

BOARD OF APPEALS  
COUNTY OF HAWAII

HEARING TRANSCRIPT  
JANUARY 16, 2009

A regularly advertised hearing on the appeal of **KOHALA PRESERVE CONSERVATION TRUST, LLC (BOA 08-000070)** was called to order at 10:03 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i with Chairman Joel Gimpel presiding.

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

ABSENT AND EXCUSED: Charlene Hart

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

Joel Kam, Esq. representing Appellant  
Molly Lugo representing Planning Director

And six people from the public in attendance.

**PETITIONER: KOHALA PRESERVE CONSERVATION TRUST, LLC (BOA 08-000070)**  
- Continued hearing, including consideration on the Petition to Intervene filed by Kamakani O Kohala Ohana (KAKO`O), on the Appeal of Decision by the Planning Director dated July 3, 2008, to defer action on the application for proposed subdivision and approval of preliminary plat map. The project area consists of approximately 365.5 acres and is located in the vicinity and north of Mahukona Harbor, Kapaaunui, Kou, Kamano, and Mahukona, North Kohala, Hawai'i, TMK: (3) 5-7-2:11, 5-7-3:3 and 10.

GIMPEL: The next item on the agenda is the Kohala Preserve Conservation Trust, LLC, and that's BOA 08-000070. And this is a continued hearing that includes the consideration on the Petition to Intervene filed by Kamakani O Kohala Ohana on the Appeal of Decision by the Planning Director dated July 3, 2008, to defer action on the application for proposed subdivision and approval of a preliminary plat map. The project area consists of approximately 365.5 acres and is located in the vicinity and north of Mahukona Harbor, Kapaaunui, Kou, Kamano, and Mahukona, North Kohala, Hawai'i. The Tax Map number is (3) 5-7-2:11, and 5-7-3:3 and 10. Are the counsel for the parties here?

KAM: Good morning, Chair Gimpel and Members of the Board. Joel Kam for the petitioner, Kohala Preserve Conservation Trust.

GIMPEL: Thank you.

LUGO: And again, Molly Lugo, Deputy Corporation Counsel for the Planning Director and the Planning Department.

GIMPEL: All right, thank you. Where are we on this case now?

KAM: I believe we are, our position is that we are asking the Board to move forward this morning with the motion to intervene and with our petition.

GIMPEL: Okay. Is the representative for the petitioners to intervene present? No representative being present, I will -. Yes? I thought you had something to say. I will entertain a motion regarding the intervention. Do I have a motion regarding the intervention either to deny it or allow it?

KAM: Chair Gimpel?

GIMPEL: Yes?

KAM: May I make a short statement on the motion to intervene?

GIMPEL: Yes, you may.

KAM: We did file a memorandum in opposition to the motion to intervene. I think it sets out quite clearly our opposition to that motion. There is one thing that I just did want to emphasize for the record. The intervenors did point to a 1999 Hawaii Supreme Court case; that is the basis upon which they claim the right to intervene in this matter. I would just reemphasize for the Board that the proposed intervenors' reading of that case is incorrect; the Hawaii Supreme Court did not hold in that case that the predecessor group of the intervenors had the right to intervene in the SMA permit proceedings below. In fact, what the Hawaii Supreme Court held was that they did not have standing to intervene in the SMA permit proceedings relating to this project. This is an analogous proceeding. We believe that the same situation applies, and that the intervenors cannot meet the standard and have not demonstrated that they meet the standard to justify intervention in this matter. Thank you.

GIMPEL: Thank you. Does the Planning Department have any position on the intervention?

LUGO: No. The Planning Department is not taking any position on the intervention.

GIMPEL: All right, thank you. As I understand the issue in this case now is that we are concerned about what was the actual date of the eventual allowing of the proposed subdivision approval. Is that correct?

LUGO: Right, the tentative approval.

GIMPEL: The tentative approval. Is that correct?

KAM: To boil it down, that is correct, Mr. Chairman. The question is whether the Director's deferral decision was timely. If it was untimely, the approval date would be the 46<sup>th</sup> day. That is our position.

GIMPEL: So in my view the issue is then whether the proposed intervenors have anything to add regarding the dates of the granting whether it was timely or not.

KAM: We would agree with that, Mr. Chairman.

GIMPEL: All right. That being said, do I have a motion regarding the intervention, please?

HENDRICKS: For purposes of discussion, I move that the intervention be denied.

GIMPEL: Thank you. Is there a second?

MAEDO: I second.

GIMPEL: There has been a second. All right, let's discuss. Mr. Hendricks?

HENDRICKS: From the information I've been able to obtain and hear and read it seems as though for one thing we are not dealing with a final decision of the Director. And I believe that the plaintiff has made a good case for their side. But I'd like to have a little more discussion, if we could; I'm just still a little foggy on a couple of things.

