

BOARD OF APPEALS  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
NOVEMBER 9, 2007

A regularly advertised hearing on the petition filed by **MARLENE E. CALVERT (BOA 05-000014)** was called to order at 10:02 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i, with Valta Cook, Chairman, presiding.

PRESENT: Valta A. Cook  
David Drury  
Peter Hendricks  
Joel Gimpel  
Diane Gentry  
Kim Tavares

ABSENT & EXCUSED: Kelly Ann Soo

Brooks Bancroft, Counsel to the Board  
Alice Kawaha, Staff to the Board

Randy Vitousek representing Marlene E. Calvert  
Amy Self representing the Planning Director

And 9 people from the public in attendance.

**PETITIONER: MARLENE E. CALVERT (BOA 05-000014)** - Adoption of Findings of Fact, Conclusions of Law, and Decision and Order relating to the decision by the State of Hawaii Third Circuit Court which remanded the appeal to the Board. This matter relates to Appeal of Decision by the Planning Director dated September 29, 2005 relating to the Denial of Variance Application WH(VAR 05-056) relating to water supply requirements of Chapter 23, Subdivision Code, for proposed 7-lot subdivision on each parcel. The subject properties consist of approximately 42.6 acres and is located in Kona-South Estates Unit III, Kahuku, Ka'u, Hawai'i, TMK: (3) 9-2-150:13 and 18.

COOK: We're right on to the first item on the agenda, which is the Calvert Board of Appeals 5-14, it's adoption of the Findings of Fact, Conclusions of Law. And I would note that we had asked Mr. Vitousek, whose client had prevailed in this matter, to prepare proposed Findings of Fact and Conclusions of Law and gave Ms. Self an opportunity to make objections; and I'll note that both items were accomplished. And I want to know if the parties have had a chance to confer after each received the, particularly after Ms. Self received the, I'm sorry, Mr. Vitousek received the objections. Have you had a chance to confer? Do we have any agreement on any of this or we're going from ground zero here?

VITOUSEK: Yeah, good morning, Randy Vitousek on behalf of the applicant. We didn't confer, but I think that from my reading of the objections the County made a number of objections to the proposed findings and proposed one additional Conclusion of Law, that's in Item 6 on page 6 of their objections. And the applicant has no objection to including their proposed Conclusion of Law and suggest including it, well, actually, we suggest including it in the section of our proposed Findings and Conclusions that's called the Standards of Review, and specifically including it as the last paragraph in the Standards of Review on Page 2, just above the heading "CONCLUSIONS OF LAW." And then other than that, I think that, you know, their objections are really just objections and they're making their objections and didn't proposed any specific alternative findings -.

COOK: Okay, you want to make a response to that, Amy?

SELF: I have no objection to including the Conclusion of Law that I proposed where Mr. Vitousek just mentioned and -.

COOK: You're agreeable with inputting it where he has suggested, there's no problem with that?

SELF: Correct.

COOK: Okay.

SELF: Yes, I have no problem with that. And the objections I've stated, I wanted to get those objections on the record. So -.

COOK: Okay. All right, I just want to state it as a matter of form here that ordinarily the prevailing party has to defend whatever decision that we make here. And since we find for the prevailing party, that's why we allowed them to prepare their proposed Findings of Fact, Conclusions of Law. And with that as a background, I wonder if any of the Board Members here have any comments on any of the objections, or can we take it as a whole or -? I don't want to spend an hour going every one of these objections here. Mr. Gimpel, do you have any input here? I know you're one of the guys that dots all the "i's" and crosses all the "t's."

GIMPEL: Oh, yes.

COOK: And, by the way, I have given this careful consideration myself today, as I'm sure the rest of the Board Members have also.

GIMPEL: Yes, and I want to congratulate both parties on really developing some very interesting arguments and statements here. As long as we're dotting "i's" and crossing "t's" I noticed there was one thing in Mrs. Self's, I think it was Mrs. Self's, oh, yes, yes, paragraph 14 of your thing on page 4 -.

COOK: This is on the proposed -?

GIMPEL: This is not a legal issue, but the word “infers” is inappropriate. It should be “implies.” You infer from an implication. You don’t imply -.

COOK: What paragraph is that?

GIMPEL: That’s in paragraph 14.

VITOUSEK: Page 4.

GIMPEL: Yeah. My English teacher is waking up on me. But the comments I had is that the objections failed to acknowledge, I think, that the Appellant’s burden is to, has the burden of proof, but it’s not to prove necessarily that there is enough water. It’s merely to prove that the Director’s finding was arbitrary, or against the law, or something like that, obviously. And so I think that that is adequately stated in the proposed Findings of Fact and Conclusions of Law; and I would note also that the proposed Findings of Fact and Conclusions of Law do state that when something is found in the Findings of Fact that should have been set forth as a Conclusion of Law or the converse, that it shall be deemed as such. So I think that’s appropriate. That’s all I have to say.

COOK: You know, maybe to move this along, it doesn’t mean that we’re going to approve everything that’s submitted -. But could I have a motion and then we can make any arguments relating to the Findings. Could I have a motion to either approve or deny the -?

GIMPEL: I’ll move to approve the proposed Findings of Fact, Conclusions of Law, and Decision and Order as amended pursuant to our earlier discussion and agreement.

COOK: That is the stipulation for the inclusion of that particular Finding of Fact and your correction of a word -?

GIMPEL: It’s just a matter of information, that word, Mr. Chairman

COOK: Do I have a second for that?

GENTRY: Second.

COOK: I have a second. Okay, is there a discussion? All right could I have a vote then if we have no further discussion? Madam Clerk, could you call the roll, please.

KAWAHA: Mr. Gimpel?

GIMPEL: Aye.

KAWAHA: Ms. Gentry?

GENTRY: Aye.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Tavares?

TAVARES: Nay.

KAWAHA: Chair Cook?

COOK: Yes.

KAWAHA: Chair, there are five ayes and one nay, motion is carried.

COOK: Okay, I want to adopt what Mr. Gimpel said about the work that was done by both parties on this case. For those in the public that might not know, this case actually was heard before us, we made an initial decision, it went up on appeal, it was reversed, it came back to us. We had extensive briefing from both sides, we made another decision; and these Findings of Fact, and Conclusions of Law are the result of that. So I want to also thank both counsels for doing excellent work in preparing us to make our final determination. Thank you very much.

VITOUSEK: Thank you.

The discussion ended at 10:10 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary