

BOARD OF APPEALS
COUNTY OF HAWAI'I

TRANSCRIPT
January 12, 2024

The County of Hawai'i Board of Appeals took up the petition for **CLAUDIA ROHR (PL-BOA-2023-000075)** at 9:51 a.m. This was a hybrid meeting held in person at the Hawai'i County Council Chambers at 25 Aupuni Street, Hilo, HI 96720 and via the Zoom online platform. The meeting was called to order with Chair Stacey Aguiar presiding.

MEMBERS PRESENT: Stacey Aguiar (Chair), Richard "Ritchie" Henderson (Vice Chair), Scott Martin, Daina "Noe" Saiki, Scott Trefethen, and Lisa McNamarra.

MEMBERS EXCUSED: Cathy Lewis

ALSO IN ATTENDANCE: Sherilyn Tavares, Esq. (Deputy Corporation Counsel for the Board), April Surprenant (Staff to the Board), and Ashley DeVera (Board Secretary).

CLAUDIA ROHR (PL-BOA-2023-000075)

Appeal of Decision by the Planning Department Dated August 14, 2023, issuance of Special Management Area (SMA) Use Permit Assessment Application (SAA-19-001724), Special Management Area, Minor Use Permit (PL-SMM-2022-000016), and Notice of Violation and Order (ZCV-2018-091E)

Location: Pepeekeo Point Subdivision, South Hilo, HI

TMK: (3) 2-8-008:100

PARTIES PRESENT: Claudia Rohr (Appellant) and Jean Campbell (Deputy Corporation Counsel for the Planning Department).

There were approximately twelve members of the public in attendance.

AGUIAR: Now on to new business, which is case item number two, Claudia Rohr PL-BOA-2023-000075, appeal of decision by the Planning Department dated August 14, 2023, issuance of special management area use permit assessment application SAA-19-001724, special management area minor use permit PL-SMM-2022-000016, and notice of violation and order ZCV-2018-091E. Location Pepeekeo Point subdivision, South Hilo, Hawaii. TMK (3) 2-8-008:100.

There are two matters today that relates to this case as the contested case hearing portion has been continued on the request of the appellant until our March 8th, 2024, hearing, here in Hilo; so the two matters that we need to address today prior to that contested case hearing would be the first matter—sorry, Declaration of Claudia Rohr in lieu of affidavit for recusal and the second matter that will be addressed is motion to dismiss, appellee Zendo Kern, Planning Director, County of Hawaii's motion to dismiss, memorandum in support of motion letter to Hank Correa Jr.

At this time, for item number one, I will be handing the proceedings over to Vice Chair Henderson and I will be stepping away.

HENDERSON: Thank you, Chair Aguiar. I will now take over the proceedings for this portion of the meeting and for the record the Board has received the following documents, October 18, 2023, request for recusal of Chair Aguiar and Corp Counsel Tavares; and item B, January 8th, 2024, declaration of C. Rohr for recusal. These—oh, and C response submitted January 11th, 2024, re: Rohr declaration. These three items that are currently being considered.

The request for the removal of Corporation Counsel S. Tavares was previously denied and is not within the jurisdiction of the Board. Chair Aguiar has elected not to recuse herself. Pursuant to Rule 2-3, the remaining Board Members shall decide by a majority, whether the member should be disqualified from the proceedings, therefore we need to address this request and make a ruling. Is there any discussion that the board would like to have before I take a motion on this request?

SAIKI: No discussion for me, but Vice Chair, I would like to make a motion.

HENDERSON: Alright, please do.

SAIKI: Based on the record on file and pursuant to the Board of Appeals Rule 2-3, I make a motion for Chair Aguiar to remain in her position as Chair. She should not be disqualified from this case as requested by the appellant on October 18, 2023.

HENDERSON: Do I have a second?

MARTIN: Second.

HENDERSON: It's been moved and seconded, for the motion to allow Chair Aguiar to remain in the proceedings. Is there any discussion at this time? Can I have a vote taken?

SURPRENANT: Yes.

SAIKI: Aye.

MARTIN: Aye.

MCNAMARRA: Aye.

TREFETHEN: Aye.

HENDERSON: Aye.

SURPRENANT: Motion passes.

HENDERSON: Alright, so the motion has passed and at this time, I'd like to recall Chair Aguiar back to take over the proceedings.

AGUIAR: Thank you, so we will now move onto the second matter before us. Second matter before us is appellee Zendo Kern, Planning Director, County of Hawaii's motion to dismiss memorandum in support of motion and letter to Henry Correa Jr. and if I could call both parties, the County and the appellant, Ms. Rohr, then we can start.

ROHR: Could you please have staff set up my computer as you planned?

AGUIAR: Ms. Rohr, would you prefer to use the one that's already running?

