NO. CAAP-13-0005781

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

SURFRIDER FOUNDATION; HAWAII'S THOUSAND FRIENDS; KA IWI COALITION; AND KAHEA – THE HAWAIIAN-ENVIRONMENTAL ALLIANCE, Petitioners-Appellants, vs. ZONING BOARD OF APPEALS, CITY & COUNTY OF HONOLULU; DIRECTOR OF THE DEPARTMENT OF PLANNING & PERMITTING, CITY & COUNTY OF HONOLULU; KYO-YA HOTELS & RESORTS LP; AND 20,000 FRIENDS OF LABOR, Respondents-Appellees.	Civil No. 13-1-0874-03 RAN PETITIONERS'-APPELLANTS' REQUEST FOR TRANSFER TO THE HAWAII SUPREME COURT, CERTIFICATE OF SERVICE APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

PETITIONERS'-APPELLANTS' REQUEST FOR TRANSFER

TO THE HAWAII SUPREME COURT

I. REQUEST FOR TRANSFER TO THE HAWAII SUPREME COURT

Comes now Petitioners-Appellants SURFRIDER FOUNDATION ("Surfrider"), HAWAII'S THOUSAND FRIENDS (HTF"), KA IWI COALITION ("Coalition"), and KAHEA – THE HAWAIIAN-ENVIRONMENTAL ALLIANCE ("KAHEA") (hereinafter "Appellants) by and through counsel Linda M. B. Paul and hereby submit their Request for Transfer to the Hawaii Supreme Court in accordance with Rule 40.2, Hawai`i Rules of Appellate Procedure ("H.R.A.P.") and H.R.S. §602-58 (a)(1) and (b)(1).

II. STATEMENT OF PRIOR PROCEEDINGS

. Petitioners-Appellants ("Appellants") have respectfully appealed the Circuit Court order entered on October 16, 2013, (Appendix B) which affirmed in its entirety the Zoning Board of Appeals ("ZBA") Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O") in Petition No. 2011/ZBA-1 filed on February 18, 2013, which affirmed in their entirety the Director ("Director") of the Honolulu Department of Planning Permitting's ("DPP") FOF, COL and D&O filed on December 1, 2010, which granted Partial Approval of Zoning Variance Application No. 2010/VAR-9 Kyo-ya Hotels and Resorts, LP ("Kyo-ya"), 2353 and 2365 Kalakaua Avenue – Waikiki, Tax Map Key 2-6-1; 12 and 13. (RA Part 6 @ 257-275)

The zoning variance and the foregoing decisions affirming same allow for the construction of a 308-foot hotel/condominium tower on the Diamond Head side of the historic Moana Hotel, which will replace an existing eight-story hotel building and encroach 74.3% into the Waikiki Special District's ("WSD") mandatory coastal setback and coastal height setback zone in violation of the Revised Ordinances of the City and County of Honolulu ("LUO").

This appeal is brought pursuant to Hawaii Revised Statutes ("HRS") HRS §§ 91-9(e)(6), 91-12 and 14(g)(1),(2),(5) and (6), and § 205A-1, 2(b), (c)(1),(3),(7), (9) and 41; LUO §§ 21-9.80, 21-9.80-1, 21-9.80-4(g)(2) and 23-1.3; Revised Charter of the City & County of Honolulu ("RCH") §§ 6-1503(j), 1516-1517, and 13-103; Hawaii Administrative Rules ("HAR") § 13-222; and Rules of the ZBA § 22-1. RCH § 6-1517 allows the Director to grant an applicant a zoning variance in the WSD if the applicant satisfies the following mandatory three-prong variance test:

> RCH § 6-1517. The director shall hear and determine petitions for varying the application of the zoning code with respect to a specific parcel of land and may grant such a variance upon the ground of unnecessary hardship if the record shows that (1) the applicant would be deprived of the reasonable use of such land or building if the provisions of the zoning code were strictly applicable; (2) the request of the applicant is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and (3) the request, if approved, will not alter the essential character of the neighborhood nor be contrary to the intent and purpose of the zoning ordinance.[30]
>
> [30]"Reasonable use" within the meaning of the charter is not the use most desired by the property owner; property owner must show inability to make any reasonable use of his land without the variance. "Unique circumstances" has to do with whether specific attributes of the parcel are present that justify the request for a variance. Korean Buddhist Dae Won Sa Temple of Hawaii, Inc. v. Zoning Board of Appeals of City and County of Honolulu, 87 Hawai'i 217, 953 P.2d 1315 (1998).

