

FILED

LINCOLN S. T. ASHIDA 4478  
Corporation Counsel

2006 DEC 18 PM 2:23

BOBBY JEAN LEITHEAD-TODD 4326  
AMY G. SELF 7628  
Deputies Corporation Counsel  
Hilo Lagoon Centre  
101 Aupuni Street, Suite 325  
Hilo, Hawai'i 96720  
Telephone No. 961-8251  
Email: bjtodd@co.hawaii.hi.us

C. OKAWA, CLERK  
THIRD CIRCUIT COURT  
STATE OF HAWAII

Attorneys for Appellant/Appellee CHRISTOPHER J. YUEN,  
PLANNING DIRECTOR OF THE COUNTY OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

CHRISTOPHER J. YUEN, PLANNING  
DIRECTOR, COUNTY OF HAWAII

CIVIL NO. 06-1-0184  
(Agency Appeal)

Appellant/Appellee,

vs.

BOARD OF APPEALS OF THE COUNTY  
OF HAWAII, VALTA COOK,  
in his capacity as Chairperson of the BOARD  
OF APPEALS OF THE COUNTY OF  
HAWAII, and MARLENE E. CALVERT,

APPELLANT/APPELLEE  
CHRISTOPHER J. YUEN, PLANNING  
DIRECTOR OF THE COUNTY OF  
HAWAII'S REPLY BRIEF;  
CERTIFICATE OF SERVICE

Appellees/Appellant.

JUDGE: Greg K. Nakamura

ORAL ARGUMENTS:

Date: January 5, 2007 at 9:00 a.m.

s:\lit\calvert\reply brief\121806\AGSkd

APPELLANT/APPELLEE CHRISTOPHER J. YUEN,  
PLANNING DIRECTOR OF THE COUNTY OF HAWAII'S REPLY BRIEF

COMES NOW Appellant/Appellee CHRISTOPHER J. YUEN, PLANNING  
DIRECTOR, COUNTY OF HAWAII (hereinafter "Director"), by and through his

undersigned counsel, AMY G. SELF, Deputy Corporation Counsel, pursuant to Hawai'i Revised Statutes ("HRS") § 91-14 and Rule 72 of the Hawai'i Rules of Civil Procedure, respectfully submits his Reply Brief in accordance with the Briefing Schedule established by the Court and filed on August 17, 2006, as amended by the Stipulation and Order extending the time for the Director to file his reply brief filed December 14, 2006.

**I. ARGUMENT**

**A. The Director is not Precluded from Judicial Review for Failure to Object to the Proposed Finding of Fact and Conclusions of Law.**

HRS § 91-14(a) sets forth the following jurisdictional requirements for an agency appeal:

- (1) The proceeding that resulted in the unfavorable agency action must have been a contested case hearing that was required by law and determined the rights, duties, and privileges of specific parties;
- (2) The agency action must represent a final decision and order or a preliminary ruling that such deferral of review would deprive the claimant of adequate relief;
- (3) The claimant must have followed the applicable agency rules and have been involved in a contested case hearing; and
- (4) The claimant's legal interest must have been injured -- i.e., the claimant must have standing to appeal.

*Hui Kako'o Aina Ho'opulapula, et al. v. Board of Land and Natural Resources, et al.*,  
112 Haw. 28, 35, 143 P.3d 1230, 1237 (2006).

Appellees' reliance on the court's decision in *Hui Kako'o Aina Ho'opulapula* for the supposition that this Court may lack jurisdiction to conduct judicial review of the appeal filed by the Director because the Director failed to raise timely objections to the Findings of Fact and Conclusions of Law ("FOFCOL") proposed by Appellee/Appellant

Marlene E. Calvert (hereinafter referred to as "Mrs. Calvert") is misplaced. In that case that case, the appellants' failure to follow the agency's rules relating to contested case proceedings (i.e., failure to submit a written request for a contested case hearing) resulted in the appellants' failure to participate in a contested case hearing, which is required under HRS § 91-14(a) for judicial review of an agency's decision. *See Hui Kako'o Aina Ho'opulapula*, 112 Haw. 28, 143 P.3d 1230. Because there was no contested case hearing during which evidence was produced, there was no record on appeal or a final decision for the court to review; therefore, the court lacked jurisdiction to hear the appellants' appeal. *See id.*

In arriving at its decision, the court relied on the Intermediate Court of Appeals' ("ICA") decision in *Simpson v. Dep't of Land and Natural Res.*, 8 Haw. App. 16, 791 P.2d 1267 (1990), which held that a public hearing required by law was not a contested case hearing "where (1) the agency has properly promulgated specific procedures for a contested case hearing and (2) a party has failed to follow such procedures." *Hui Kako'o Aina Ho'opulapula* at 112 Haw. at 39, 143 P.3d at 1241 (citing *Simpson*, 8 Haw. App. 16, 24-25, 791 P.2d 1267, 1273 (1990)).

In the case of *Simpson*, the petitioner had applied for a mooring permit from the Department of Land and Natural Resources ("DLNR") and participated in a public hearing required by law, but did not request a contested case hearing pursuant to the DLNR's agency rules regarding contested case proceedings. *See Simpson*, 8 Haw. App. at 18-19, 791 P.2d at 1270-1271. Because there was no final decision from a contested case, the circuit court dismissed the appeal on the ground that it lacked subject matter jurisdiction and the ICA agreed. *See Simpson*, 8 Haw. App. at 18-20, 791 P.2d at 1270-

1271. The ICA went on to state that the basic purpose of the DLNR's rules regarding contested case proceedings was to provide the Board of Land and Natural Resources ("BLNR") "an opportunity to establish an adequate formal record for judicial review of its decision and order" and that since the petitioner did not request a contested case hearing, the record of the proceedings before the BLNR was sparse and inadequate for judicial review. *Simpson*, 8 Haw. App. at 24-25, 791 P.2d at 1273. In other words, the basis of the ICA's decision in *Simpson* and the Hawai'i Supreme Court's decision in *Hui Kako'o Aina Ho'opulapula* was that without a contested case hearing, there was no final decision and no formal record to qualify for judicial review under HRS § 91-14(a).

Unlike the appellants in the cases of *Hui Kako'o Aina Ho'opulapula* and *Simpson*, the Director has met the four judicial requirements for an agency appeal. First, there was a contested case hearing, which was required by law that resulted in the unfavorable decision by the Board of Appeals (hereinafter "Board") against the Director. Second, the Board's decision represents a final decision of the contested case hearing. Third, the Director followed the applicable rules of the Board by participating in the contested case hearing through his attorney. Fourth, the Director is a "person" aggrieved by the Board's final decision as defined in HRS § 91-1(2). Moreover, *Hui Kako'o Aina Ho'opulapula* and *Simpson* are distinguishable from the present case because in the present case, this Court has a final decision from a contested case hearing and an entire record of the contested case proceeding for judicial review. To determine that the Director is precluded from judicial review for failure to object to the FOFCOL would require a great leap from the reasoning provided by the Hawai'i Supreme Court's decision in *Hui Kako'o Aina Ho'opulapula* and the ICA's decision in *Simpson*.

**B. Submitting Objections to the FOFCOL Would Have Been Superfluous.**

During the contested case hearing, the Director, through his attorney, raised the following legal arguments:

- 1) That if the Director fails to act on a variance application within sixty days, the variance application is deemed denied under Section 23-18 of the Subdivision Code and under 25-2-54 of the Zoning Code;
- 2) That HRS § 91-13.5 does not apply to the County's Subdivision Code; and
- 3) That HRS § 91-13.5 especially does not apply to an application for a variance from the Subdivision Code, since a variance provides an exception to what is required by the Subdivision Code at the discretion of the Director.

*Record on Appeal* (hereinafter "*ROA*") at 442 and 447-449. Those legal arguments were preserved on the Record that is before this Court.