ROHR: No.

AGUIAR: So, can—did you register yourself for the Zoom login, so you have a link to log into?

ROHR: I think I did it days ago, but—

AGUIAR: Yes, we'll take the latitude to do it. You also promised to be here thirty minutes early, so we could set you up.

ROHR: Actually, I did not promise. I requested a continuation and told you I couldn't make it.

AGUIAR: Alright, we'll, we'll set you up on Zoom. Thank you.

ROHR: And you chose to ignore me. And the sound is terrible.

AGUIAR: You know what, we'll just take a short recess if anyone needs to run to the restroom while we set up. Thank you, we're in recess.

At 10:00 a.m., the Board took a short recess.

The Board returned from recess at 10:07 a.m.

AGUIAR: We're currently back in session at the BOA meeting, Friday, January 12, 2024, back from recess and we have now Ms. Claudia Rohr passing out copies.

TAVARES: It's a copy of the document she filed on December 29th. If you need an extra Ms. Rohr, you can take this one. I don't need one.

AGUIAR: So, we're back from recess and at this time we are addressing the motion to dismiss by appellee Zendo Kern, Planning Director, County of Hawaii's motion to dismiss memorandum in support of motion and letter to Hank Correa Jr. At this time, we have that document as well as the document memorandum in opposition to motion to dismiss and if I may have the County start with three minutes to—

ROHR: May I just state—

AGUIAR: I'm sorry, hold on, one second. I forgot to ask you to please intro—may the two parties please introduce themselves.

CAMPBELL: Good morning, Jean Campbell, Deputy Corporation Counsel here on behalf of the Planning Department.

AGUIAR: Thank you.

ROHR: Claudia Rohr, appellant. May I please explain why I passed this out?

AGUIAR: Not at this time, so when we get to address your document, then you can, so—at this time, we're going to have each party take three minutes to—we did read both documents, the Board has received them and reviewed them, and the parties can take three minutes starting with the Department who filed the motion to give us a summation or brief.

CAMPBELL: Good morning. Good morning, Chair and Board Members. Thank you so much for taking the time to hear this motion to dismiss. The basis of this motion is the Planning Department's request that the Board recognize the proper scope of this appeal, what it is and what it is not.

This matter is an appeal of a special management area minor permit issued by the Planning Department in August of 2023. The matter is not an appeal of the 2019 notice of violation issued by the Planning Department covering a larger area of the same property. As many of you are likely aware, the geographic scope of this special management area is limited and, in this case, the SMA covers only the portion of the property adjacent to the coastline, not that mauka area near Loa Road. Thus, the scope of the SMA minor permit is limited in jurisdiction as well.

The 2019 NOV, on the other hand, did cover both SMA violations and zoning code violations that are located outside of the SMA. By way of background for you, the 2019 NOV, which was not appealed, identified improvements which had been illegally installed in the SMA and other zoning code violations outside of the SMA. It is the regular practice of the Planning Department to issue an NOV covering all known violations at a property in one NOV, and then work with the property owner to bring the property into compliance through all applicable routes.

When multiple laws are at issue, in one NOV, this will often involve securing different permits and approvals to address all of the different violations. In this case, the parties discussion about possible SMA resolutions went through several iterations, until the property owner finally elected to remove the improvements rather than seek permits to keep them in place; so the SMA minor permit was issued, after the fact, to authorize the installation and the removal of the improvements essentially as a way to complete the record on this portion of the NOV, for the Planning Department files.

The permit also alleges, to authorize land survey work, as noted in the Department's December 20th letter, Ms. Rohr is correct, that land survey work is an activity that is exempt from SMA regulation and so should not have been included. In an attempt to remind the property owner of the remaining issues covered by the 2019 NOV, the cover letter for the SMA minor permit,

mentions matters that are not included in the permit itself, but to be clear the SMA minor permit covers only improvements within the SMA area. The department's December 20th letter was an attempt to clarify the scope of the SMA matter and the resolution of the SMA violations, as well as to clarify that potential future actions without concrete plans today, will require a future evaluation and are not included in the minor permit authorization.

There also appears to be confusion about what this SMA minor permit actually authorizes. This permit does not authorize the existence of the locked gate that continues to be a violation of the 2019— a violation that was noted in the 2019 NOV. That gate is located outside or mauka of the SMA area. The minor permit did not in fact authorize any improvements to remain on the property. As noted earlier, it's an after the fact permit to document the work that has now been completed, to remove all illegally constructed structures from the SMA area, because no improvements actually remain, that rely on this permit, whether this Board upholds or rescinds the SMA minor permit is essentially meaningless.