GIMPEL: Mr. Drury, you had something?

DRURY: Mr. Chair, I would like some enlightenment from Renee Schoen, if it's possible, about the question of the grounds for intervention, if we could be read the relevant piece of the Act. And my question concerns this: In our instructions, should the grounds for intervention be narrowly limited to the grounds stated by the appellant, or is there a scope for intervention on wider grounds? That's my basic question.

SCHOEN: In answer to your question, Mr. Drury, I refer the Board to its own Rules, Rule 2-7, and that particular rule sets out the standard by which this Board would allow a party to intervene. And in particular I'm referring to 2-7(b)(2), and that rule states, "Any person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that that person will be so directly and immediately affected by the Board's decision that that person's interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as a party upon timely application for intervention." And (3) is, "Any other person may be admitted as a party upon a timely application, when the Board finds there is just cause for intervention." So that's your rule. If you would like my opinion regarding your rights, liabilities, duties and responsibilities and you'd want further expansion on that, I would suggest we go into executive session. Prior to going into executive session, I might suggest that the Board maybe inquire of the parties and have them explain their positions a little bit more.

DRURY: Okay, thank you.

HENDRICKS: Mr. Chairman?

GIMPEL: Mr. Hendricks?

HENDRICKS: Just a personal bias, I understand the concerns of the folks who are coming before the Board from KAKO`O, and those being the general quality of life in the community and good planning and the challenges of growth. But I'm pretty comfortable with my motion at the present time, and that is to deny the intervention; I don't think there is direct enough connection here for our jurisdiction, or rather our granting of intervention.

GIMPEL: Mr. Drury?

DRURY: I had hoped to raise exactly the question that Renee suggested to ask the intervenors directly to summarize their grounds for wanting to intervene; unfortunately, there is no one to ask here right now.

GIMPEL: As I understand -. Are there any other questions or comments? As I understand it, the issue we are dealing with in this case is relatively narrow. One is, assuming that the subdivision plat was filed on May 7<sup>th</sup>, is the failure to act within 45 days a final decision of the Director that grants us jurisdiction? Question also was the plat ever filed, and was deferral a final decision? In my view I don't think the intervenors have anything to add to those issues. They may well have some interest in the general quality of the land use in the area; I think that that was decided when the property was rezoned. So in my view I don't think that the intervention has enough direct help to the issues in this case that we have to decide to help our decision in that regard. So that's my view. We had a suggestion that we go into executive session. Do you still want to make a motion to do that? Anybody want to make a motion to do that? All right. Then we'll have a vote on the motion to deny the intervention. Would you call the roll, please? Thank you.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Chair, there are four ayes. Motion is carried. I'm sorry, five ayes.

GIMPEL: Five ayes. Thank you. So the intervention is denied. All right. Let's now hear the case.

KAM: Thank you, Chair. We have submitted papers in support of the petition seeking the Board's decision that the Director's deferral decision was untimely and confirming that the application for tentative approval was automatically approved on the 46<sup>th</sup> day after May 7, 2008. If there're any questions, I'm prepared to address them. But at this time we would just stand on the papers we have filed.

GIMPEL: Okay. Planning Director, Department?

LUGO: In the Record on Appeal I believe you have a copy of the letter from the Planning Director, dated November 28<sup>th</sup>, issuing tentative approval on the applicant's submission. As to the issue, which is on appeal here on whether or not the tentative approval should be deemed effective as of the date that the 45 days ran back in June 2008, the Planning Department is not taking any position on that.

GIMPEL: So then, as I understand it, the appellant is urging that the tentative approval was granted 45 days after May 7<sup>th</sup>. Is that correct?

KAM: That's correct.

GIMPEL: Okay. And you are saying, well, we granted it in November. So is there a big issue because of the difference between the 45 days after May 7<sup>th</sup> and whenever the November letter? Is that a concern now? Does that remain a concern?

KAM: It is a concern to us, Mr. Chair, and we do, for other reasons, we do think that it is to our benefit to have an order from the Board confirming that the application was approved on the 46<sup>th</sup> day.

GIMPEL: And you have no position on whether it was approved on the 46<sup>th</sup> day or not. Is that correct?

LUGO: That's correct.

GIMPEL: Okay. Anything else to add? Either party?

LUGO: Nothing further. Thank you.

GIMPEL: And no witnesses from either party? I don't think there is anything to witness at this point. All right. You have no witnesses.

KAM: No witnesses.

GIMPEL: Can I have a motion from the Board? As I understand it, the petitioner is urging that we determine that the tentative approval was granted by default 45 days after May 7<sup>th</sup>. The Planning Department does not contest that, and indicates that it eventually issued a written tentative approval of the subdivision in November. Can I have a motion one way or the other?