Those same legal arguments were also outright rejected by the Board during the contested case hearing. In fact, some of the Board's members engaged in heated debates with the Director's attorney insisting that because the Director failed to meet the sixty days, the variance application was deemed approved pursuant to HRS § 91-13.5 with total disregard of Section 23-18 of the Subdivision Code to which the Director and the Board is bound. (*ROA* at 448-449.) Ultimately, this was the basis for the Board's decision. (*ROA* at 450-451.) Because the FOFCOL accurately reflected the reasons for the Board's decision, there was no need for the Director to object to the FOFCOL. The legal issues raised by the Director's attorney during the contested case hearing were purely questions of law, which were not affected by the facts of the case, and are freely reviewable by this Court to determine if the Board's decision was in excess of statutory

authority. *See Curtis v. Board of Appeals of the County of Hawai'i*, 90 Hawai'i 384, 393, 978 P.2d 822, 831 (1999).

Moreover, Board's Rules § 3-18 does not require the parties to submit FOFCOL. Because the Board found in favor of Mrs. Calvert, it requested Mrs. Calvert's attorney to submit proposed FOFCOL, effectively waiving the requirement for the Director to submit proposed FOFCOL pursuant to Board's Rule § 8-13. (*ROA* at 451.) The Director's attorney was not requested or required to submit proposed FOFCOL or to submit objections to Mrs. Calvert's proposed FOFCOL. (*ROA* at 451.) Board's Rule § 3-18 merely provides a time limit for submitting objections to FOFCOL, if a party desires to do so.

C. **The Board Exceeded its Statutory Authority or Made an Error of Law When it Decided That Mrs. Calvert's Water Variance Application Was Automatically Approved By Operation of HRS § 91-13.5.**

HRS § 91-13.5 provides that:

Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval. . . .

(Emphasis added.)

It is well established that HRS § 91-1 clearly excludes legislative branches from the definition of "agency" and therefore, from compliance with the provisions contained in HRS, Chapter 91. *See Sandy Beach Defense Fund v. City Council*, 70 Hawai'i 361, 369, 773 P.2d 250, 256 (1989). The Hawai'i County Council (hereinafter "Council") is the legislative branch of Hawai'i County. *See* Article III, Section 3-1, Hawai'i County Charter. In 1982, the Council adopted Ordinance No. 763, Sec. 5, and codified as

Section 23-18, Hawai'i County Code ("Subdivision Code"), which provides in pertinent part as follows:

The director shall, within sixty days after the filing of a proper application or within a longer period as may be agreed to by the applicant, deny the application or approve it subject to conditions. The conditions imposed by the director shall bear a reasonable relationship to the variance granted. All actions shall contain a statement of the factual findings supporting the decision.

If the director fails to act within the prescribed period, the application shall be considered as having been denied.

(Emphasis added) § 23-18, Hawai'i County Code. The passage of that section of the Hawai'i County Code preceded the passage of HRS § 91-13.5, so it was "otherwise provided by law" (i.e., § 23-18, Hawai'i County Code). In addition, Section 6-4.2 of the Hawai'i County Charter requires the Planning Director to administer the subdivision ordinances passed by the Council. This means that the rules adopted by the Planning Department must implement the Subdivision Code.

When the Board voted to reverse the Director's decision to deny the water variance because the Director's decision was not rendered within sixty days and was therefore automatically approved pursuant to HRS, Section 91-13.5, the Board essentially made a decision to completely disregard Section 23-18, Hawai'i County Code as adopted by the Council. (ROA at 453.) Moreover, based on the Board's decision, the Board is essentially ordering the Director to violate Section 23-18, Hawai'i County Code when making similar decisions in the future. In other words, if it takes the Director longer than sixty (60) days to deny or approve any variance applications in the future, the Director will have to approve the application in violation of Section 23-18, Hawai'i County Code which requires that the application be deemed denied; otherwise, his decision will be

overturned by the Board on appeal.

The Board clearly exceeded its statutory authority by concluding that the variance application was automatically approved contrary to the clear dictates of the Hawai'i County Subdivision Code. Contrary to Appellees' contention, the language of Section 23-18, Hawai'i County Code, is not in conflict with HRS § 91-13.5 because HRS § 91-13.5 does not apply to the Subdivision Code. The Subdivision Code was enacted by the Council and the Council is not an "agency" for the purposes of Chapter 91. (*See* HRS § 91-1(1).) Furthermore, the Director does not have the authority to enact a rule that is contrary to the express language of the County's Subdivision Code. If the Director did enact a rule that is contrary to the express language of the County's Subdivision Code, such rule would be superseded by the County's Subdivision Code. Likewise, the Board does not have the authority to make a decision that is contrary to the express language of the County's Subdivision Code.

**D. The Legal Arguments Contained in the Director's Opening Brief Involve a Question of Great Public Import.**

Even if, as Appellees contend, the Director's legal argument that HRS § 91-13.5 does not apply because a variance is "otherwise provided by law" was raised for the first time on appeal and should not be considered by this Court, it involves a question of great public import and is therefore, well within this Court's discretion to hear. *See Greene v. Teixeira, et al.*, 54 Haw. 231, 235, 505 P.2d 1169, 1172 (1973). The Director's legal argument is purely a question of law and is freely reviewable to determine if the Board's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of Board, or affected by other error of law. *See Curtis v. Board of Appeals of the County of Hawai'i*, 90 Hawai'i at 393, 978 P.2d at 831 (1999).

Moreover, it is a matter of great importance to the public to have a proper interpretation of HRS § 91-13.5 to provide guidance to the Director and the Board for similar cases in the future.

## II. CONCLUSION

The Director is not precluded from judicial review by this Court under HRS § 91-14 for failure to submit objections to Mrs. Calvert's FOFCOL. He participated in the contested case hearing through his attorney as required by HRS § 91-14. The legal arguments made by the Director's attorney were preserved in the Record that is now before this Court.

The Board exceeded its statutory authority by finding that the variance application was automatically approved contrary to the clear dictates of the Hawai'i County Subdivision Code. Automatic approval does not apply to subdivision variances because they are "otherwise provided by law," which is the Hawai'i County Subdivision Code enacted by the County Council. The County Council is a legislative body specifically exempted from the provisions of HRS, Chapter 91. The Director must comply with the Hawai'i County Subdivision Code. Therefore, his decision to deny the variance application is in compliance with the clear dictates of the Hawai'i County Subdivision Code.

Likewise, the Board's decision was clearly erroneous as HRS § 91-13.5 does not apply to the Hawai'i County Subdivision Code.


Based upon all of the foregoing, the Director respectfully requests that the Court reverse the Board's Findings of Fact, Conclusions of Law, and Decision and Order and

issue an Order deeming the Calvert water variance application automatically denied as of  
September 29, 2005, pursuant to Hawai'i County Code, Section 23-18.

DATED: Hilo, Hawai'i, December 18, 2006.

CHRISTOPHER J. YUEN,  
PLANNING DIRECTOR,  
COUNTY OF HAWAI'I  
Appellant/Appellee

BY: \_\_\_\_\_

  
AMY G. SELF  
Deputy Corporation Counsel  
His Attorney

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

CHRISTOPHER J. YUEN, PLANNING  
DIRECTOR, COUNTY OF HAWAI'I

Appellant/Appellee,

vs.

BOARD OF APPEALS OF THE COUNTY OF  
HAWAI'I, VALTA COOK, in his capacity as  
Chairperson of the BOARD OF APPEALS  
OF THE COUNTY OF HAWAI'I, and  
MARLENE E. CALVERT,

Appellees/Appellant.

CIVIL NO. 06-1-0184  
(Agency Appeal)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE


The undersigned hereby certifies that on this date a copy of the foregoing document was duly served upon the following individual(s) by hand delivery or depositing same in the United States mail, postage prepaid, addressed as follows:

PATRICIA K. O'TOOLE  
Deputy Corporation Counsel  
Office of the Corporation Counsel  
101 Aupuni Street, Suite 325  
Hilo, Hawai'i 96720

Attorney for Appellees/Appellant  
BOARD OF APPEAL OF THE COUNTY OF HAWAI'I  
VALTA COOK, in his capacity as  
Chairperson of the BOARD OF APPEALS OF THE  
COUNTY OF HAWAI'I

ROY A. VITOUSEK, III, ESQ.  
JOCELYN B. GAROVOY, ESQ.  
Cades Schutte  
75-170 Hualālai Road, Suite B-303  
Kailua-Kona, Hawai'i 96740  
Attorneys for Appellee MARLENE CALVERT

DATED: Hilo, Hawai'i, December 18, 2006.

  
\_\_\_\_\_  
AMY G. SELF  
Deputy Corporation Counsel  
County of Hawai'i