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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

KAMAKANI ‘O KOHALA ‘OHANA,) CIVIL NO. _____
) (Agency Appeal)
Appellant,)
) STATEMENT OF THE CASE
vs.)
)
HAWAII COUNTY BOARD OF APPEALS,)
DARYN ARAI in his official capacity as)
Hawai`i County Planning Director and)
KOHALA PRESERVE CONSERVATION)
TRUST LLC,)
)
Appellees.)
)
)
_____)

STATEMENT OF THE CASE

Pursuant to Rule 72(e) of the Hawai`i Rules of Civil Procedure, Appellant KAMAKANI ‘O KOHALA ‘OHANA (“KAKO’O”), by and through its undersigned attorney, makes the following statement of the case.

INTRODUCTION

1. Appellant brings this appeal to challenge the decisions of the Hawai`i County Board of Appeals to (a) deny Appellant the right to intervene in the proceeding brought before the Board of Appeals by the landowner/developer Kohala Preserve Conservation Trust, LLC and (b) automatically approve the developer's preliminary plat map and subdivision. The approval affects the area around Mahukona Harbor in North Kohala.

PARTIES

2. Appellant KAKO'O is a federally registered 501(c)3 non-profit community organization whose mailing address is P.O. Box 76, Hawi HI 96719. The organization was formed in October 1995 by the merging of several North Kohala community groups dedicated to preservation of natural resources of North Kohala including preservation of historic sites, coastal and mountain access, clean air, water and ocean as well as sustainable development. The largest group in the merging was Hui Lihikai -- Citizens for Protection of the North Kohala Coastline (CPNKC) with 400 member families.

3. Appellee County of Hawai`i Board of Appeals is an agency of Hawai`i County, which has been delegated the responsibility to hear and determine appeals from the "final decisions" of the planning director, pursuant to sections 6-10.2 of the Hawai`i County Charter.

4. Appellee Daryn Arai is the Interim Planning Director for Hawai`i County.

5. Kohala Preserve Conservation Trust, LLC is the landowner of TMKs 5-7-002:011, 5-7-003: 003 & 010. It is the successor to Chalon International of Hawai`i Inc. and Surety Kohala.

STANDING

6. In its Petition for Intervention, KAKO'O pointed out that "[m]embers of KAKO'O are users of the parks, of the harbor, of the tightly controlled pedestrian coastal trail. They are practitioners of Hawaiian traditional culture and have special knowledge of the historic and cultural sites on the land. Our members will be affected by the decision of the Board of Appeals as it will directly impact our use and enjoyment of the most popular ocean access area of our 29-mile coastline. Members of KAKO'O include experts in the fields of Hawaiian history and culture, reef and near shore water quality preservation, recreational activities and opportunities of North Kohala."

7. KAKO'O also pointed out that it is the successor to Citizens for the Protection of the North Kohala Coastline, whose interests were recognized by the Hawai'i Supreme Court in *Citizens for the Protection of the N. Kohala Coastline v. County of Hawaii*, 91 Hawai'i 94, 979 P.2d 1120 (1999) – a case involving the same parcels of land.

JURISDICTION

8. The Circuit Court has jurisdiction over this appeal pursuant to HRS § 91-14 which provides in pertinent part:

Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review under this chapter.

9. Appellant is entitled, pursuant to HRS § 91-14 to judicial review of the January 16, 2009 decisions of the Board of Appeals to (a) deny Appellant the right to intervene in the proceeding brought before the Board of Appeals by the landowner/developer Kohala Preserve

Conservation Trust, LLC and (b) automatically approve the developer's preliminary plat map and subdivision.

10. If necessary, this Statement of the Case may also be construed as an original complaint pursuant to Rules 1, 8(a) and 8(e), Hawai'i Rules of Civil Procedure; *See also, Life of the Land v. Land Use Comm'n*, 58 Haw. 292, 295, 568 P.2d 1189, 1192 (1977); HRS §§ 603-21.5, 632-1, and Article XI § 9 and Article XII § 7 of the Constitution of the State of Hawai'i.

11. Appellant is also filing concurrently a separate complaint pursuant to HRS §§ 603-21.5, 632-1, Articles XI § 9 and Article XII § 7 of the Constitution of the State of Hawai'i.

GENERAL FACTUAL ALLEGATIONS

12. In July 1999, the Hawai'i Supreme Court issued its decision in *Citizens for the Protection of the N. Kohala Coastline v. County of Hawaii*, 91 Hawai'i 94, 979 P.2d 1120 regarding a proposed development at Mahukona.

13. Kohala Preserve Conservation Trust, LLC the current owner of TMKs (3) 5-7-2:11 and 5-7-3:3 & 10 located in Mahukona, North Kohala, applied for tentative approval of its preliminary plat map and subdivision plans in early March 2008

14. Christopher Yuen, the planning director at that time, on March 31 and April 15 pointed out problems with the developer's application and the need for additional information.

15. On July 3, 2008, Christopher Yuen, the planning director at that time, wrote a letter to Kohala Preserve Conservation Trust, LLC deferring further action on the application for proposed subdivision and approval of preliminary plat map.

16. Subsequently, Kohala Preserve Conservation Trust, LLC appealed the planning director's July 3 decision to defer decision making on Kohala Preserve Conservation Trust, LLC's application and preliminary plat map.

17. On September 30, 2008, KAKO'O filed its petition to intervene in Kohala Preserve Conservation Trust, LLC's appeal before the County of Hawai'i Board of Appeals.

18. On January 16, 2009, the Board of Appeals summarily denied Appellant's petition to intervene in the contested case hearing concerning Kohala Preserve Conservation Trust LLC's appeal and granted automatic approval of Kohala Preserve Conservation Trust LLC's preliminary plat map and subdivision.

CLAIM FOR RELIEF

COUNT 1

(Board of Appeals Erred in Denying the Request for Intervention)

19. Appellant realleges and incorporates by reference the above paragraphs.

20. Board of Appeals Rules of Practice and Procedure Rule 2-7 provides that "any person . . . who can demonstrate that the 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."

21. The Board of Appeals' denial of the request for intervention was improper.

COUNT 2

(Board of Appeals Lacked Jurisdiction to Automatically Approve Subdivision)

22. Appellant realleges and incorporates by reference the above paragraphs.

23. Hawai'i County Charter Section 6-10.2 limits the jurisdiction of the Board of Appeals to "hear and determine appeals from final decisions of the planning director."

24. The Planning Director's July 3, 2008 letter does not by its plain terms constitute a "final decision."

25. Non-action or a non-decision prior to July 3, 2008 is not a "decision."

26. The planning director has exclusive jurisdiction to approve subdivision applications. HCC § 23-2.

27. The Board of Appeals lacked jurisdiction to hear Kohala Preserve Conservation Trust, LLC's appeal and to summarily approve the developer's preliminary plat map and subdivision through default.

COUNT 3

(Board of Appeals Decision Violated Obligation to Protect Traditional and Customary Practices)

28. Appellant realleges and incorporates by reference the above paragraphs.

29. The County and its agencies are obligated to protect traditional and customary practices.

30. In order to protect these practices, the County must first investigate the extent to which traditional and customary native Hawaiian rights are exercised in the area proposed to be subdivided and developed. It must then determine how those rights will be affected by the development and take action to protect those rights.

31. The Board of Appeals failed to fulfill its constitutional, statutory, general plan and development plan obligations to protect traditional and customary practices.

COUNT 4

(Board of Appeals Decision Violated HRS Chapter 343)

32. Appellant realleges and incorporates by reference the above paragraphs.

33. HRS Chapter 343 requires that the preparation of an environmental assessment for an applicant action that includes the proposed use of county or state land.

34. On March 31, 2008, the planning director informed Kohala Preserve Conservation Trust, LLC that the planning department “will require Chapter 343 compliance prior to tentative subdivision approval, unless we get a written statement from the DOT that they will not require an EA or EIS for work within the right-of-way for this project.”

35. In addition, the applicant is proposing to use county or state land for county park improvements as a component of its subdivision development.

36. No environmental assessment, environmental impact statement or exemption determination was prepared pursuant to HRS Chapter 343 prior to the Board of Appeals’ decision.

37. The Board of Appeals’ decision violated HRS Chapter 343.

COUNT 5

(Board of Appeals Decision Violated the Subdivision Control Code By Authorizing Approval by Default Despite Planning Director’s Action)

38. Appellant realleges and incorporates by reference the above paragraphs.

39. The Subdivision Control Code does not authorize approval by default if the planning director defers decision making within 45 days of the submission of a preliminary plat. HCC § 23-62.

40. The planning director acted within 45 days of Kohala Preserve Conservation Trust, LLC’s submission and made clear to the applicant that he was deferring decision making.

41. The Board of Appeals erred in approving the subdivision in violation of HCC § 23-62.

COUNT 6

(Board of Appeals Decision Violated the Subdivision Control Code By Failing to Require Information from the Developer Required by the Subdivision Control Code)

- 42. Appellant realleges and incorporates by reference the above paragraphs.
- 43. The Subdivision Control Code identifies information that is required to submitted with an application. HCC §§ 23-63, 23-64, 23-65, 23-66.
- 44. There is no evidence in the record that the planning director waived or determined that provision of this information could be deferred.
- 45. The Board of Appeals erred by approving the subdivision by default prior to the submission of the required information.

COUNT 7

(Board of Appeals Decision Violated General Plan)

- 46. Appellant realleges and incorporates by reference the above paragraphs.
- 47. Subdivision approvals must be consistent with the County of Hawai`i General Plan.
- 48. Board of Appeals' approval of Kohala Preserve Conservation Trust, LLC's by default is inconsistent with the obligations imposed by the County of Hawai`i General Plan.

COUNT 8

(Board of Appeals Decision Violated North Kohala Community Development Plan)

- 49. Appellant realleges and incorporates by reference the above paragraphs.
- 50. Subdivision approvals must be consistent with the North Kohala Community Development Plan.

51. Board of Appeals' approval of Kohala Preserve Conservation Trust, LLC's by default is inconsistent with the obligations imposed by the North Kohala Community Development Plan.

COUNT 9

(Board of Appeals Decision Violated Zoning Code)

52. Appellant realleges and incorporates by reference the above paragraphs.

53. A preliminary plat map must be disapproved where the subdivider has failed to comply with the provisions of chapter 25, zoning code.

54. The subdivider has failed to comply with numerous provisions in the zoning code.

COUNT 10

(Board of Appeals Decision Failed to Act Pursuant to the Public Trust Doctrine)

55. Appellant realleges and incorporates by reference the above paragraphs.

56. The County is obligated to conserve and protect the State's natural resources.

57. The Board of Appeals failed to ensure that the development would not adversely affect coastal water quality and other natural resources.

PRAYER FOR RELIEF

Wherefore, Appellant respectfully prays that this Court:

A. Reverse the Board of Appeals' decision to deny the request of KAKO'O to intervene in Kohala Preserve Conservation Trust, LLC's appeal.

C. Reverse the Board of Appeals' decision to automatically approve Kohala Preserve Conservation Trust, LLC's preliminary plat map and subdivision.

B. Remand to the Board of Appeals to commence a hearing on the appeal of Kohala Preserve Conservation Trust, LLC with the participation of KAKO'O or to dismiss the appeal of Kohala Preserve Conservation Trust, LLC.

C. Provide for such other and further relief as the Court shall deem just and proper.

DATED: Waimea, Hawaii, February ____, 2009.

Richard Schulze,
Attorney for Appellant

Achahn Schulze,
Attorney for Appellant