

BOARD OF APPEALS
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
JUNE 13, 2008

A regularly advertised hearing on the application of **BEN AKAMINE (BOA 08-000055)** was called to order at 10:04 a.m. in the County of Hawaii, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawaii, with Chairman Joel Gimpel presiding.

PRESENT: Joel Gimpel
David Drury
Charlene Hart
Peter Hendricks
Karen Maedo
Kim Tavares

ABSENT & EXCUSED: Kelly Ann Soo

Rene Schoen, Counsel to the Board
Alice Kawaha, Staff to the Board

Jeffrey Choi representing Ben Akamine
Molly Lugo representing Planning Director
Amy Self representing Planning Director
Charles Allen, property owner

And approximately 9 people from the public in attendance.

PETITIONER: BEN AKAMINE (BOA 08-000055) - Adoption of Findings of Fact, Conclusions of Law, and Decision and Order regarding the Appeal of Decision by the Planning Director dated January 17, 2008, approval of Variance application (VAR 07-075), to landowner Charles Allen Jr., from Chapter 25, Zoning Code, relating to minimum yards. The property consists of approximately 7,413 square feet and is located on the Puna side of Puainako Street across of Waiakea Elementary School, Waiakea Homesteads, South Hilo, Hawai'i, TMK: (3) 2-4-9:53.

GIMPEL: The next item on the Agenda, the petitioner is Mr. Ben Akamine, Board of Appeals No. 08-000055. And on the agenda is the adoption of Adoption of Findings of Fact, Conclusions of Law, and Decision and Order regarding the Appeal of Decision by the Planning Director dated January 17, 2008, approving a Variance application to landowner Charles Allen Jr. relating to minimum yards. The property consists of approximately 7,413 square feet and is located on the Puna side of Puainako Street across of Waiakea Elementary School, Waiakea Homesteads, South Hilo, Hawai'i, TMK: (3) 2-4-9:53.

We have before us a draft Findings and Order and Objections to those filed by the Planning Director. And we'll identify the parties here. Petitioner is -?

CHOI: I'm Mr. Choi for Mr. Akamine.

NOMURA: Microphone, please.

GIMPEL: Use the microphone, please. Thank you.

CHOI: Mr. Choi for Mr. Akamine.

GIMPEL: Okay. And you are?

ALLEN: I'm Charles Allen, the owner.

GIMPEL: Okay. Thank you.

LUGO: Good morning, Chair and Members of the Board. Molly Lugo, Deputy Corporation Counsel for the Planning Director and the Planning Department.

GIMPEL: Okay. All right, we have before us the proposed Findings of Fact Conclusions of Law, and Decision and Order that was prepared by Mr. Choi. I think to go forward, can I have a motion regarding either the adoption or rejection of those proposed Findings of Fact, Conclusions of Law and Order? And then we can proceed.

DRURY: Mr. Chair?

GIMPEL: Yes.

DRURY: I move that the Findings of Fact and Conclusions of Law as written should not be adopted at this point.

GIMPEL: Do we have a second?

TAVARES: I'll second that.

GIMPEL: All right. We also have before us a letter and correspondence from Mr. Allen who is the owner of the property in question. Is that correct?

ALLEN: Yes.

GIMPEL: Mr. Allen, I think it would be appropriate for us to hear from you now what your concerns and objections are to this.

CHOI: Mr. Gimpel?

GIMPEL: Mr. Choi.

CHOI: Could we have the record reflect that Mr. Akamine objects to any substantive testimony by Mr. Allen at this point in the proceedings?

GIMPEL: The record will so reflect. Mr. Allen?

ALLEN: Yes?

GIMPEL: Would you indicate the nature of your objections to the proceedings so far?

ALLEN: Well, first of all, the County made a mistake in approving my plans, not notifying us that these -.

CHOI: Excuse me, Mr. Allen. Mr. Gimpel, am I to understand that Mr. Allen has been given permission to in effect reopen the proceedings and readdress the substantive issue, rather than the question at issue which is the proposed Findings of Fact?

GIMPEL: I'm just getting to his objections to the proceedings thus far, procedurally.

CHOI: I object procedurally. Cause if we pursue this, in effect, we're just reopening the whole thing. I received a copy of Mr. Allen's letter about five minutes ago.

GIMPEL: Mr. Allen, apparently, is objecting to the adequacy of the notice to him of the original hearing. This would be the appropriate time to hear that.

CHOI: Mr. Gimpel?

GIMPEL: Yes.

