

NO. 29376

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

CHRISTOPHER J. YUEN, PLANNING  
DIRECTOR, COUNTY OF HAWAI'I

CIVIL NO. 07-1-0414

Plaintiff-Appellant,

APPEAL FROM JUDGMENT

vs.

FILED HEREIN ON AUGUST 29, 2008

BOARD OF APPEALS OF THE COUNTY  
OF HAWAI'I, VALTA COOK, in his  
capacity as Chairperson of the BOARD OF  
APPEALS OF THE COUNTY OF HAWAI'I  
and MARLENE E. CALVERT,

THIRD CIRCUIT COURT

Defendants-Appellees.

HONORABLE GREG NAKAMURA

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**APPELLEES BOARD OF APPEALS OF THE COUNTY OF HAWAI'I AND VALTA  
COOK, IN HIS CAPACITY AS CHAIRPERSON OF THE BOARD OF APPEALS OF  
THE COUNTY OF HAWAI'I'S ANSWERING BRIEF**

**STATEMENT OF RELATED CASES**

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COUNTY OF HAWAI'I

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COOK, IN HIS CAPACITY AS CHAIRPERSON OF THE BOARD OF APPEALS OF  
THE COUNTY OF HAWAI'I'S ANSWERING BRIEF**

Appellees BOARD OF APPEALS OF THE COUNTY OF HAWAI'I and VALTA COOK, in his capacity as Chairperson of the BOARD OF APPEALS OF THE COUNTY OF HAWAI'I (hereinafter "Appellees"), by and through their undersigned counsel, respectfully submits this Answering Brief in response to Appellant Christopher J. Yuen, Planning Director, County of Hawai'i's Opening Brief filed December 30, 2008 (hereinafter "Opening Brief").

**I. STATEMENT OF THE CASE**

**A. Factual Background**

**1. The Property and Application for Water Variance**

In 1978, Defendant-Appellee, Marlene E. Calvert (hereinafter "Calvert") and her husband purchased 480 acres of land located in the Ka'u district. Record on Appeal (hereinafter "ROA") at 00495. Calvert and her husband intended to subdivide the land and sell the lots to the public in three separate phases, ultimately using the proceeds to fund their retirement. *Id.*

The first two phases of the project, collectively named "Kahuku Country Estates," were completed between 1982 and 1989. *Id.* During these phases, Calvert and her husband applied

for, and received, water variances from the County of Hawai'i Planning Department (hereinafter "Planning Department"). *Id.* Each phase consisted of two 21-acre parcels that were subdivided into fourteen 3-acre parcels. Calvert and her husband successfully marketed and sold all of the available lots. ROA at 00885.

In order to begin development of phase III of Kahuku Country Estates Subdivision, as they did with the first two phases, Calvert filed an Application for Variance (hereinafter "Variance Application" or "Application") from Chapter 23 of the Hawai'i County Code (hereinafter "HCC") on June 8, 2005. Calvert planned to subdivide two 21-acre lots—identified as TMKs (3) 9-2-150:13 and 18 (hereinafter, collectively, the "Property")—into fourteen 3-acre lots, with domestic water being supplied by catchment tanks. ROA at 00885-86.

Calvert's Variance Application was received by the Kona office of the Planning Department on June 9, 2005. Calvert's Variance Application was marked as received in the Hilo office of the Planning Department on June 16, 2005. ROA at 00149.

Receipt of a Variance Application is important because HCC §23-18, and Rule 6-7(a) of the Planning Department's Rules of Practice and Procedure (hereinafter "Rule 6-7") require the Planning Director (hereinafter "Director") to deny the application or approve it subject to conditions, within sixty (60) days after filing the application, unless a longer period is agreed upon by the applicant. If the Director fails to act within the prescribed period, the application shall be deemed approved. See HCC §23-18; Rule 6-7(c), Planning Department's Rules of Practice and Procedure.

