

KAUA'I PLANNING COMMISSION
CONTESTED CASE CALENDAR
January 10, 2017

The contested case calendar of the Planning Commission of the County of Kaua'i was called to order by Chair Keawe 9:28 a.m., at the Līhu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Keawe
Mr. Roy Ho
Mr. Wayne Katayama
Mr. Mahoney
Ms. Kanoe Ahuna

Absent and Excused:
Ms. Glenda Nogami Streufert

The following staff members were present: Planning Department – Michael Dahilig, Leslie Takasaki; Office of the County Attorney – Deputy County Attorney Jodi Higuchi Sayegusa; Deputy County Attorney Mark Bradbury; Office of Boards and Commissions – Administrator Jay Furfaro, Commission Support Clerk Lani Agoot

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Keawe called the meeting to order 9:28 a.m.

CALENDAR

In the Matter of Appeal of Planning Director's Decision Regarding Application for Non-Conforming Use Certificate; Contested Case No. CC-2015-5; TVRNCU #4122; TMK: (4) 5-8-011:010 = **Laura Bancroft Living Trust and David Bancroft.**

Petitioners Laura Bancroft Living Trust's and David Bancroft's Reservation of Their Right to Call Cross Examine Witnesses and to Submit Additional Evidence in Light of the Order Granting County of Kauai Planning Department's Motion for Leave to Submit Additional Evidence Dated August 26, 2016.

Appellants Laura Bancroft Living Trust's and David Bancroft's Exceptions to Hearing Officer's Report and Recommendations; Certificate of Service.

Planning Department of the County of Kauai's Objection to the Untimely Filing of Petitioners Laura Bancroft Living Trust and David Bancroft's Exceptions to Hearing Officer's Report and Recommendation; Certificate of Service.

Chair Keawe: Jodi, can you give us a history of 1(a).

Ms. Higuchi Sayegusa: Sure.

Chair Keawe: Do we have both of the parties here?

Mr. Jonathan Chun: Good morning Mr. Chair, Jonathan Chun on behalf of the Bancrofts.

Deputy County Attorney: Deputy County Attorney Mark Bradbury on behalf of the Planning Department.

Ms. Higuchi Sayegusa: Just to bring everyone up to speed considering matter 1(a), Petitioner's Request to Reserve Their Right to Call and Cross Examine Witnesses, I wanted to provide a procedural history on this particular matter. The contested case hearing was conducted by the Hearing Officer on May 17, 2016. On August 26, 2016 the Planning Department filed a motion for Leave to Submit Additional Evidence. On September 2, 2016 the Petitioner filed Petitioner's Opposition to Kauai County Planning Department's Motion for Leave to Submit Additional Evidence. On September 7th the Planning Department submitted its reply. On September 14th a hearing on the motion for additional evidence was conducted by phone between all the parties. On October 6, 2016 the Hearing Officer issued his order granting the motion for additional evidence and then on October 10th the Petitioner filed the current substantive matter which is the Petitioner's Reservation of Their Right Call Cross Examine Witnesses and to Submit Additional Evidence in Light of the Order Granting the Planning Department's Motion for Leave to Submit Additional Evidence. This is, in a summary, the procedural history of this particular matter.

Chair Keawe: Mr. Chun?

Mr. Chun: As to matter 1(a) only?

Chair Keawe: 1(a).

Mr. Chun: That is to correct recitation of the facts of what was going on. After the hearing was closed the Planning Department somehow found another witness and somehow found more documents they wanted to submit after we submitted our supporting memo. We of course opposed it because after the hearing was closed and we submitted our final arguments the County comes in and says "I have more evidence to consider". Be that as it may the Hearing Officer granted that request. We would still stay that the granting of the request its self was improper but in terms of any of our requests to have additional witnesses called and cross examined, we will withdraw that request. But as far as objections, we are not waiving any objections to the propriety of them being allowed to bring in new witnesses and new evidence after the hearing was closed.

Ms. Higuchi Sayegusa: Being that it is withdrawn I think we can move on to items 1(b) and (c) and those are the Petitioner's Exceptions to the Hearing Officer's Report and Recommendation and the Planning Department's Objection to the Untimely Filing of the Petitioner's Exceptions.

Chair Keawe: Mr. Chun.

Mr. Chun: Thank you. As a procedural matter, the Planning Department did file an objection to the filing of our exceptions. I think we probably should address that first. If the Commission chooses to honor the Planning Department's objection then I would turn around and ask that I be given my normal three (3) minutes under 92-3 to speak on any agenda item. But if the Commission decides to listen to the exceptions then we would go under arguments at that point in time because there are different rules involved and that is why I am saying maybe procedurally the best way is to see if you want to hear the exceptions. If you do then we can go under the exceptions procedure, if you don't want to hear the exceptions then my clients want their three (3) minutes under 92-3.