The duty of any judicial tribunal is to decide actual controversies with a judgment that can be carried into effect, not to give opinions on moot questions. In this case, the permit does not authorize the continued existence of the gate currently blocking the public shoreline access because that gate is outside the SMA area. That gate is a matter under the 2019 NOV, which is not the subject of this appeal. The permit authorized the removal of illegally installed improvements, which work has been completed, rendering the matter of this appeal, moot. Thank you.

AGUIAR: Thank you, Ms. Campbell for the County. Ms. Rohr, at this time would you like to give a brief and explanation or your side of your filing in opposition to the motion to dismiss?

ROHR: I would like to clarify the record first and explain why I passed this out—without it being three minutes.

AGUIAR: Sure, if it's a—what is the basis of the clarification? Is it not a document that we already received?

ROHR: I would like to just do it. I would like to apologize when I filed my brief. I had not corrected the title block and it read mot—memorandum in opposition to motion to dismiss and then forty five minutes later, I submitted a brief replacement, but the staff renamed my brief memorandum or motion in opposition to motion to dismiss and put it in the Board packet that way, and so if you read that document in preparation to today, that was my brief, not the memorandum, so I printed these out so you would have the memorandum I intended for you to read for the motion today.

AGUIAR: Thank you, and I believe we did get clarification and we are clear on your memorandum, so please proceed with your brief.

ROHR: The SMA permit PL-SMM-2022-000016, the minor permit, does state that Hank Correa has two years to remove the gate and fencing. Paragraph one of SMA minor permit PL-SMM-2022-000016 states project description, the special management area minor use permit is being pursued to obtain after the fact approval for the following activities, construction of gates and

metal fencing and subsequent demolition of gates and metal fencing. Paragraph two states the purpose of the project, the applicant has submitted the application as a resolution to notice of violation and order number ZCV-2018-091E.

This is echoing, I just want you to know. Please be a little more patient and give me more than three minutes, it's—every time I speak its echoing. Very distracting for a person with an auditory processing disorder.

Under *Hawaii Thousand Friends versus Honolulu*, the Korea's entire project, even the gate and fencing outside the SMA and including the demolition of the same will require a SMA permit because the overall project may have significant ecological or environmental impact on the special management area by analysis under PC Rule 9-10 (c) and (h). The department must assess the development as a whole and the assessment cannot be undertaken on a piecemeal basis. By the segmenting of the project in issuing an SMA minor permit without assessing the adverse environmental effects of the entire project, the Planning Department violated PC Rule 9-10 (c) and (h) and failed in their duty under the public trust doctrine.

Under Planning Commission Rules 9-11 assessment, if the Planning Director did not approve the assess—SMA use permit assessment application within sixty days – this is ridiculous – within sixty days of the last document being filed, they were to submit it to the Windward Planning Commission for their review. That didn't happen and the last document was submitted in August of 2021, so by September 2021, the Planning Department should have forwarded it on to the Windward Planning Commission. So, they violated that equitable estoppel or judicial estoppel applies.

Pursuant to the doctrine of judicial estoppel, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to or inconsistent with one previously assumed by him. At least where he had or was chargeable with full knowledge of the facts and another will be prejudice by their action, and I gave you the case for that.

This doctrine prevents the parties from playing fast and loose with the court or blowing hot and cold during the course of litigation. Claiming now that PL-SMM-2022-000016 was never intended to resolve NOVO but was only intended to address unpermitted development within the portion of the property that is in the SMA, is disingenuous.

The Director's memorandum states that—admits that the NOV has not been resolved and the letter that Alex Roy wrote on December 20th is inconsistent with the Director's memorandum because he states that due to the fact that you have resolved all violations within the SMA portion of the property, the County hereby acknowledges that the August 14th, is no longer necessary since the offending structures have been removed and the land returned to its natural state.

TAVARES: Thirty seconds.

ROHR: However, I'm asking for more time.

TAVARES: You've had six minutes already Ms. Rohr.

ROHR: It's echoing, it's very—.

TAVARES: That is because you have your earbuds in and you're the only speaker, so if you take it out then—.

ROHR: I can't hear myself then—.

TAVARES: Okay.

ROHR: The room dampens all the sound, and I couldn't speak—

TAVARES: I'm just trying to explain to you, you're the only one receiving the echo and it's because you have those earbuds in your ear. No one else is hearing the echo, I was just trying to help you.

ROHR: Considering that Alex Roy and the Director will derive an unfair advantage or impose an unfair detriment on me, the opposing party. If not, a stop from playing fast and loose using inconsistent positions judicial estoppel does apply.

There's twelve conditions of the SMM minor permit PL-SMM-2022-000016, all of which were put in place to make sure that the NOVO would be resolved. To say now that, that permit can just be withdrawn and oh gee we win. I'm sorry, but you heard today that we have been waiting a long time to deal with this issue and we feel that it should have gone to the Windward Planning Commission under the Planning Commission Rules 9-11 assessment. They can't hold onto a SMA permit use permit assessment application for two and a half years or—two years after they submitted their last document and the other thing is you have to realize that Planning Director and the Deputy Director are conflicted out and this is Alex Roy and April, working on their own. The charter does not approve—okay—Chapter 205A-29 says that the Planning Commission is to implement rules on SMA minor permits, and the Planning Commission Rules say that the Director has authority to approve an SMA permit. This SMA permit PL-SMM-2022-000016 is a complete fabrication by Alex Roy and April mistakenly signed it. Thank you.

AGUIAR: Thank you, Ms. Rohr, for your testimony. I do want to clarify something regarding the Board's jurisdiction and unfortunately, this Board does not have any jurisdiction over the Planning Commission's Rules or any of their rulings or the jurisdiction. And so, we are the Board of Appeals regarding the Planning Department or DPW's Directors' actions, but as for the Planning Commission, we have no jurisdiction over what they do and don't do. I just wanted to make that clarification.

ROHR: I don't know how that applies.

AGUIAR: So, at this—so at this time, I'm entertaining if any of the Board Members have any questions for either the department or Ms. Rohr, the appellant regarding this motion on the table.

TREFETHEN: Ms. Campbell, could you enlighten me a little bit about the difference between PL-SMA-2022-000016 and PL-SMA-2023-000016?

ROHR: Oh, that was my mistake.

TREFETHEN: As far as how it—

ROHR: I'm sorry.

TREFETHEN: So, it's just a typo.

ROHR: A typo—

TREFETHEN: Thank you.

AGUIAR: Any other Board Members have any questions? At this time, I'm entertaining a motion on this matter.

MARTIN: Madam Chair, based on the record on file on the motions presented to us today, I make a motion to grant the appellee's a motion to dismiss because the SMA permit is no longer required and therefore the appeal is a moot.

AGUIAR: Is there a second on that motion?

MCNAMARRA: I'll second it.

AGUIAR: So, we have a motion to grant the motion to dismiss and a second and any discussion by Board Members regarding this motion on the table? We're currently in discussion.

I think I only have one comment, which is—

ROHR: I'm sorry there's a discussion going on?

AGUIAR: I only have one comment regarding the motion on the table and it is unfortunate that it is not in our jurisdiction. I also, if I understand correctly, any further work or proceedings on the property would still have to go in—back in for whatever permits they would like to submit and at that time, it goes back in motion as to what is allowed and what is not allowed. Unfortunately, the Board of Appeals does not have any jurisdiction to rule on anything that is not really in existence right now, so that's my only comment.

Any other comments from the Board?

SAIKI: Noe Saiki, I wanted to add onto Chair Aguiar's thoughts on the matter. It is true that we are outside of the jurisdiction of making any, any decisions in this matter. I did want to mention that we are part of a huge system. There are other avenues to go in order to take care of this and we are one, but this is—at this point this is a matter that we cannot take care for you, but if you

continue to figure out, like come before the Planning Commission, continue to talk to people and come into these—give testimony when you can at other venues, it will help. That's—that's what I, that's all I have to say.

AGUIAR: Any other Board Members have any other discussion?

TREFETHEN: Scott Trefethen, Board Member. I just watched some gentlemen get up and leave.

ROHR: Use your mic, please.

TREFETHEN: I think that, I think that Ms. Saiki is correct, that this isn't the right venue to deal with this issue. This is an important issue, access to the beaches is very important to all of us. We need to protect that in the future. The information that's been brought, that I've seen today, a lot of energy was put into putting this together, taking time off work, coming in here to speak up. I appreciate you coming in here today to speak up. It's important, but this energy needs to be directed, so that beach access is protected. That was not done today. So, I'd like to see that done in the future, if possible. Thank you.

AGUIAR: Thank you, Board Member. Any other discussion by members? Seeing none. April, can we take a vote?

SURPRENANT: Yes. Ms. Saiki, oh I'm sorry, I went out of order.

MARTIN: Aye.

MCNAMARRA: Aye.

HENDERSON: Aye.

TREFETHEN: Aye.

SAIKI: Yes.

AGUIAR: Yes

SURPRENANT: Motion passes, six ayes.

AGUIAR: So, the motion to dismiss as submitted by the County passes. If I may ask the County, Ms. Campbell, if you can submit the order granting the motion to dismiss and distribute it.

CAMPBELL: Yes, I'll take care of that. Thank you.

AGUIAR: Thank you. I do thank you Ms. Rohr and Ms. Campbell for your time here in front of us.

This matter concluded at 10:33 a.m.

Respectfully submitted,

Ashley DeVera, Board Secretary