CHOI: As it so happens we're almost exactly one year after this started. The construction started a year ago. The last time I was before you was several months ago. It's almost inconceivable to me that Mr. Allen didn't check, wondering what has been going on, and availed himself of any opportunity to come back in, have a rehearing or whatever.

GIMPEL: We're not giving him a rehearing on the evidence now. I just want to hear the nature of his objection for the record.

CHOI: All right, thank you.

GIMPEL: Thank you. Mr. Allen?

ALLEN: Well, I just wanted to bring up, you know, what had happened and what my concerns were. And after reading what was said, my concern is what does Ben Akamine want from me? First of all, the mistake was the County's. Second, the distance between his rental unit and my house is just 4 1/2 feet difference and it has a stonewall separating the two properties. I have been given three options. One was to move the house. One was to buy additional property which if I did then his house would be in jeopardy of the setback, so that I couldn't do. And the third one was going for a variance, which I did and which was approved. But my concern is is there some kind of issue by being that short? I mean does it create a safety or health issue between the two houses?

GIMPEL: Mr. Allen, we've already adjudicated -.

ALLEN: Okay.

GIMPEL: That issue. And the fact is, is that we found, one, you were not present at the hearing.

ALLEN: I was not informed at the time.

GIMPEL: Well, that is what we're asking you to address, whether you were informed at all of the hearing.

ALLEN: No, because I wasn't here at the time. I was in, off-island at the time.

GIMPEL: At what time?

ALLEN: At the time, whatever. Cause I didn't receive any correspondence because I had Imata Associates to follow through on my behalf at that time.

GIMPEL: You had an agent responsible for the property, is that what you're saying?

ALLEN: Yes.

GIMPEL: And they didn't notify you of the hearing?

ALLEN: Well, they didn't let me know personally. But the part is when I came back from my trip it was over already.

GIMPEL: The hearing was over?

ALLEN: Yes.

GIMPEL: Thank you. We have a motion before us as to whether to -. Are there any questions of Mr. Allen from any of the parties, from the Board? I would like to go into executive session for a few minutes to consult with our attorney regarding questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities in this case. Can I have a motion for a short executive session?

HENDRICKS: So move.

GIMPEL: It has been moved.

TAVARES: Second.

GIMPEL: We have a second?

TAVARES: Yes.

GIMPEL: All in favor aye?

MEMBERS: Aye.

GIMPEL: Okay, we'll take a short executive session. So please -.

EXECUTIVE
SESSION

The Board went into executive session 10:12 a.m. and came out of executive session at 10:30 a.m. by a motion made by Ms. Tavares, seconded by Mr. Hendricks and unanimously carried by a voice vote of all Members in attendance.

GIMPEL: Thank you. We're back in session. We have a motion before the Board to not accept the proposed Findings of Fact, Conclusions of Law and Order offered by the petitioner in this case. Could we have discussion? Mr. Drury, you had some comments?

DURY: Just to clarify the reasons for the motion, assuming that the one page Findings of Fact and Conclusions of Law that we received is the whole document, it's really not adequate in the sense that it doesn't have a conclusion of law, it doesn't have a decision and order; and if this case were to be taken to appeal it would not be very useful to an appellate court to lay out these important issues in the case; and in that sense it's for your own protection.

CHOI: Mr. Drury, I understand the concern. You obviously understand. For anybody on the Commission who might not have a full understanding of why we're going through this exercise, if this matter proceeds further the next step would be that it would go to court. Every day in the United States as we sit here some place in the country there's another administrative body making this kind of decision, and somebody is going to get mad, and somebody is going to appeal it. And the United States Court system has uniformly held that only in the rarest of circumstances would a court overrule an administrative body because they don't want to encourage people to constantly appeal these thousands and thousands of decisions. So even if a judge looks at it and says, boy, why did those people vote that way, I wouldn't have voted that way," he'd still sustain the administrative body, which in this case is this group. The only way that you can hope to succeed at the next level is if there's a procedural error or somebody is drunk, wrong notices, something like that.

So in drafting the Findings of Fact I think you're faced with a choice. Philosophically there are two basic ways you can approach it. You could set out a laundry list, detailed findings, including maybe the one suggested by the Corporation Counsel that starts out from how this began, and he didn't get a license, and he didn't get the permits, and he got notices to stop, and he got notices to comply with setback, and you just go down the line and all of that. The only reason, and you're right, Mr. Drury, that would be to Mr. Akamine's benefit. The only reason I elected not to do that is slightly less delicate. In ruling as this Board did, it goes against the Planning Director, which is not a flattering thing for the Planning Director. But rather than wash all the laundry and have the judge take a look at it and say, holy mackerel, no wonder they voted that way, I tried to do it in a general way that didn't directly indict the decision-making process of the Planning Director but hopefully will pass muster. Now I don't have any problems with tinkering

a little bit with the Conclusions of Law or if you want to include the Order. I'm not familiar, since your rules don't have a detailed statement of how you want those things drafted, I didn't understand that you would want that. Before the proceedings started, I went and got a hold of your rules to see, it has been years since I've done this kind of thing, and most of the administrative rules will tell you things like you go first, you go second, you have so many minutes to speak and dah, dah, dah, dah dah; and your rules don't have that. They're very general. That being the case, I don't, in a general sense anyway, object to the idea, should you elect to do that of going the detailed route, incorporate the suggestions of the Deputy Corp. Counsel. But you couldn't just incorporate those. They in effect speak against the conclusion so if you only put that in it wouldn't make any sense. The judge would look at it and say, what, that's why they decided that? It doesn't go. You know, it's a non sequitur. So you could put that in but then you'd have to put in all the other stuff, too. And that would presumably consume a lot of time because you'd have to then say, okay, we find yes he built without a permit, we find that yes he got three warnings, no I think he got only two warnings, oh I think he got four warnings, and then you go down the line and get details, and the Board vote on all the specific findings. I just thought that this was a less unwieldy if you did it this way as a general thing say, hey, as a general proposition the Planning Director didn't have all the information. Presumably if he had had it he would have made a different decision. But, in effect, if you say the Planning Director didn't have all the facts before him and yet he made a decision and we find that now that we know what the facts are, that this decision was wrong, I'm willing to gamble that it would pass legal muster. But I certainly have no objection to doing it the detailed way. And as you correctly point out, it would be better for Mr. Akamine to do that. I just thought it might be a little bit unwieldy for the Board.

DRURY: And we do appreciate the extra burden that's put on you to write a good complete findings of fact.

GIMPEL: Any other discussion by the Board? Planning Director, do you have any comments?

LUGO: No. We stated our reasons for objecting to the proposed Findings of Fact and Conclusions of Law; and I think it sounds like Mr. Choi is agreeing. It's just important that the basis for the decision be laid out in the order and the pertinent facts and the relevant law; and that's what we'd ask be put into the revised document that Mr. Choi prepares.

GIMPEL: Thank you. Any other questions from the Board? Hearing none, then I'll call for the question. All in favor of the motion to refuse to accept this Findings of Fact, Conclusions of Law and Order without further amendment please say aye.

HENDRICKS: Aye.

DRURY: We're not going to do a roll call?

GIMPEL: Okay, we'll do it.

MAEDO: Well, wait.

GIMPEL: Yes?

MAEDO: Forgive me. I think I know what I'm hearing. However, I think I need clarification. I know what I'm reading, I know what I'm hearing, but I'm still confused. Tell me if I vote yes what am I voting for?

GIMPEL: You're voting to deny the proposed Conclusions of Law, Findings of Fact, and Order as submitted by the petitioner in this case, period.

MAEDO: Okay. And that means then?

GIMPEL: That means that we've got to go with something else.

MAEDO: Okay. And then if I vote no?

GIMPEL: That means you would accept those proposed Findings of Fact, Conclusions of Law and Order.

MAEDO: And then this would be over?

GIMPEL: Then this would be over.

MAEDO: Okay. That's what I thought I heard.

GIMPEL: Okay, let's call the roll.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Hart?

HART: Aye.

KAWAHA: Mr. Hendricks?

HENDRIKCS: Aye.

KAWAHA: Ms. Maedo?

MAEDO: No.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Chair, there are five ayes and one no. Motion is carried not to accept.

GIMPEL: Thank you. So we'll need to address a revised Conclusions of Law and so forth. But we have another motion, I believe, that is going to be presented. Mr. Drury?

DRURY: Mr. Chair, after discussions about procedures of various kinds in executive session, I would like to make a motion that, for discussion purposes at least, that the case be reopened to allow the property owner to examine witnesses.

GIMPEL: Do I have a second?

HENDRICKS: Second.

GIMPEL: Thank you. It has been moved and seconded to reopen this matter to allow Mr. Allen to present evidence and examine witnesses.

CHOI: I submit a continuing objection -.

GIMPEL: I understand.

CHOI: For the record.

GIMPEL: Yes, and it's now on the record. We understand the objection. We have some questions of Mr. -. Yes?

CHOI: I don't mean to lecture but as I indicated about the only way that an administrative body gets overruled is if the procedure is defective. I want the record to note that this is being reopened with Mr. Akamine's representative getting notice, not formal notice but a hand-carried copy of Mr. Allen's letter presented to him at the hearing a couple of minutes before the proceedings starts, and that I also want the record to reflect all the notices that were sent either to Mr. Allen himself or his representative, and that Mr. Allen asked for a transcript of this proceeding a while, I don't know exactly when, but not yesterday to which he has already referred, and yet Mr. Allen did nothing about trying to reopen this until, what, couple of minutes ago. And I would like the record to reflect that.

GIMPEL: The record now reflects it but we want to, we have some questions that we need to ask regarding the adequacy of the notices that were sent to Mr. Allen pursuant, that have to be in accord with our rules. And so we'd like to proceed with that. I think the first question I would ask is whether Mr. Allen was sent a copy of the appeal in the first place.

CHOI: If you want to swear me in, I'd be happy to do that. I hand delivered, his representative at the time, Clyde -.

GIMPEL: Let's swear you in.

CHOI: His representative, Mr. Imata, is a personal friend of mine. I hand delivered the documents to his office.

GIMPEL: All right. Do you swear to tell the truth, the whole truth, and nothing but the truth?

CHOI: I do.

GIMPEL: Thank you.

CHOI: As I say I hand delivered the documents to his office.

GIMPEL: To the office of, again, would you repeat that?

CHOI: Imata Engineering.

GIMPEL: And Imata Engineering is what relationship to Mr. Allen?

CHOI: I don't know what happened between Mr. Allen and Clyde Imata, but the application for a variance and the earlier documents all indicated that Mr. Imata was representing Mr. Allen; and I received nothing to the contrary.

GIMPEL: What was the date that you delivered that?

CHOI: It would have been the same day that the appeal was filed.

GIMPEL: Okay. Our rules require that notice of the hearing also be provided to all parties. What notice of hearing was provided to Mr. Allen, if you know?

CHOI: Mr. Gimpel, I can't speak to that because the notice of hearing is issued from the Planning Department, not from me.

GIMPEL: Thank you. All right, Mr. Allen I'm going to swear you in now. Do you swear to tell the truth, the whole truth and nothing but the truth?

ALLEN: I do.

GIMPEL: Thank you. Mr. Allen, it has been indicated that your agent received notice of the appeal, information regarding the appeal. Was that the person your agent, that office?

ALLEN: Yes.

GIMPEL: Okay. When did you receive the notice, information regarding the hearing that was held I believe in April?

ALLEN: I know when I came back it was too late to do anything as far as the hearing.

GIMPEL: When did your agent receive notice of the hearing or when did you receive the notice?

ALLEN: I really can't say. I have to go back and look through my files to see exactly when that was mailed to me.

GIMPEL: According to notes of your conversation with the secretary of the Planning Department you acknowledged that you received a March 12th letter that was sent to Mr. Akamine with a copy to you regarding this hearing, but you didn't indicate when.

ALLEN: Well, there's two reasons. One is that because I'm represented by Imata and Associates I thought they would be the one to represent me. Second, I wasn't here at the time the letter was sent to me; and by the time I read it, it was too late. So assuming that Imata represented me because they did all the variances for me from the start -.

GIMPEL: They were your agent for this purpose so -.

ALLEN: Yes.

GIMPEL: In effect you received the letter because your agent received the letter as far as I can see. Do you have a copy of that letter?

ALLEN: No. I mean I didn't think I needed to bring it.

GIMPEL: Counsel advises me that because these matters weren't on our agenda today that we should not be discussing the adequacy of notice, so forth and so on. So we have before us a motion to reopen to allow Mr. Allen to present evidence and examine witnesses. Any questions by any members of the Board?

DRURY: Mr. Gimpel?

GIMPEL: Yes.

DRURY: Though we have a motion to reopen the case, is perhaps the next step to be clearer about what notice was received by whom, when? Because that has a large bearing on whether the case should be reopened or not.

GIMPEL: Exactly. I think we need to know not only what, when, and by whom, but also the contents of the notice, what was contained in the notice because our rules contain certain requirements for the notice.

DRURY: So perhaps there should be a separate motion after we deal with the motion on the floor, and that separate motion should be to reopen some kind of examination of notice as opposed to reopening the entire case?