Chair Keawe: That is if the exceptions are denied?

Mr. Chun: If the Commission does not want to hear the exceptions.

Chair Keawe: Mr. Bradbury?

Mr. Bradbury: It is the Planning Department's position that the exceptions were filed untimely and that this proceeding shouldn't go forward.

Mr. Chun: My only response to that is if you read the rules, the rules say the parties "may" file and the Commission "may" do certain things. As you know the word "may" is optional, it is not mandatory. Even when the word "shall" is used the courts have determined that the word "shall" sometimes is not mandatory. Our position is it is optional; it is guidance in terms of the timing. If you want to look at it, the timing of the seven (7) days is there in order if you want to give the Commission and parties' time to put things in writing so that at the next meeting they can have things in writing. And I just want to point out that the last time when we looked at that rule and we said it was optional we didn't file any exceptions. The Commission did hear the objections to the findings report but then came back and said could you file written exceptions too, to have the complete record and complete written arguments. This time rather than put the Commission through that we decided to file something in writing. Again, it is totally up to the Commission if they want to hear the exceptions. That is their choice. If they don't want to hear the exceptions then we are just left with the 92-3 three (3) minutes and public comment.

Chair Keawe: Commissioners, any comments, any questions for either counsel?

Ms. Ahuna: So 1(a) has been withdrawn?

Ms. Higuchi Sayegusa: Yes. We are not considering the exceptions and what to do with them. The options on the table are to accept petitioner's exceptions and grant the request for oral argument or strike the exceptions and deny the request for oral argument. Under the rules even if you deny the exceptions and do not accept it you folks on your own motion can direct oral argument at the decision making phase which is when we are back on the General Business Matter considering what to do with the Report and Recommendation by the Hearing Officer. Those are the options with regard to the exceptions at this point. The rules under the Planning

Commission Rules of Practice and Procedure, 1-6-19(b) (1) does say "Prior to seven (7) working days after service of the report and recommendations by the Hearing Officer any Party may file exceptions to the report. Such Party shall service copies". So again, the Hearing Officer served his Report and Recommendation on November 4th, the petitioners filed and served their exceptions on December 1 and so it is beyond that seven (7) day mark.

Chair Keawe: Any comments from the Commissioners with regard to understanding the issue?

Mr. Mahoney: Chair, I think the timeline had gone by and I don't think we should address them.

Chair Keawe: Any others? Commissioner Katayama?

Mr. Katayama: To the department, do you wish to hold fast to that seven (7) day rule as stated?

Mr. Bradbury: The way the department views that rule it is jurisdictional. Mr. Chun said "may", may mean you don't have to file exceptions but if you don't file exceptions you don't get the oral argument and we contend it is jurisdictional. If you don't file it on time you have lost out. You have to remember this case is all about untimeliness, the underlying problem was untimely. We are back here again untimely and yes, we are holding hard on that point.

Chair Keawe: Commissioner Ho?

Mr. Mahoney: I agree with the attorney. I think the whole case is based on timeliness. Decisions were made because of timeliness and I don't think we should address it because timeliness was not achieved on the procedure so that is my position.

Chair Keawe: Commissioner Ahuna, any comments?

Ms. Ahuna: No comment.

Mr. Katayama: May I ask a question to our counsel? Basically this has not come before the Commission to make a decision on, is that correct, that is going to come up at some later date? The decision on how this should be disposed.

Ms. Higuchi Sayegusa: We also have still pending on the regular Commission agenda within General Business the Hearing Officer's Report and Recommendation.

Mr. Katayama: At that time will the petitioner have the ability to articulate their case?

Ms. Higuchi Sayegusa: Under the rules you folks can still make a motion and a second and vote on whether to allow for oral argument.

Mr. Katayama: But for this Commission to adopt conclusions of law we would need to understand both parties and where they stand on the interpretation of the proceedings.

Ms. Higuchi Sayegusa: Yes. That is at your pleasure if the will of the Commission is to allow for oral argument then you can make that motion. Under the rules it is either, if exceptions are accepted and a written request oral argument is made then you can allow for the oral argument. If it is not accepted then it falls back to the other option which is for you folks to make a motion and a second and vote on whether to allow for oral argument.

Mr. Katayama: The question before us this morning is how many bites of the apple does the Petitioner get in terms of these points because they have articulated their exceptions and at the final decision making process they can articulate it again as well.

Ms. Higuchi Sayegusa: Should you folks vote on allowing for the oral argument. You also have the full packet, I know it is a thousand pages or something but you were also provided the full record. An option also when we go back to the regular agenda is if you folks need more time to digest of course you have the option to make a motion to defer the matter should you need that time.

Mr. Katayama: So the decision this morning is which was is the most prudent way to dispose of this.

Ms. Higuchi Sayegusa: Right now we are just trying to take care of all the procedural matters prior to going to the actual decision making and so again, on the table is still, what to do with the exceptions.

Mr. Katayama: But again if we hear the exceptions this morning does that help us whenever the decision making comes before the full body.

Ms. Higuchi Sayegusa: Then you folks can incorporate the exceptions into your consideration and how to decide what to do with the report and recommendation.

Chair Keawe: I think it is a question of timing like Commissioner Mahoney said but also the amount of opportunities that the petitioners have had to state their case, several times and missing several deadlines with regard to that. So it is a question of, what you said Commissioner Katayama, how many bites of the apple does the Petitioner get to state their case.

Mr. Katayama: I think it is sort of clarifying both the department and the Petitioner's position on the process of the application for the non-conforming use permit.

Ms. Ahuna: Deputy Attorney, can you repeat the applicant's appeal, the timeline?

Ms. Higuchi Sayegusa: The contested case hearing was conducted May 17, 2016, November 4th the Hearing Officer served and filed his report and recommendation, December 1st the Petitioner served and filed their exceptions to the Hearing Officer's report and Recommendation, and then the next day, December 2nd the Planning Department filed their objection to the Petitioner's exceptions.

Ms. Ahuna: Can you repeat the guidelines to that appeal, the seven (7) days?

Ms. Higuchi Sayegusa: The Commission rules specifies that prior to seven (7) working days after service of the report and recommendation by the Hearing Officer a party may file with the Commission, exceptions to the report.

Ms. Ahuna: So in that regard it says they may file in regards to responding to appeal however to me it is spelled out right there that they "may" file. If they choose not to then they don't but if they want to file against the appeal then they do it in seven (7) to ten (10) days.

Ms. Higuchi Sayegusa: Seven (7) days.

Mr. Mahoney: I am just going to reiterate that the whole case is about timing and I agree with some of the thoughts of Commissioner Ahuna that the timeline wasn't met. The timeline is the crux of this whole matter and I don't think we should entertain it at all. We decided to go to a Hearing Officer and all the rules to handle this to begin with; it didn't go before the Commission. And the Hearing Officer made some decisions and there was a timeframe that should have been adhered to, it wasn't adhered to. So I think once again it is about timelines, the timelines weren't meant and I don't think we should entertain any arguments. That is my position.

Chair Keawe: My understanding is we have two options, one is to accept the Petitioner's exceptions and recommendations and grant request for oral argument or to strike the Petitioner's exceptions to the Hearing Officer's report and deny the request for oral argument. Is anybody willing to make a motion at this point?

Mr. Mahoney: I will make a motion to strike the arguments.

Mr. Ho: Second.

Chair Keawe: It has been moved by Commissioner Mahoney and seconded by Commissioner Ho, to strike the Petitioner's Exceptions to the Hearing Officer's Report and Recommendation and deny the request for oral argument. Can we do a roll call?

Mr. Katayama: Chair, can I make a comment please? I think it is in the best interest for this Commission to get all the facts and understand all the nuances of what has happened in this position and if there is an opportunity at a later date to address these issues, I think we don't need to do it twice because I am sure that the Petitioner will not let these issues go away. So if there is an opportunity to do that, again I think, at the time the decision making is upon the Commission then that is fine with me rather than (inaudible) the focus on these dozen or so issues.

Chair Keawe: Any other comments before we vote?

Mr. Mahoney: I stand by my statement. There are two thousand pages of documents there if you want to read them all but I feel decisions were made by a Hearing Officer and a timeframe was allowed, it wasn't met. The whole case was about timelines not being met and I think we have enough information to move forward.

Chair Keawe: Jodi do you want to call for the vote?

Ms. Higuchi Sayegusa: Commissioner Ho.

Mr. Ho: Aye.

Ms. Higuchi Sayegusa: Commissioner Ahuna.

Ms. Ahuna: Aye.

Ms. Higuchi Sayegusa: Commissioner Katayama. Commissioner Mahoney?

Mr. Mahoney: Aye.

Ms. Higuchi Sayegusa: Chair Keawe.

Chair Keawe: Aye.

Ms. Higuchi Sayegusa: Motion carried (5:0).

Chair Keawe: Is there any other business that needs to come before the Commission? If not we can have a motion to adjourn.

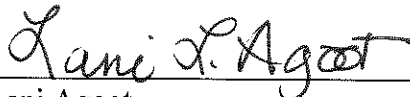
Mr. Mahoney: Move to adjourn.

Mr. Ho: Second.

Chair Keawe: All those in favor. (Unanimous voice vote) Motion carried 5:0.

Chair Keawe adjourned this portion of the meeting at 9:47 a.m.

Respectfully submitted by:



Lani Agoot
Commission Support Clerk

() Approved as circulated (add date of meeting approval)

() Approved as amended. See minutes of _____ meeting.