On the other hand, Hawai'i Revised Statutes (hereinafter "HRS") §91-13.5<sup>1</sup> provides for

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<sup>1</sup> HRS 91-13.5 provides in pertinent part:

**91-13.5. Maximum time period for business or development-related permits, licenses, or approvals; automatic approval; extensions**

(a) Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval; provided that the application is not subject to state administered permit programs delegated, authorized, or approved under federal law.

\* \* \* \* \*

(c) All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved; provided that a delay in granting or

automatic approval of business or development-related permits where the permitting agency has failed to meet its own deadlines in approving or denying such an application. There are two separate definitions of what constitutes an “application for business or development-related permit, license, or approval” under HRS §91-13.5(g). The first definition is “any state or county application, petition, permit, license, certificate, or any other form of request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise.” The second definition is “any permit license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P. See HRS §91-13.5(g).

In a letter dated August 11, 2005, the Director acknowledged receipt of the Variance Application and instead of approving or denying the application, the Director stated that he would “render a decision on the subject variance on or after September 5, 2005, but no later than October 4, 2005.” ROA at 00205-00207. No request for an extension of time was made by the Director or agreed upon by the applicant. *Id.*

## **2. Denial of the Variance Application**

A decision denying the Variance Application was not issued until October 5, 2005. Although that denial letter was dated September 29, 2005, the Planning Department’s date-stamp on the letter and postmark on the envelope, indicate that the letter was not mailed until October

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denying an application caused by the lack of quorum at a regular meeting of the issuing agency shall not result in approval under this subsection; provided further that any subsequent lack of quorum at a regular meeting of the issuing agency that delays the same matter shall not give cause for further extension, unless an extension is agreed to by all parties.

\* \* \* \*

(g) For purposes of this section, "application for a business or development-related permit, license, or approval" means any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46- 4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.

\* \* \* \*

5, 2005. ROA at 00237-00243. The Director's decision was fifty-eight (58) days late.

**B. Procedural History**

**1. Board of Appeals No. 05-014**

Calvert received the Director's denial letter on or about October 6, 2005, and filed a timely appeal to the County of Hawai'i, Board of Appeals (hereinafter "BOA") on October 28, 2005. ROA at 00001-00133. The BOA held a contested case hearing in the matter on March 10, 2006.

After the March 10, 2006 hearing on the matter, the BOA reversed the Director's denial of the Variance Application and filed its Findings of Fact, Conclusions of Law, Decision and Order on May 17, 2006. ROA: 00494-00506. The BOA concluded that, pursuant to HRS § 91-13.5, the Variance Application was automatically approved because the Director's decision was not made within sixty days from August 8, 2005. ROA at 00505. The BOA's Decision and Order states that:

“. . .the Board hereby orders and reverses the Planning Deirector's decision to deny the Calvert water Variance Application, VAR 05-056, and hereby approves the water variance for all 14 proposed 3-acre lots.

Pursuant to Hawai'i Revised Statues 91-13.5, the Board hereby finds that the Calvert water variance application was deemed automatically approved as of August 8, 2005. The Director's decision letter dated September 29, 2005, and served October 5, 2005, was a violation of applicable state law.

ROA at 00494-00506.

**2. Civil No. 06-1-0184**

On June 14, 2006, the Director appealed the BOA's decision to the Circuit Court of the Third Circuit (hereinafter "Circuit Court") in Civil No. 06-1-0184, asserting, *inter alia*, that the BOA exceeded its statutory authority or was clearly erroneous in reversing the Director's decision by finding that the variance Application was automatically approved because this was contrary to the Hawai'i County Subdivision Code. ROA at 00523-00544.

The BOA and Calvert asserted, *inter alia*, that the Planning Department is an agency as defined by HRS § 91-1 and therefore HRS § 91-13.5 applies to Calvert's Variance Application because it is a business development or development related permit application, and it is a permit required under agency rules authorized by HRS § 46-4. ROA at 554-555.

Oral arguments were held on January 5, 2007. Upon completion of the hearing, the



Circuit Court reversed the BOA's decision and remanded the matter to the BOA for further proceedings consistent with the Court's Decision and Order.

The Circuit Court agreed with the BOA and Calvert's position that the Planning Director was an "agency" falling within the meaning of HRS § 91-1(1), and was therefore an "agency" for the purpose of HRS § 91-13.5. ROA at 00557-00558. However, the Circuit Court concluded that the statutory authority for the County Subdivision Code was not HRS § 46-4, but instead HRS § 46-1.5(13). ROA at 00558-00559.

Accordingly, the court found that the Variance Application did not fall within the second definition of HRS § 91-13.5(g) because it was not an application for a form of approval required under HRS §§46-4 and 46-5. *Id.* However, since the BOA did not decide the issue of whether the Variance Application fit within the first definition of HRS § 91-13.5(g) as a "state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise," the Circuit Court reversed the Board's May 17, 2006 Decision and Order and remanded the matter to the BOA for further action consistent with its decision. ROA at 00561.

### **3. Board of Appeals No. 05-014 on remand**

On remand from the Circuit Court, the BOA conducted a pre-hearing conference via telephone on June 18, 2007, and a briefing schedule was established to address the remaining issues pending before the BOA. ROA at 00706. On June 19, 2007, the BOA informed the parties via letter that the primary remaining issues were as follows:

- (1) Is the variance request a business related permit within the meaning of Section 91-13.5, Hawai'i Revised Statutes?
- (2) Does Section 23-18 of the Hawai'i County Code providing for an automatic denial apply? If so, what are the implications for the Board's consideration of the substantive issues? This topic includes due process and notice requirements as well as tolling issues.
- (3) If needed, the Board considering the substantive merits of the case.

ROA at 00706.

On September 14, 2007, a hearing was held on the three issues set forth by the BOA. ROA at 00808-00809. At the conclusion of the hearing, the BOA reversed the Director's

decision and granted Calvert's appeal. ROA at 00808-00809, 00812. On November 9, 2007, the BOA adopted its Findings of Fact, Conclusions of Law, and Decision and Order (hereinafter "Order"). The Order was filed on November 19, 2007, and stated the following basis for the BOA's decision:

In its meeting on September 14, 2007, the Board granted the appeal on the grounds that the Planning Director's decision was late and therefore automatically approved, as this was an application required for the expansion of a commercial enterprise as specified in HRS Section 91-13.5 (c), and in the alternative, that the decision denying the variance was arbitrary and capricious in that it failed to consider other relevant factors including the size of the catchment system, storage capacity and monthly rainfall data.

ROA at 00898.

**4. Civil No. 07-1-0414**

On December 18, 2007, the Director filed a Notice of Appeal to the Circuit Court from the BOA's decision in BOA No. 05-000014. See Index to Record on Appeal filed November 24, 2008 (hereinafter referred to as "IROA") at pp. 2-47. The Circuit Court heard oral arguments on the matter on May 2, 2008.

Upon completion of the hearing, the Circuit Court affirmed the BOA's decision and made the following relevant Findings of Fact and Conclusions of Law:

Findings of Fact

34. (k) Mrs. Calvert's application to subdivide two 21-acre tracts of land into 14 separate 3-acre parcels with the intent of selling the 3-acre [*sic*] parcels to the public is part of a commercial enterprise.
- (l) It is not economically feasible for Mrs. Calvert to develop a water system which meets County standards as a prerequisite to subdividing two 21-acre tracts into 14 separate parcels.
- (m) Mrs. Calvert has already engaged in commercial activity by developing the first two phases of the Kahuku Country Estates Subdivision.
- (n) Mrs. Calvert's current application for a water variance is to expand the commercial enterprise known as the Kahuku Country Estates Subdivision by developing another phase of the subdivision.
- (o) Mrs. Calvert will not be legally permitted to expand the commercial enterprise known as Kahuku Country Estates unless the water variance is

approved by the Planning Department.

(p). An application for a water variance is a county application for an approval required by law before Mrs. Calvert can expand the commercial enterprise known as Kahuku Country Estates Subdivision.

(q). Mrs. Calvert's application for a water variance being reviewed by the Board is an application for an approval required by law before Mrs. Calvert can expand a commercial enterprise.

(r). The application for a water variance at issue is an "application for a business or development-related permit, license, or approval" as defined in HRS 91-13.5.

(s). In HCC 23-18, the Planning Director established a 60 day time period beginning on the date an application is filed in which to make a decision to approve or deny the variance application.

(t). The Planning Director did not issue a decision to grant or deny the subject variance application within 60 days of receiving the application.

(u). By action of law under HRS § 91-13.5, Mrs. Calvert's Variance Application was deemed to be approved when the Planning Director failed to make a decision to grant or deny the application within 60 days of receiving the application.

35. Because the Board concluded that the Variance Application was automatically approved, the Board rejected the Planning Director's argument that the application was automatically denied pursuant to HCC § 23-18. HRS § 91-13.5 covers the same subject area as HCC § 23-18. If the two provisions are inconsistent, the State statute preempts the County Code.

36. The Board also found that Mrs. Calvert's Variance Application meets the criteria stated in HCC § 23-15 for issuance of a variance and that the Planning Director's Decision denying the Variance Application was arbitrary, capricious, and marked by an abuse of discretion or clearly unwarranted exercise of discretion.

IROA at 261-262.

#### Conclusions of Law

1. The Planning Director is an agency for purposes of HRS § 91-13.5.
2. The Variance Application at issue in this appeal is a county application for approval required by law to be obtained before the formation, operation or expansion of a commercial enterprise under HRS § 91-13.5.

3. The primary dispute in this case is whether HRS § 91-13.5 (2005) applies so as to automatically grant a variance from the water supply requirements under the Subdivision Code of the County of Hawai‘i Code (the “Subdivision Code”).

HRS § 91-13.5 (2005) states that:

(a) Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval; provided that the application is not subject to state administered permit programs delegated, authorized, or approved under federal law.

\* \* \* \*

(c) All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved: provided that a delay in granting or denying an application caused by the lack of quorum at a regular meeting of the issuing agency shall not result in approval under this subsection; provided further that any subsequent lack of quorum at a regular meeting of the issuing agency that delays the same matter shall not give cause for further extension, unless an extension is agreed to by all parties.

\* \* \* \*

(g) For purposes of this section, “application for a business or development-related permit, license, or approval” means any state or county application, petition, permit, license, certificate, or any form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.

4. In determining whether HRS § 91-13.5(a) applies, the first question is whether the Planning Director’s determination in this case constitutes an action by any “agency.” Under HRS § 91-1(1), an “‘agency’ means each state or county board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.” Rule 2 of the County of Hawai‘i’s Planning Department Rules of Practice and Procedure (“Planning Department Rules”) gives the Planning Director the power to make rules. Therefore, the Planning Director is an “agency” for the purpose of HRS § 91-13.5 (2005).

5. The next question is whether the application for a variance constituted an “application for a business or development-related permit, license, or approval” for the purpose

of HRS § 91-13.5 (2005). The Court determines that the mixed findings of fact and conclusions of law or conclusions of law that support the view the Calvert Variance Application was an “application for a business or development-related permit, license, or approval” as defined under HRS § 91-13.5(g) were not clearly erroneous nor did they constitute errors of law. This is because the Calvert Variance Application was a “county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise.”

6. Mrs. Clavert’s plan is to subdivide two 21-acre parcels into 14 separate 3-acre parcels and sell the parcels for profit. The plan to subdivide and sell subdivided lots is a commercial enterprise. The Variance Application is part of that plan.

7. Moreover, in most contexts, subdivision of land is a commercial enterprise. This is recognized in the Subdivision Control Code of the Hawai‘i County Code itself. The Subdivision Code states that “subdivided land”:

Means improved or unimproved land or lands divided into two or more lots, parcels, sites, or other divisions of land **for the purpose, whether immediate or future, of sale, lease, rental, transfer of title to or interest in, any or all such parcels, includes re-subdivision, \*\*\*.**

Hawai‘i County Code, 23-3(31).

8. The decision is affirmed on the ground that the Planning Director’s denial of the Calvert Variance Application was issued after the 60-day period for action on the application had expired and that, as a result, the application was automatically granted pursuant to HRS § 91-13.5.

9. Because of this Court’s conclusion that the Variance Application was approved as a matter of law on August 8, 2005, the Court does not reach the other leases considered by the Board of Appeals in its Decision and Order filed November 19, 2007.

10. Based on the foregoing, the Board of Appeals’ Decision and Order is affirmed.

IROA at 264-265. This appeal followed.

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## II. STANDARD OF REVIEW

### A. Secondary Appeal

The review of a decision made by the circuit court upon its review of an agency’s decision is a secondary appeal. *Citizens Against Reckless Development v. Zoning Bd. of Appeals of City and County of Honolulu, et. al.*, 114 Haw. 184, 159 P.3d 143 (2007). The standard of review in a secondary appeal is whether the circuit court was right or wrong in its decision, apply the standards set forth in HRS §91-14(g) to the agency’s decision. *Id.* at 193, 159 P.3d at 152 (citations omitted).

HRS § 91-14(g) provides in relevant part:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"[U]nder HRS §91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." *Id.* (citations omitted).

“ ‘An agency's findings are not clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence unless the reviewing court is left with a firm and definite conviction that a mistake has been made.’ ” *Poe v. Hawaii Labor Relations Bd.*, 105 Hawai‘i 97, 100, 94 P.3d 652, 655 (2004) (quoting *Kilauea Neighborhood Ass'n v. Land Use Comm'n*, 7 Haw.App. 227, 229-30, 751 P.2d 1031, 1034 (1988)). “ ‘[T]he courts may freely review an agency's conclusions of law.’ ” *Lanai Co., Inc. v. Land Use Comm'n*, 105 Haw. 296, 307, 97 P.3d 372, 383 (2004) (quoting *Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990) (other citation omitted)).

#### **B. Statutory Construction**

Statutory interpretation is "a question of law reviewable de novo." *State v. Levi*. 102 Haw. 282, 285, 75 P.3d 1173, 1176 (2003) (quoting *State v. Arceo*, 84 Hawai‘i 1, 10, 928 P.2d 843, 852 (1996)). In *Peterson v. Hawai‘i Elec. Light Co., Inc.*, 85 Hawai‘i 322, 944 P.2d 1265 (1997), the Hawai‘i Supreme Court stated that: “[t]he fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the

statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. *Id.* at 327-28, 944 P.2d 1270-71, *superseded on other grounds by* HRS § 269-15.5 (Supp.1999) (block quotation format, brackets, citations, and quotation marks omitted).

### III. ARGUMENT

#### A. The Circuit Court Correctly Affirmed The Board of Appeal's Decision that the Water Variance Application is Governed by the Automatic Approval Provision of HRS § 91-13.5.

The central issue in this case is whether Calvert's Variance Application was automatically approved when the Planning Director failed to take action within the requisite time period it adopted for itself. HRS § 91-13.5(c) provides:

All such issuing agencies shall take action to grant or deny *any application for a business or development-related permit, license or approval* within the established maximum period of time, or the application shall be deemed approved...

[Emphasis added.]

Appellant asserts that the automatic approval provision of HRS § 91-13.5 does not apply because an application for a variance from the County Subdivision Code is not a County application required by law prior to the formation, operation, or expansion of a commercial or industrial enterprise. Opening Brief ("OB") at 13-14.

#### 1. **The Variance request is "required by law to be obtained prior to the formation, operation, or expansion of a commercial enterprise".**

HRS § 91-13.5 provides in pertinent part:

**Maximum time period for business or development-related permits, licenses, or approvals; automatic approval; extensions.**

(a) Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval; provided that the application is not subject to state administered permit programs delegated, authorized, or approved under federal law.

(b) All such issuing agencies shall clearly articulate informational requirements for applications and review applications for completeness in a timely manner.

(c) All such issuing agencies shall take action to grant or deny *any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved*; provided that a

delay in granting or denying an application caused by the lack of quorum at a regular meeting of the issuing agency shall not result in approval under this subsection; provided further that any subsequent lack of quorum at a regular meeting of the issuing agency that delays the same matter shall not give cause for further extension, unless an extension is agreed to by all parties.

