriateness of the private residence being used as a public shelter, similar to a motel. My personal concern is that if this body gives approval for the bed and breakfast to happen, I do not – and the rest of my family – do not take kindly to having the burial sites be viewed as almost like a scenic spot. There would be strangers coming in and out. And the last thing we want is for somebody to say, oh, how quaint, a cemetery in your place, and have it be open for public viewing. It's always been pretty private. And so, on those two points, I do want to raise consideration that the family feels that it would be intrusive to have strangers who probably could not avoid walking through the cemetery portion. Thank you.

WATANABE: Thank you. Mr. Domingo?

DOMINGO: Thank you, Mr. Chairman. When was your mother-in-law buried at the cemetery?

HAALILIO: I can't recall the exact date, but that was just a couple years ago -.

DOMINGO: Oh, just a couple of years ago.

HAALILIO: A few years ago. Uh huh.

DOMINGO: And since then, have any of the family been permitted to go and visit the grave?

HAALILIO: Not so much permitted. I believe on the sale agreement, the relatives are able to go visit during normal day hours; but if after five, for example, then they would have to receive permission from Mr. Ibbetson. But yes, they have gone down often.

DOMINGO: I see. Thank you.

WATANABE: Are there any other questions for the testifier? Thank you. You may be seated. Mr. Krueger, I assume that you echo your objection to this testimony also in light of her relationship?

KRUEGER: Mr. Chairman, I'm not sure exactly what Mrs. Haalilio's relationship is to the intervenor. She did testify at the original contested case hearing. I believe her testimony is part of the record. I think that perhaps what she said today was duplicative of what she's already stated on the record previously. My objection is just to, I mean the intervenor had the opportunity to present witnesses during the course of the contested case hearing to provide this testimony, should he have chosen to do that. And I guess my objection is to him coming in after the fact and trying to persuade the Commission through the testimony of the "public" at this point in time.

WATANABE: I fully understand that, and can appreciate that technically the hearing is closed. Thank you. Are there any other testifiers for this application? None? Thank you. Then once again I would appreciate or entertain a motion to move into executive session.

RHO: Mr. Chairman, I'd like to move that the Commission move into executive session to consult the Commission attorney regarding this case.

WATANABE: Thank you.

OGATA: Second.

WATANABE: Thank you. It's been moved and seconded that we move into executive session to discuss the procedural matters for this case.

TORIGOE: Mr. Chairman?

WATANABE: Mr. Torigoe.

TORIGOE: Just for the record, I want to clarify what it is that, I guess, the nature of the inquiry that you want to make, I guess. Are you looking at, just trying to get an idea what some of your procedural options may be and the legal defensibility of those?

RHO: I guess all of that.

TORIGOE: Okay. Just to make clear again, this is not to deliberate over the merits of the matter in any way.

RHO: No.

TORIGOE: Right.

WATANABE: Thank you. I believe we have a motion that's on the table to move into executive session. All in favor, please say aye.

COMMISSIONERS: Aye.

WATANABE: Any opposed? Thank you. Let's go into executive session then.

EXECUTIVE SESSION The Commission went into executive session at 9:30 a.m. to discuss legal concerns with its counsel. The Commission came out of executive session at 10:05 a.m.

RECESSED The Chair called a recess at 10:05 a.m.

RECONVENED The meeting reconvened at 10:24 a.m.

WATANABE: Okay. We were, well, just to inform you, we were in, I apologize for being in executive session for so long. The Rules are not very clear on how we can proceed once the 90-day period has expired, and it is very rapidly approaching us. So suffice it to say that we did not deliberate on this issue; we just spoke to and addressed the procedural issues and what might transpired if we are unable to arrive at conclusion today. With that I've also spoken to the counsels of both the applicant and the intervenor, and they are attempting to contact their clients to see if they can come to some agreement so that we can find a reasonable method of proceeding from here. That said, because all of the representatives have not been able to contact their clients, we would like to defer this matter to later on today, during this same meeting, and proceed with the Agenda Item 2, if that is all right.

IWASHITA: Are the parties in agreement to that?

WATANABE: To my knowledge, yes, the parties are in agreement to that. If you want that on the record, we could call up Mr. Matsukawa and Mr. Krueger to confirm. Oh, and also I guess the Director 'cause you are a party, since it was an appeal.

KRUEGER: Mr. Chairman, this is Dennis Krueger. I have no objection to deferring this matter to a later time in this meeting.

MATSUKAWA: Same, this is Mike Matsukawa, to the end of the calendar, fine.

WATANABE: Thank you.

YUEN: And Chris Yuen. That's fine.

WATANABE: Okay, thank you.

DOMINGO: Mr. Chairman?

WATANABE: Yes, Mr. Domingo.

DOMINGO: Just a thought I have. You know, this whole issue was decided by the courts and the court remanded this issue back to the Planning Commission for further deliberation. And during the course of deliberation, we had advised, through meetings, both representatives from both sides to work things out. And that has been several months ago. And I think in September we had taken up this issue and deliberated on that, and we took a vote on it, but there was not a majority vote to determine either or, whether it was approved or not. And we are here today, and we are asking them, we are suggesting a deferral so they can go back and further discuss this issue so that they may be able to come to some agreement. If that is something promising on their part that they can work out something, it will be well. But if not, you know, I think it's going to be something we should seriously think about, because we are going to come back here again and face the same issue. And I just was -.