HENDRICKS: I move that approval of the subdivision was in fact given 46 days after the application as per our regulations.

GIMPEL: Is that 46 or 45 days?

HENDRICKS: Sorry, maybe 45.

GIMPEL: It's 45 days, within 45 days.

HENDRICKS: Forty-five, excuse me.

GIMPEL: So your motion is to construe the application as having been approved by default 45 days after May 7<sup>th</sup>. Is that correct? Do I have a second?

MAEDO: Maedo, second.

GIMPEL: Okay, seconded. Any discussion? Let's call the roll.

DRURY: Actually -.

GIMPEL: I'm sorry. Mr. Drury?

DRURY: I would like to clarify something with the counsel for the Planning Department. Does our vote one way or another have any bearing on this revised tentative approval issued on November 28<sup>th</sup>? Does it make any difference to the acceptance of that tentative approval?

LUGO: If I understand your question, it doesn't make any difference as far as the substance of what's in that revised tentative approval dated November 28<sup>th</sup>; all the conditions remain the same and the applicant would still have to meet all of those criteria in order to get final subdivision approval. So really the only thing that would be different is the effective date.

DRURY: Okay, so in substantive terms the appellant still has to undertake the activities discussed in this November 28<sup>th</sup> memo regardless of which way we vote.

LUGO: Yes. And I suppose the only thing that would be different is that the certain things have to be completed within one year of the date of the tentative approval, and so that one year, if you were to consider it deemed approved back in June, that one year would start running from the date in June rather than November, and the petitioner is aware of that.

KAM: If I could just respond to that. The Subdivision Code says that if an application is automatically approved, that the applicant must satisfy all the requirements relating to roads, sewer, drainage, and other improvements as required by law necessary to obtain final

subdivision approval. There is a general requirement to satisfy all other requirements that may be applicable to the subdivision before the applicant can then obtain final subdivision approval; that is our position of what the applicant will need to satisfy in order to obtain final subdivision approval. We understand that the Department will take the position that the conditions that are set out in the November 28<sup>th</sup> letter are the conditions that need to be satisfied in order for us to obtain final subdivision approval. We understand that that's what they are going to say. And whether the applicant follows through and agrees with the Department that it will actually satisfy those specific conditions has yet to be determined, but we understand that that is the position that the Planning Department will take. Our position is there is a general requirement to satisfy all laws. What we understand their November 28<sup>th</sup> letter to be a more specific list of what they believe needs to be done in order to satisfy the general requirement, if I'm making myself clear, but there hasn't been an order from the Planning Department that that actually is what needs to be done.

GIMPEL: Any other comments?

MAEDO: I guess now I am confused.

KAM: Okay, I'm sorry. Let me try and -.

MAEDO: Well, I guess, okay, the issue to my simple self is, are we talking here May, like I hear Molly saying, or June, like I hear Molly saying, versus the end of November that I hear you saying?

KAM: We are asking the Board to confirm that the application was automatically approved at the end of June 2008. If you take that action, then the Director's subsequent letter of November 28, 2008 is moot because the application was already approved in June 2008; that would be our position. The Code requires the applicant to satisfy all laws relating to drainage, roads, other improvements. There is a general requirement to satisfy that in order to move forward and obtain final subdivision approval. And that is what the applicant will satisfy.

GIMPEL: What I understand you are saying is that you are suggesting that the November 28<sup>th</sup> letter may contain some requirements that are not set forth in law; therefore you might object to having to satisfy those requirements.

KAM: That is correct. It is possible that the applicant and the Planning Department may agree subsequently to do those things anyway, but today for today's purpose we are not admitting that the conditions set out in the November 28<sup>th</sup> letter constitute the exact requirements that we need to satisfy in order to obtain final subdivision approval.

GIMPEL: Is that understood now? They are saying that the letter might not repeat the law. But they are not saying that it does not, saying it might not, but they'll combat that as they go. Are there any other questions, any other concerns, issues? All right. Alice, would you please call the roll?

KAWAHA: Sure. Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: Mr. Drury?

DRURY: Aye.

KAWAHA: Ms. Tavares?

TAVARES: No.

KAWAHA: Chair Gimpel?

GIMPEL: Aye, in as much as the Planning Department has indicated that it will not object, already has indicated that; I'm going to say, all right, let them fight out any later concerns later. Thank you.

KAWAHA: Chair, the vote passes with four ayes and one no.

GIMPEL: Thank you. All right. Thank you very much.

The discussion ended at 10:25 a.m.

Respectfully submitted,

Noriko Sauer, West Hawai`i Secretary