(d) Notwithstanding any other law to the contrary, any agency that reviews and comments upon an application for a business or development-related permit, license, or approval for a housing project developed under section 201H-38 shall respond within forty-five days of receipt of the application, or the application shall be deemed acceptable as submitted to the agency.

(e) The maximum period of time established pursuant to this section shall be extended in the event of a national disaster, state emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements.

(f) This section shall not apply to:

- (1) Any proceedings of the public utilities commission; or
- (2) Any county or county agency that is exempted by county ordinance from this section.

(g) For purposes of this section, “application for a business or development-related permit, license, or approval” means any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.

(Emphasis added.)

Appellant’s argument that a variance application is not the type of approval subject to the automatic approval provision of HRS § 91-13.5 is misplaced. HRS § 91-13.5(g) specifically defines the approvals or permits that require automatic approval: (a) any “state or county application, petition, permit, license, certificate, or any other form of a request for approval ***required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise,***” or (b) “any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.”

(Emphasis added.)



In its prior reversal of the BOA's decision, the Circuit Court held that the statutory authority for the counties' subdivision codes derives from HRS § 46-1.5(13) and, accordingly, that the Variance Application does not fall within the second category of permits, licenses, certificates, or approvals as set forth in (b) above. *See* ROA at 00561.

In its July 31, 2008 Decision and Order, the Circuit Court affirmed that the BOA decision was not clearly erroneous nor constituted errors of law when it found that the Calvert's Water Variance application fell under the first category –a “county application, petition, permit, license, certificate, or any other form of request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise”. ROA at 264.

The Circuit Court correctly affirmed the BOA's decision because Calvert's primary purpose for subdividing the Property is to offer the lots for sale to the public and to ultimately generate a profit. Central to the court's decision was the fact that this was a commercial enterprise as evident by the following relevant Findings of Fact and Conclusions of Law:

Findings of Fact

34. (k) Mrs. Calvert's application to subdivide two 21-acre tracts of land into 14 separate 3-acre parcels with the intent of selling the 3-acre [*sic*] parcels to the public is part of a commercial enterprise.

(l). It is not economically feasible for Mrs. Calvert to develop a water system which meets County standards as a prerequisite to subdividing two 21-acre tracts into 14 separate parcels.

(m). Mrs. Calvert has already engaged in commercial activity by developing the first two phases of the Kahuku Country Estates Subdivision.

(n). Mrs. Calvert's current application for a water variance is to expand the commercial enterprise known as the Kahuku Country Estates Subdivision by developing another phase of the subdivision.

IROA at 261-262.

However, without the variance approval, Calvert would not be able to proceed with developing the property or “expanding a commercial enterprise.” She would not be able to develop because of the prohibitive cost of installing a water system approved by the Department of Water Supply. The Circuit Court found that:

Findings of Fact

34. (o). Mrs. Calvert will not be legally permitted to expand the commercial

enterprise known as Kahuku Country Estates unless the water variance is approved by the Planning Department.

(p). An application for a water variance is a county application for an approval required by law before Mrs. Calvert can expand the commercial enterprise known as Kahuku Country Estates Subdivision.

(q). Mrs. Calvert's application for a water variance being reviewed by the Board is an application for an approval required by law before Mrs. Calvert can expand a commercial enterprise.

(r). The application for a water variance at issue is an "application for a business or development-related permit, license, or approval" as defined in HRS 91-13.5.

IROA at 262.

The Variance Application in this instance is clearly "required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise" as provided in HRS § 91-13.5.

Appellant asserts that HRS § 91-13.5 does not apply to approval under counties' subdivision approvals (and variances thereto) because HRS § 46-1.5(13) is not one of the statutory sections referenced in HRS § 91-13.5. OB at 14-15. However there is no indication that the statute was written to limit its scope to certain types of permits. As stated above, the definition for "application for a business or development-related permit, license, or approval" sets forth two different types of approvals. Appellant appears to be referring to the second definition within HRS § 91-13.5(g) where specific statutory references are made. However, this second definition is not an issue in this case. The Circuit Court's decision below focused upon the BOA's finding that the first definition applied in the instant case.

Appellant also asserts that applying HRS § 91-13.5 to a Variance from the water requirements of the County's subdivision code would produce an absurd result. OB at 16-17. He states that requiring automatic approval would create even more substandard subdivisions in Hawai'i County, and would be automatically approved without regard to whether the variance meets the ground for variances in § 23-5 of the Subdivision Code or whether it is consistent with the County's General Plan. *Id.*

Appellant argument misses the primary purpose of HRS § 91-13.5 – to effectuate uniform changes to the State-wide regulatory process and to ensure that government agencies

establish and adhere to maximum time periods for review and approval of all business and development related permit approvals.

**2. The Legislative History of HRS § 91-13.5 support automatic approval in this case.**

The legislative history of HRS § 91-13.5 strongly suggests that the primary purpose in enacting the section was to effectuate uniform, broad, and wide-reaching changes in the State-wide regulatory processes. For instance, the Hawai'i Senate Conference Committee Report for S.B. 2204 (hereinafter "Conference Report"), the precursor to HRS § 91-13.5, provides:

The purpose of this bill is to improve the regulatory process by requiring government agencies to establish and adhere to maximum time periods for review and approval of all business and development related permit approvals and licenses . . .

S. Conf. Comm. Rep. No. 143, 19<sup>th</sup> Leg., 1998 Reg. Sess., Haw. S.J. (1998), *reprinted in* Haw. Sess. Laws 613.

More importantly, the Conference Report additionally states:

Your Committee on Conference finds that the Department of the Attorney General expressed its concerns about the vagueness of certain terms and the possible constitutionality and conflict problems the bill would pose as drafted . . . ***Accordingly, your Committee amended S.B. No. 2204, S.D. 2, H.D. 2, by . . . defining the term "application for a business or development-related permit, license, or approval[.]"***

*Id.* The above quotation indicates that S.B. 2204 did not include *any* definition of "application for a business or development-related permit, license, or approval" throughout the entire *first three readings* of the Bill. The testimony provided by the Department of the Attorney General appears to be the sole reason as to why a definition was included at all. In other words, there is no indication as to the level of discussion, if any, that occurred regarding the language that was ultimately included—and excluded—from the final definition of "business or development-related permits, licenses, or approvals."

In fact, if the oral testimony of some of the legislators is considered, it appears likely that at least some supporters encouraged a broad application of S.B. 2204, envisioning benefits not only for corporate entities, but individuals as well. For instance, Senator Norman Sakamoto testified in support of S.B. 2204, and noted:

[If] we want to create a business-friendly Hawai'i where people and the land prosper, then we must go much farther . . . *We know we must allow and encourage entrepreneurs and self-employment.*

S.B. 2204, 19<sup>th</sup> Leg., Reg. Sess. (1998), *reprinted in* Haw. Sess. Laws 613 (emphasis added).

Based upon the foregoing, the legislative history of HRS § 91-13.5 supports the Circuit Court's decision that automatic approval applies to Calvert's water Variance Application.

**3. HCC § 23-18 is preempted by HRS § 91-13.5.**

HRS § 46-1.5(13) provides, in relevant part:

Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State.

Additionally, HCC § 23-18 states:

The director shall, within sixty days after the filing of a proper application or within a longer period as may be agreed to by the applicant, deny the application or approve it subject to conditions. The conditions imposed by the director shall bear a reasonable relationship to the variance granted. All actions shall contain a statement of the factual findings supporting the decision. If the director fails to act within the prescribed period, the application shall be considered as having been denied. Such denial is appealable pursuant to section 23-[5] of this division.

In *Richardson v. City & County of Honolulu*, 76 Hawai'i 46, 49, 868 P.2d 1193, 1196 (1994), the Hawai'i Supreme Court opined that a municipal ordinance may be preempted pursuant to HRS § 46-1.5(13) if "(1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law...A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication."