WATANABE: I understand your concern, but actually they, what they are working on with their clients is to satisfy some of our procedural issues with regard to the 90-day; it's not to compromise on whether to, you know, approve or disapprove the permit, the Special Permit. So I, you know, and we are not suggesting that we would defer this to another meeting because the 90-day period would expire prior to that. So what we are suggesting is that we defer it to a later point so that both counsels will be able to confer with their clients, and whatever they represent today will be with the blessing of their clients.

DOMINGO: So is it correct to assume that the clock is stopped right now until they decide a procedural avenue to take, whatever procedural avenue there is to take?

WATANABE: That is right. Nothing has transpired that would change the clock at this point.

DOMINGO: Okay.

WATANABE: Okay.

(At this time, 10:30 a.m., the Commission took up Agenda Item No. 2 regarding Matthew Kilgore's application for a Special Management Area Use Permit to allow the construction of a 5-story, 11-unit condominium project, TMK: 7-6-14:13 – SEE EXHIBIT B. At 11:45 a.m., the Commission again took up the subject application.)

WATANABE: Will the Planning Commission meeting please come back to order? We are back now on our Agenda Item No. 1 which we had deferred earlier; this would be a case of Daniel Ibbetson, SPP 05-000015. And I trust everyone is on the same page with this, so at this point, the Chair would entertain a motion. Mr. Iwashita?

IWASHITA: Thank you. I move that, regarding Applicant: Daniel Ibbetson, SPP 05-000015, that the application be denied, and that we adopt the intervenor's proposed Findings of Fact, Conclusions of Law, Decision and Order, which is on the record in this case as the basis for the denial.

DOMINGO: Second -.

WATANABE: Is there a second?

DOMINGO: Second.

WATANABE: Okay, it has been moved by Commissioner Iwashita and seconded by Commissioner Domingo that the application 05-000015 be denied based on the intervenor's Findings of Facts and Conclusions of Law.

IWASHITA: Mr. Chair?

WATANABE: Yes.

IWASHITA: I'll try to make a brief, as brief a comment as possible on this point. And it is to emphasize that the record is clear and the reference is made in the proposed findings of the existence of the Circuit Court action that I think we all agree it would be determinative one way or another on whether or not this proposed use is going to be allowed after the Court hears all the evidence in that case. So this proceeding is really premature, and the suggestion earlier made that, well, we can make it, if we approve it, it can be made subject to becoming invalid if the Court rules adverse to Mr. Ibbetson, to me is, would be a waste of the paper that the decision is written on. So I really strongly feel that this application is premature, that the Third Circuit Court case should be allowed to run its course, and if Mr. Ibbetson prevails in that proceeding, then he can reapply. Thank you.

WATANABE: Thank you. Any other comments, discussion? Mr. Darrow?

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

IWASHITA: Yes.

DARROW: Commissioner Domingo?

DOMINGO: Aye.

DARROW: Commissioner Ogata?

OGATA: Pass.

DARROW: I'm sorry?

OGATA: Pass. Kanalua.

DARROW: Commissioner Rho?

RHO: No.

DARROW: And Mr. Chair?

WATANABE: Nay.

DARROW: Commissioner Ogata?

OGATA: No.

DARROW: The motion does not pass, two ayes and three noes.

WATANABE: Okay. As we discussed earlier, we are up against the 90-day timeframe and it will expire prior to our next meeting. So I'd like to call up the representatives of both the applicant and the intervenor, Mr. Matsukawa and Mr. Krueger. Earlier we had discussed the potential for an agreement between the parties of continuing this case. We provided you with some time to contact your clients, and I'd be, I'm interested in hearing what the conclusion is.

MATSUKAWA: This is Mike Matsukawa. Intervenor wouldn't mind continuing to your next Kona meeting, and I understand it might be on December 12th. So we would waive any problems with the 90-day rule under that situation.

WATANABE: Thank you.

KRUEGER: Mr. Chairman, Dennis Krueger. My client was here earlier and had to leave; I apologize for that. And I've been trying to reach him by telephone. I've called him four or five times, but have not been able to reach him. I don't have authority in his part to waive any timeframe, but I would represent to this Commission that my recommendation to him would be to go ahead and proceed and go forward with a hearing at the Commission's next hearing date. I just, I don't have the authority to tell you that I can waive that on his part at this point.

WATANABE: Okay. In your, Mr. Krueger, in your professional opinion, is there any reason why he would not agree to that?

KRUEGER: I don't, as I said, I would recommend it to him, if he asked me for my recommendation. I would certainly recommend it to him, if he asked for my legal advice. I don't know, I don't know what he might or might not do; but I don't have any belief that he would say, oh, appeal it because this falls outside of the 90-day timeframe. But I can't, I just -.

WATANABE: Okay, thank you. I don't mean to put you on a spot; it's just -. I'm reminded by counsel that I have another party involved in this. That would be the Director, and so I'd appreciate your comments.

YUEN: It's fine with the Department; and then, that's what the Department would suggest in this situation, that the only thing to do is for the Commission to defer it to the next meeting.

WATANABE: Thank you. Then because the parties have all agreed, or tentatively agreed, to defer it to the next meeting, I believe it's within our discretion to then schedule this for the December 12th meeting; and it seems Mr. Hayashi has acknowledged that it's possible. Okay. Thank you for your cooperation. I'm reminded maybe I should for the record ask if there are any objections from any of the Commissioners.

DOMINGO: No objections.

WATANABE: Hearing none, we'll continue this at our next December 12th meeting. Thank you.

The discussion ended at 11:53 a.m.

Respectfully submitted,

Noriko Sauer
West Hawaii Secretary