GIMPEL: I think the reverse would be best. But I think we can handle it either way. We can have a motion, we can decide on a motion to reopen to allow testimony and examination of witnesses. Assuming that passes then I think the next motion then could establish the need for a hearing to discover the adequacy of the notice that was presumably provided.

DRURY: That conceivably is two separate sessions; and I don't know if I'm over complicating this, and maybe Corp. Counsel has something to say –.

GIMPEL: I would think we would probably do it in one session. We can deal with the second issue first and then the first issue second.

DRURY: So then this motion to reopen the case would include this first step of establishing notice?

GIMPEL: Why don't we do it in one motion then. You can amend your motion, if it's okay with the seconder, to reopen the case, one, to examine the adequacy of the notice that was provided and, two, if adequate to allow Mr. Allen to present evidence and examine witnesses.

DRURY: Fine.

GIMPEL: Is that okay with the seconder?

HENDRICKS: Yes.

GIMPEL: Yes.

CHOI: Mr. Gimpel?

GIMPEL: Yes.

CHOI: If I may, as you know, I object to reopening. But if the Board is going to reopen, and as I understand it the logic here is your decision on whether to reopen or not reopen is partially contingent upon what Mr. Allen knew or did not know and when. And granted that receipt of an official notification might be important, but it seems to me you also need to determine from him when he first found out that there was a decision in this matter that was adverse to his position and how come he waited until the day of -. This is the same old pattern from day one, you wait until the horse is out of the barn and then you try to find some way to close it. And if this holds true with the previous pattern, I think that's something we're going to be arguing at court. And I would like to have the Board determine whether or not he waited until yesterday afternoon or whatever it was, despite the fact that he knew, what, we had the last meeting in April, this is now July and he waited until the last day, last minute, almost within 24 hours. I think we should get that on the record. Thank you.

GIMPEL: It is now on the record. But the evidence of that we cannot take today because of the Sunshine Law issue. It's not on the agenda to examine the adequacy or the timing of his -.

CHOI: Precisely. That's why, how could you have this motion and entertain this? It's not on the agenda.

DRURY: The whole idea of the motion is to reopen it so that there is notice, there is time, everyone can bring the relevant evidence to bear. That's why, so that we don't do it bootstrapped last minute.

GIMPEL: Any other discussion? All right -.

HENDRICKS: I hope I'm speaking for the Board. We're concerned with following due process more than the merits of the case; and this is a relatively new item for the Board, and it would apply to any case. So I think we need to settle the matter of due process, and the motion is very important. It sets an opinion, but we can have some more discussion by the Board on this.

CHOI: Mr. Hendricks, I agree and your concern is entirely appropriate. But I ask that the Board remember that you need to follow due process for Mr. Akamine also, and that he has a position, I mean he followed all the rules, filed what he was suppose to file, waited patiently, sent a representative to the hearing. So if the Board invents a new method, which you do not have in your rules, what happens to the due process to Mr. Akamine?

GIMPEL: We're not inventing a new method. We are concerned that we follow our rules and that our rules be followed. There has been an indication that our rules have not been followed. Whether it's our fault or your fault or somebody's fault, we want to make sure that the rules are followed to the fairness of everybody. So, therefore, we are taking this action and voting on this motion that's before us. Are there any other questions or comments? Let's call the roll.

MAEDO: Can you -?

GIMPEL: The motion is, as I understand it, -.

MAEDO: Chairman, I was just going to say would you read the motion.

GIMPEL: Yeah, well, as I understand it, I'll paraphrase it. The motion is to reopen the hearing to, one, take evidence regarding the adequacy of the notices that were provided Mr. Allen to assure that they are in compliance with our rules and, two, if not, to allow Mr. Allen to present evidence and examine witnesses. That's basically the motion. Okay, will you call the roll.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Hart?

HART: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

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

GIMPEL: Thank you. We will resume this matter at the next meeting in Hilo, which is two months from now. I apologize for the delay but we want to make sure that we follow our procedures and our rules to the "t" so that any final decision by us is upheld and not somehow overturned because of our failure to follow the rules. So our next meeting in Hilo is scheduled for when?

KAWAHA: August 8th.

GIMPEL: We will place that first on the agenda if possible. Thank you.

DRURY: And, again, I think I speak for the Board to say we are truly sorry for the extra bother this caused everyone.

The discussion ended at 10:56 a.m.

Respectfully submitted,

Sharon M. Nomura, East Hawaii Secretary