Within this framework, HCC § 23-18 does not govern the water variance application in this instance, because HCC § 23-18 is preempted by HRS § 91-13.5. First, HRS § 91-13.5 "covers the same subject matter embraced within a comprehensive state statutory scheme

disclosing an express or implied intent to be exclusive and uniform throughout the state.” *See id.* The legislative history for HRS § 91-13.5 clearly demonstrates that the legislature intended it to apply in an “exclusive and uniform” manner throughout the State. This is evidenced by language in the Section’s enabling legislation, such as the following: “the State’s intent to improve the *overall* regulatory climate” and “the legislature recognizes the need to . . . improve *Hawai‘i’s* business climate.” Act 164, Section 2, 19<sup>th</sup> Leg., Reg. Sess. (1998), *reprinted in* Haw. Sess. Laws 613 (emphasis added).


Second, HCC § 23-18 conflicts with HRS § 91-13.5 because it “directly contradicts an area occupied by general law, either expressly or by legislative implication”—in this case, HRS § 91-13.5. Specifically, HCC § 23-18 provides for the automatic *denial* of a variance application if an agency fails to act within the required time period; HRS § 91-13.5 conversely allows for automatic *approval* in the same scenario. As a final consideration, allowing a county to exempt itself from the automatic approval requirements would appear to expressly conflict with the primary purpose in enacting HRS § 91-13.5: to improve the *overall* regulatory climate throughout the entire *State*.

#### IV. CONCLUSION

Based on the foregoing, Appellees BOARD OF APPEALS OF THE COUNTY OF HAWAI‘I, and VALTA COOK, in his capacity as Chairperson of the BOARD OF APPEALS OF THE COUNTY OF HAWAI‘I, respectfully request that this Court affirm the Circuit Court’s Findings of Fact, Conclusions of Law, and Decision and Order Affirming the Board of Appeals of the County of Hawai‘i’s Decision and Order filed November 19, 2007, filed July 31, 2008.

Dated: Hilo, Hawai‘i, February 9, 2009.

BOARD OF APPEALS OF THE COUNTY OF  
HAWAI‘I, and VALTA COOK, in his capacity as  
Chairperson of the BOARD OF APPEALS OF  
THE COUNTY OF HAWAI‘I,  
Appellees

By   
RENEE N.C. SCHOEN  
Deputy Corporation Counsel  
Their Attorney

NO. 29376

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

CHRISTOPHER J. YUEN, PLANNING  
DIRECTOR, COUNTY OF HAWAI'I

Plaintiff-Appellant,

vs.

BOARD OF APPEALS OF THE COUNTY  
OF HAWAI'I, VALTA COOK, in his  
capacity as Chairperson of the BOARD OF  
APPEALS OF THE COUNTY OF HAWAI'I  
and MARLENE E. CALVERT,

Defendants-Appellees.

CIVIL NO. 07-1-0414

APPEAL FROM JUDGMENT  
FILED HEREIN ON AUGUST 29, 2008

THIRD CIRCUIT COURT

HONORABLE GREG NAKAMURA

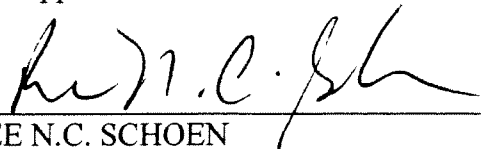
**STATEMENT OF RELATED CASES**

Defendant-Appellees BOARD OF APPEALS OF THE COUNTY OF HAWAI'I and VALTA COOK, in his capacity as Chairperson of the BOARD OF APPEALS OF THE COUNTY OF HAWAI'I are unaware of any related cases known to be pending in the Hawai'i courts or agencies.

Dated: Hilo, Hawai'i, February 9, 2009.

BOARD OF APPEALS OF THE COUNTY OF  
HAWAI'I, VALTA COOK, in his capacity as  
Chairperson of the BOARD OF APPEALS OF  
THE COUNTY OF HAWAI'I,  
Defendant-Appellees

By

  
RENEE N.C. SCHOEN  
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HONORABLE GREG NAKAMURA

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 9, 2009, two (2) copies of the foregoing  
document was served upon the following in the manner indicated below:

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