On January 3, 2011, the DPP file-stamped Appellants' *pro se* petition (RA Part 3 @ 22-28) hand delivered to the DPP appealing the Director's December 1, 2010, decision granting Partial Approval of Zoning Variance Application No. 2010/VAR-9, Kyo-ya Hotels & Resorts, LP, 2353 and 2365 Kalakaua Avenue – Waikiki, Tax Map Key 2-6-1; 12 and 13. (RA Part 6 @ 257-275) ZBA Rule § 22-1 specifies that any person who is specially, personally and adversely affected by an action of the Director may appeal the Director's action to the ZBA by submitting a written petition to the ZBA setting forth, *inter alia*, petitioner's interest in the property, how the petitioner is adversely affected by the action appealed, and the reasons why the petitioner

believes that the Director's action was based on an erroneous finding of material fact, and/or that the Director acted in an arbitrary or capricious manner or manifestly abused his/her discretion.

Accordingly, in their petition Appellants attested as to how they would be personally and adversely affected by the Director's Decision to grant a variance that allows the construction of a 308-foot hotel/condominium tower on the Diamond Head side of the historic Moana Hotel, which will replace an existing eight-story hotel building and encroach 74.3% into the WSD's mandatory coastal setback and coastal height setbacks zone in violation of LUO § 21-9.80-4(g)(2). Appellants' petition spelled out how the Director's FOF, COL, and D&O are not supported by sufficient, substantial, non erroneous material facts, which is evidence that his "hardship findings", which are required to satisfy RCH § 6-1517 and grant a variance, are erroneous. Therefore, the Director had no basis on which to grant the partial variance.

On January 12, 2011, the ZBA sent Appellants a letter regarding Notice of Contested Case Hearing (RA Part 3 @ 30-33), and thereafter held hearings on the petition limited to establishing that the Director's decision was based on one or more erroneous findings of a material fact. During the course of the hearings seven witnesses were sworn in: (1) Marti Townsend as an injured party witness, (2) Patrick Onishi, architect and former Director of the City's Department of Land Utilization ("DLU"), as an expert witness on urban planning, (3) Dr. Charles Fletcher, geologist, as a subpoenaed expert witness on beach erosion, (4) John Whalen, former DLU Director, as a subpoenaed expert witness on urban planning, (5) Scott Wilson, architect, as an expert witness on urban planning, (6) Robert Iopa, architect for Kyo-ya, and (7) David Tanoue, DPP Director. (RA Part 1 @ 174-175)

On February 19, 2013, the ZBA filed its FOF, COL and D&O in Case No. 2011/ZBA-1, holding that Appellants had failed to identify a single erroneous fact. (RA Part 8 @ 549-583)

The ZBA cited no legal authority that allows the Director to grant a variance or the ZBA to affirm a decision granting a variance that does not satisfy all parts of the three required prongs of RCH § 6-1517 and further does not comply with the mandatory provisions of the LUO and HRS.

On March 21, 2013, Appellants filed a timely Notice of Appeal, Statement of the Case, and Order for Certification & Transmission of the Record on Appeal with the First Circuit Court pursuant to HRS § 91-14(g) (RA Part 1 @ 14-41). Appellees objected to the scope of the Order for Record on Appeal on April 1, 2013, (RA Part 1 @ 82-84), which Appellants responded to on April 8, 2013. (RA Part 1 @ 87-94) The DPP filed the Record on Appeal on April 10, 2013. (RA Part 1 @ 97-112) The documents listed in the Record on Appeal date only from January 3, 2011, the date the petition for a contested case was filed, forward, and do not include all the documents requested by the Appellants in their Notice of Appeal, including the Director's FOF, COL, and D&O and all DPP staff memoranda that may have been considered by the Director prior to making his Decision to grant the variance, except for those that were appended as exhibits to the parties' pleadings during the contested case hearing.

Appellants filed their Opening Brief on May 20, 2013, (RA Part 1 @ 168-201) and their replies to Appellees' Answering Briefs on July 15, 2013. (RA Part 1 @ 311-319; 322-331; 334-343) The Circuit Court heard oral argument on September 20, 2013. (Dkt #23. TR 09/20/2013 @ 1) The Circuit Court entered an order affirming the decision of the ZBA on October 16, 2013, (RA Part. 1 @ 351-362), filed its Final Judgment in Civil Action No. 13-1-0874-03 (RAN) on October 30, 2013, (RA Part 1 @ 363-367), and its Notice of Entry of Final Judgment on November 4, 2013. (RA Part 1 @ 368-371) Appellants filed their Notice of Appeal to the Intermediate Court of Appeals and Civil Docketing Statement on November 29, 2013, (RA Part

1 @ 415-435) and their Statement of Jurisdiction on February 3, 2014. The Record on Appeal was filed on January 24, 2014.

III RELEVANT FACTS

Intervenor Appellee Kyo-ya is the fee simple owner of the Moana Surfrider Hotel Complex located on a combined zoning lot on Waikiki Beach in the WSD at 2365 Kalakaua Avenue. (RA Part 8 @ 551) There are three out-of-code, revenue-generating hotel buildings on the lot, the Surfrider Tower, the Banyan Wing (historic Moana Hotel), and the existing eight-floor Diamond Head Tower ("DHT"). (RA Part 4 @ 206), (RA Part 6 @ 260), (RA Part 8 @ 551-552) In 2004 Cerberus Capital Management LP, a private investment firm, purchased a controlling interest in Kyo-ya. The current coastal setback and coastal height setback requirements were in force when the controlling interest was purchased.

Sometime prior to February 23, 2010, Kyo-ya (sometimes herein referred to as the "Applicant") submitted Zoning Variance Application No. 2010/VAR-5 to the DPP, which was resubmitted on March 19, 2010, (described further herein below) to allow it to replace the existing eight-floor DHT with a new 26-floor, 308 foot hotel/condominium tower that would encroach 74.3 percent into the mandatory 100-foot WSD coastal setback and coastal height setback zone on the Diamond Head side of the Moana Hotel. (RA Part 6 @ 159) Above the 16th floor the entire building would encroach into the coastal height setback zone required by LUO § 21-9.80-4(g)(2). (RA Part 6 @ 208, 210-212, 233-234, 239-240, 250-251)

On March 7, 2010, Kyo-ya sent a "memorandum support of its application for a zoning variance for relief from the strict application of the coastal height setback (LUO Section 21-9.80-4(g)(2)) to the proposed redevelopment of the Moana Surfrider Hotel's Diamond Head Tower."

(RA Part 6 @ 167-200) The memorandum outlined *inter alia* how the Applicant believed its project met the City Charter's three-pronged test for a variance and went on to assert:

> "had the beach been constructed by the State, as contemplated by the 1965 beach agreement, it is likely that the beach fronting the Diamond Head Tower site would be approximately 180 feet wider than it is today. . . . Had this occurred, we believe that almost no portion of the proposed Diamond Head Tower would encroach into the coastal height setback." (RA Part 6 @ 170-171)

Kyo-ya argued that "the statutory test for locating the shoreline . . . is in many respects inappropriate and unfair in this particular instance." (RA Part 6 @ 173) However the Applicant does not provide any evidence indicating an inability to make any reasonable use of the three out-of-code hotel buildings currently operating on the Moana-Surfrider zoning parcel, as required by *Korean Buddhist Dae Won Sa Temple*, 87 Haw. at 234-235, 953 P.2d at 1332-1333. See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122-123 (1978).

On March 19, 2010, Kyo-ya resubmitted its variance application to the DPP under a new number, Zoning Variance Application No. 2010/VAR-9, along with Attachments A – H, to allow the new 308-foot "hotel and residential tower" to encroach into the 100-foot coastal setback and coastal height setback. (RA Part 6 @ 159-226)

On March 30, 2010, the Director issued an Acceptance Notice informing Kyo-ya that its variance application had been reviewed and accepted as meeting the basic filing requirements and required further plans and information be submitted. (RA Part 6 @ 231-234)

On April 6, 2010, Kyo-ya sent a response to the Director's March 30th request, which included the following:

> Attachment 1: Two (2) sets of revised plans (sheets A-4 and A-6) showing the horizontal encroachment into the 100-foot coastal setback and coastal height setback;

Attachment 2: Two (2) sets of color diagrams showing the existing and proposed open space for TMKs (1) 2-6-1: 12 and 13; and
Attachment 3: Two (2) sets of color diagrams showing the height of the pool deck as measured from existing grade. Note that the finished floor elevation of the pool deck is at elevation +8.4'/8.5' above mean sea level, and that the existing grade in that area is approximately at elevation +8.3'/8.4' above mean sea level. (RA Part 6 236-237)

On April 16, Kyo-ya submitted revised plans to DPP. (RA Part 6 @ 249-251)

On June 1, 2010, the DPP held a public hearing on Kyo-ya's New Moana Surfrider Diamond Head Tower Setback Shoreline Variance Application File No. 2010/SV-2, its New Moana Surfrider Diamond Head Tower Planned Development-Resort/Special District Permit Application No. 2010/SDD-33(PD-R), and two other Kyo-ya permit applications. Public testimony was taken, including testimony from the Pacific Monarch Association of Apartment Owners, a member of one of the appellant organizations. (RA Part 4 @ 277-278)

On July 26, 2010, the Director sent a letter (2010/SDD-33(js)) to the City Council regarding Kyo-ya's Planned Development-Resort/Special District Permit Application No. 2010/SDD-33 (PD-R). (RA Vol. 7 @ 402) Attached to the Director's letter were his FOF, COL and Recommendation to the City Council. The Director also included Public Agency Comments in his Analysis, including comments from the City's Design Advisory Committee, who commented that the proposed tower "is a nice building in the wrong place" and does not meet the intent of the WSD. (RA Part 7 @ 415) The Committee recommended that the building comply with the 100-foot coastal height setback as measured from the certified shoreline setback subsequent to the completion of the State of Hawaii's Department of Land & Natural Resource's ("DLNR") Waikiki Beach Maintenance Project. (RA Part 6 @ 260, 266, 277, 278-283) [The State's beach replenishment project, which was completed at the end of May 2012, extended the width of the beach in front of the hotel complex 37 feet.] In part E of the Analysis on page 16 of

the July 26, 1010, letter, the Director addressed Compliance with WSD and acknowledged that "[t]he proposed tower does not comply with the 100-foot coastal height setback", and that "[t]he PD-R provisions do not offer flexibility in the coastal height set back." (RA Part 7 @ 419)

On August 18, 2010, the City Council, following public testimony that included testimony from members of the appellant organizations (RA Part 4 @ 268, 279-292), adopted Resolution No. 10-212, CD1, FD1, which specified *inter alia* that "[t]he maximum permitted height for the proposed tower shall be 308 feet, including roof forms and other rooftop appurtenances" and that "[p]rior to the application for any building permits for the Project, the Applicant shall obtain a zoning variance to encroach into the 100-foot coastal height setback." (RA Part 5 @ 178-204) There is no language in the Resolution that allowed the encroachment to be measured from any line other than the current certified shoreline.

On September 23, 2010, the Director held a public hearing on Kyo-ya's Variance Application No. 2010/VAR-9. Testimony was given by 24 individuals, including members of the petitioning organizations who opposed the variance. (RA Part 4 @ 292-298)

On December 1, 2010, the Director granted partial approval of Zoning Variance Application No. 2010/VAR-9. (RA Part 6 @ 257-283) The partial approval was granted pursuant to Revised Ordinances of Honolulu, 1990, as amended, LUO § 21-90.80-4(g)(2). The partial variance is subject to four conditions.

"Condition A" specifies:

> Prior to the issuance of a development permit, the applicant shall submit revised plans to the Director of the DPP, for review and approval, which show the new DHT shall comply with the 1-1 (45 degree angle) coastal height setback as measured from the face of the existing concrete seawall/walkway structure (Line A in the Agreement) 180 feet seaward (the approximate beach width intended in the 1965 Agreement)." (RA Part 6 @ 269)

The variance allows Kyo-ya to build a 308-foot tower on the Diamond Head side of the Moana Hotel that will encroach 74.3% into the WSD coastal height setbacks zone as measured from the current certified shoreline in violation of the mandatory setback language in LUO § 21-9.80-4(g)(2). The Director found that Kyo-ya's application satisfied all prongs of the City Charter's required three-prong hardship test for a variance (RCH § 6-1517) even though the Director did not address the second part of prong two, which requires that the reasonableness of the neighborhood zoning is not drawn into question, and the second part of prong three, which requires that the variance request, if approved, will not be contrary to the intent and purpose of the zoning ordinance. Furthermore, the parts of the hardship test he did address were not supported by sufficient, substantial, non-erroneous material facts. Therefore, his ultimate finding that the variance test was met was **not** supported by the evidence and Appellants filed their timely appeal.

Appellant SURFRIDER is a 501(c)(3) organization whose members are dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through conservation, activism, research and education. SURFRIDER acts to preserve both its members' and the public's access to public beaches and near-shore waters by promoting low impact and responsible development of coastlines and opposing developments that negatively impact these public trust resources. (RA Part 4 @ 259, 160-162, 185; Part 6 @ 329-330) Appellant HTF is a statewide land and water use planning 501(c)(3) organization founded in 1981, whose members are dedicated to ensuring that development is reasonable and responsible, that appropriate planning, management and land and water use decisions are made that protect the environment, human health and cultural and natural resources, and that decisions are made and proposals are implemented in conformity with the law. (RA Part 3 @ 23; Part 4 @ 160-162; 173-174, 184,

186-188) Appellant KAHEA is a 501(c)(3) Native Hawaiian organization that serves as an advocate and network for many hundreds of cultural practitioners, kupuna, ocean users, and educators working to protect Hawaii's unique natural resources and the cultural practices that depend on them. (RA Part 3 @ 23; Part 4 @ 142-143; 160-162, 263; Part 6 @ 327-328) It opposes variances that allow encroachment into Waikiki's mandatory coastal height setback zone, which was established to protect an extremely important and historic shoreline on the south shore of Oahu, one of the very few accessible shorelines near the urban core of Honolulu. Appellant COALITION is an unincorporated community organization with a long history of recognizing environmental and development issues that are important to Oahu communities and it advocates in behalf of that sentiment. (RA Part 3 @ 23; Part 4 @ 160-162; 189-191; Part 6 @ 333-334)

Appellants set forth their particular interests as well as the public's interest in protecting the public beach fronting the Moana-Surfrider Complex in their Petition, in their Opposition to Intervenor Kyo-ya's Motion to Dismiss filed on December 29, 2011, (RA Part 4 @ 134-202), in their Position Statement in Support of their Appeal, filed on January 12, 2012, (RA Part 4 @ 226-263), in their Memorandum in Support of Petitioners' Standing filed on February 12, 2012, (RA Part 6 @ 321-341), and the exhibits attached to the above, in testimony and oral argument during the course of the contested case proceedings, in their Statement of the Case attached to their Notice of Appeal filed on March 21, 2013, (RA Part 1 @ 16-18) and in their written and oral testimony at public hearings held during 2010 by the Honolulu City Council and DPP on the project's Planned Development-Resort ("PD-R") permit and variance applications, some of which were included as exhibits in Petitioner's Opposition to Kyo-ya's December 2011 Motion to Dismiss. (RA Part 4 @ 152, 166-202)

For many years members of the petitioning organizations and their families have used and enjoyed the public beach in front of the Moana-Surfrider Complex, a use that will be negatively impacted by the variance that was granted. Appellants testified against the proposed tower at several public hearings in 2010, including the last one on September 23, 2010, held by the DPP prior the Director's December 1, 2010, decision. (RA Part 4 @ 185-192) Appellants' injuries are directly traceable to the Director's decision to grant a zoning variance that will allow the construction of a tower that will encroach 74.3% into the 100-foot WSD coastal setback and coastal height setback zone and set a precedent for decades to come. The Appellants filed a petition contesting the Director's FOF, COL, and D&O to protect not only their interests but the public's interest in conserving Waikiki Beach and in enforcing the City's zoning code.

The objectives of the WSD are set forth in LUO Sec. 21-9.80-1 and include "the preservation, restoration, maintenance, enhancement and creation of natural, recreational, educational, historic, cultural, community and scenic resources." (LUO § 21-9.80-1(b)). The variance that was granted clearly contravenes these objectives. LUO § 21-9.80-4(g)(2), which sets forth the mandatory coastal and coastal height setbacks, further provides that "[i]n addition to the above limits, there is a need to set back tall buildings from the shoreline to maximize public safety and the sense of open space and public enjoyment associated with coastal resources. Accordingly, the following minimum setbacks shall apply to all zoning lots along the shoreline . . . ." Thus the variance is clearly and unjustifiably at complete odds with the LUO.

IV. POINTS OF ERROR TO BE RAISED AND ARGUED

1. The Circuit Court made a pure error of law and acted in excess of its statutory authority when it affirmed the Zoning Board of Appeals finding that the Director was entitled to "*ordinary*

deference" (RA Part 8 @ 582) when he granted a variance to build a 308-foot tower that is only 25.7% in compliance with the mandatory coastal setback and coastal height setbacks provisions of LUO § 21-9.80-4(g)(2), the intent and purpose of the zoning ordinance as described in the preamble of LUO § 21-9.80-4(g)(2), and the Coastal Zone Management Act, HRS § 205A-1, 2(b), (c)(1),(3), and (7). The standard of review on alleged errors of law is *de novo*, the "right/wrong" standard.

2. Both the Circuit Court and the ZBA made a pure error of law and acted in excess of their statutory authority when they affirmed the DPP Director's FOF, COL and D&O) (RA Part 6 @ 257-275), which granted a variance conditional upon compliance with a non-existent shoreline based upon an unfulfilled 1965 agreement between the Applicant and the State to extend the beach in front of the Applicant's property 180 feet seaward of the current certified shoreline (RA Part 6 @ 269:V.A:1-5), a decision that unlawfully violates the mandatory statutory and regulatory provisions set forth in HRS §§ 205A-1, 2(b), (c)(1),(3),(7) and (9); LUO §§ 21-9.80 e*t seq*; HAR §13- 222, and RCH § 6-1503(j) and § 6-1517. The standard of review is *de novo.*

3. The Circuit Court's order to affirm in their entirety the ZBA's FOF, COL and D&O was clearly erroneous and characterized by a clearly unwarranted exercise of discretion given that the ZBA had erroneously affirmed in their entirety the Director's FOF, COL and D&O even though the Applicant plainly failed to address all parts of two of the three prongs of the City Charter's mandatory variance test and failed to support all three prongs with sufficient, substantial, non erroneous material facts. The ZBA erroneously found that "*The failure to find a fact does not constitute an erroneous finding of fact.*"(RA Part 8 @ 581:para.6), "*The Charter does not require the Director to specify evidence that may not support the granting of a variance*." (RA Part 8 @

581:para. 7), and the "[*p]etitioners failed to satisfy their burden to demonstrate that any material fact found and relied upon the Director in the December 1, 2010 Director's Decision was clearly erroneous." (*RA Part 8 @ 582:para. 9) The standard of review is for mixed questions of law and fact is clearly erroneous.

3a. Variance Test Prong One: Director's finding that "the Applicant would be deprived of reasonable use of the land or building if the provisions of the zoning code were strictly applicable" (RA Part 6 @ 269:IV. A) was clearly erroneous considering he based his finding on the following erroneous facts: (1) the failure of the State to comply with an invalid 1965 beach widening agreement, (2) a hypothetical future certified shoreline, (3) an erroneous assertion that the Applicant would not be able to develop in accordance with the PD-R provisions unless allowed to build a tower that would encroach 74.3% into the coastal setback and coastal height setback, and (4) the severely out-of-code tower is necessary to maintain economic viability and avoid the unnecessary "hardship" of owning a parcel occupied by three revenue-generating, out-of-code hotels that can be completely renovated without the need for a variance as long as they do not increase the degree of their non-conformity.

3b. Variance Test Prong Two: Director's finding that the "request of the applicant is due to unique circumstances and not to general neighborhood conditions and it does not question the reasonableness of the neighborhood zoning" was clearly erroneous (RA Part 6 @ 269:IV.B) because (1) the finding is not supported by such "unique" circumstances as the size of the combined zoning lot and the nature of the shoreline bordering the lot since neither are particularly unique for shoreline lots in the WSD, and (2) the applicant failed to address whether or not the reasonableness of the neighborhood zoning is drawn into question.

3 c. Variance Test Prong Three: The Director's finding that the "request will not alter the essential character of the neighborhood nor be contrary to the intent and purpose of the zoning ordinance" was clearly erroneous (RA Part 6 @ 269:IV.C) because (1) a tower that is only 25.7% in compliance with the LUO's coastal setback requirements is not consistent with the essential character of a neighborhood that is characterized not by the presence of other non-conforming buildings in the area, but by Kuhio Beach Park on one side of the DHT, the historic Moana Hotel on the other, and the public beach in front, and (2) the Director failed to even address whether the new non-conforming tower is contrary to the intent and purpose of the zoning code as set forth in LUO §§ 21-9.80, 9.80-1, and 9.80-4(g)(2) and DPP's 2002 *Special District Design Guidelines* or the 2010 *City & County of Honolulu Zoning Variance Guidebook*.

4. The ZBA made a pure error of law and acted in excess of its statutory authority when it failed to consider and review the whole record as defined by HRS § 91-9(e)(6) and § 91-12 and required by § 91-14(g), and Article 1, Section 5 of the Hawaii Constitution, before affirming in their entirety the Director's FOF, COL and D&O. The whole record includes all DPP staff memoranda reviewed by the Director prior to making his decision to grant a partial variance. The standard of review is *de novo*.

V. STATUTORY QUALIFICATIONS FOR TRANSFER TO THE SUPREME COURT PURSUANT TO H.R.S. §602-58 (a)(1) and (b)(1).

H.R.S. §602-58(a)(1)

> H.R.S. §602-58 Application for transfer to the supreme court. (a) The supreme court . . . shall grant an application to transfer any case within the jurisdiction of the intermediate

court of appeals to the supreme court upon the grounds that the case involves: (1) A question of imperative or fundamental public importance;

Two questions in this case are of imperative and fundamental public importance: (1) whether the City Charter authorizes the Mayor's agents to convert the City Council's mandatory zoning code requirements into discretionary options through the variance process, and (2) what constitutes the "whole record" within the meaning of HRS §91-9(e)(6) and §91-14(g)(5) in a contested case proceeding.

(1) Does the City Charter authorize the Mayor's agents to convert the City Council's mandatory zoning code requirements into discretionary options through the variance process?

The ZBA found that the Director is entitled to "ordinary deference" in granting the variance at issue although the Appellants did not argue that any discretion was abused. (RA Part 8 @ 582) LUO Section 21-9.80-4(g)(2) contains no discretionary or ambiguous language that gives the Director the discretion to approve a variance from the WSD coastal setback and coastal height setback requirements, and the ZBA does not have the power to grant the Director "ordinary deference" when the LUO gives him none.

LUO Section 21-9.80-4(g)(2): [emphasis added.]

Coastal Height Setbacks. In addition to the above limits, there is a need to set back tall buildings from the shoreline to maximize public safety and the sense of open space and public enjoyment associated with coastal resources. Accordingly, the following minimum setbacks **shall** apply to all zoning lots along the shoreline: [emphasis added]

(A) There **shall** be a building height setback of 100 feet in which no structure **shall** be permitted. This setback **shall** be measured from the certified shoreline; and

(B) Beyond the 100-foot line there **shall** be a building height setback of 1:1 (45 degrees) measured from the certified shoreline. (See Exhibit 21-9.15.)

During the course of this appeal and in their subsequent motion for attorney's fees, which was denied and is also on appeal, Appellees have claimed that the Mayor's agent, the DPP Director, has the discretion, i.e. the authority, to grant variances to any LUO provision regardless of whether it is couched in mandatory or discretionary language. "[T]he shoreline height setbacks of Section 21-9.80-4(g)(2) of the zoning code do not contain any language that they are to be treated differently than every other zoning provision and are not subject to variances." (RA Part 1 @ 391)

The Director apparently also believes that RCH §6-1517 authorizes him to convert the City Council's mandatory zoning code requirements into discretionary options through the variance process. In his December 1, 2010, Decision, the Director made the erroneous finding that "if the certified shoreline was located about 180 feet seaward," . . . "[t]he proposal, viewed in that context, is not excessive." (RA Part 6 @ 266) Thereafter he conditioned the variance on the submission of revised plans based on a not-yet-certified future shoreline, indicating he believes either 1) the DPP has the power to grant variances from any LUO requirement, or 2) the language "[t]his setback **shall** be measured from the certified shoreline" is ambiguous.

The Appellees, the ZBA, and the Circuit Court, in affirming the ZBA's decision, apparently also believe that the DPP Director also has the discretion not to address all parts of all prongs of the City Charter's required three-prong variance test and is not obligated to support his findings that all three prongs have been met with sufficient, material, substantial, non-erroneous facts. Although Petitioners repeatedly argued that the Director's Decision failed to adequately support its findings that all three prongs of the variance test had been satisfied, the ZBA responded that "failure to find a fact is not an erroneous finding of fact" and claims that the City

Charter "does not require the Director to specify evidence that may not support the granting of a variance." (RA Part 8 @ 581)

The most important "evidence" in this case is the Director's FOF, COL, and D&O, which is seriously deficient in material facts that support its findings that all three prongs of the variance test had been satisfied. Evidence of insufficient material support for a required factual finding that a variance requirement has been met is evidence of an erroneous finding, not evidence of abuse of discretion.

"If an agency determination is not within its realm of discretion (as defined by the legislature), then the agency's determination is not entitled to the deferential 'abuse of discretion' standard of review." See, e.g., *Allstate Ins. Co. v. Schmidt,* 104 Haw. 261 265-66, 88 P.3d 196, 200-01 (2004). See also *Paul's Electrical Service, Inc. v. Nelson Befitel*, 104 Haw. 412, 417, 91 P.3d 494 499 (2004): Administrative agencies are created by the legislature, and the legislature determines the bounds of the agency's authority." *Morgan v. Planning Dept., County of Kauai*, 104 Haw. 173, 184, 86 P.3d 982, 993 (2004) ("'An administrative agency can only wield powers expressly or implicitly granted to it by statute.'" (Quoting *TIG Ins. Co. v. Kauhane,* 101 Haw. 311, 327, 67 P.3d 810, 826 (App. 2003).

> "When construing a statute, our foremost obligation is 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. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose." *Morgan* at 179, 86 P.3d at 988.

The U.S. Supreme Court has set the standard that the landowner must be denied **all** reasonable use before a mandatory zoning ordinance can be set aside. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122-123 (1978). See also RCH § 6-1517 footnote [30] ("'Reasonable use' within the meaning of the charter is not the use most desired by the property owner; property

owner must show inability to make any reasonable use of his land without the variance.") See also *Korean Buddhist Dae Won Sa Temple* at 234-235, 953 P.2d at 1332-1333, citing *Final Report of the Charter Commission of the City and County of Honolulu 1971-1972* at 33:

> The fact that [an applicant] might make a greater profit by using his property in a manner prohibited by the ordinance is considered irrelevant, since almost any individual applicant could make that same showing; the greater profit for that individual would be siphoned off from the value of all his neighbors' properties.

The question of fundamental public importance in this case is whether the Mayor's agent, the DPP Director, has the power to grant a variance of any magnitude from any ordinance, whether or not it is couched in mandatory or discretionary language, if the applicant claims that he will be "denied reasonable use".

(2) What constitutes the "whole record" within the meaning of HRS §91-9(e)(6) and §91-14(g)(5) in a contested case proceeding?

> HRS §91-9(e) For the purpose of agency decisions, the record shall include: . . . (6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.
>
> HRS §91-14(g) states that "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 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: . . . (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

Appellants argued that the "whole record" includes all staff submittals pertaining to Kyo-ya's PD-R application to build an out-of-code tower in the WSD that the DPP Director considered prior to making his decision to grant the partial variance from the mandatory setback provisions. (RA Part 1 @ 88-94, 176-177; RA Part 8 @ 337-340, 360) Appellees asserted in their Joint Objection to Appellants' Designation of the Record on Appeal, filed on April 8, 2013, that the court is limited to a review of the ZBA's file in Case No. 2011/ZBA-1 and that the only administrative record that the ZBA and the circuit court is required to consider is

that related to DPP's September 23, 2010, variance hearing held just prior to decision-making, citing *HOH Corp. v. Motor Vehicle Industry Licensing Bd,* 69 Haw. 135, 141, 736 P.2d 1271, 1274 (1987) and *Life of the Land v. Land Use Commission*, 58 Haw. 292, 296 , 568 P.2d 1189, 1193 (1977) (RA Part 1 @ 84-85) in support. Both *HOH* at 141 and *Life of the Land* at 296 cite HRS § 91-14(f), which states that judicial "review [is] . . . confined to the record. . . ." However, H.R.S. 91-14 does not define "record". That definition is provided in H.R.S. §91-9 Contested cases; notice; hearings; records, wherein it specifies that "(e)[f]or the purpose of agency decisions, the record shall include: . . . (6) staff memoranda submitted to members of the agency in connection with their consideration of the case."

In this case we have two different sets of administrative records, one more complete than the other: (1) the 2010 DPP administrative record, which includes staff memoranda, on Kyo-ya's PD-R application to build an out-of-code tower that presumably was considered by the Director before he made his Decision to grant the variance, and (2) the contested case record that the ZBA considered when it upheld the Director's Decision, which includes only a subset of DPP staff submittals: (a) those that were attached to Appellees' briefs, (b) a few additional documents and audio tapes the DPP allowed Appellants to review after they submitted a general request for the DPP files on Kyo-ya's PD-R application in 2011, (RA Part 4 @ 315-319) and (c) those records the DPP did not provide in response to Appellants' general request, but whose identity Appellants subsequently learned about in late February 2012, and provided in response to a *subpoena duces tecum* (missing from the record on appeal) on March 20, 2012, and are attached as an exhibits to Petitioners' Proposed FOF, COL and D&O filed on May 31, 2012, (RA Part 7 @ 394) and their Amended FOF, COL, & D&O filed on August 9, 2012. (RA Part 8 @ 250)

Missing from the Record on Appeal is the rest of DPP's administrative record on the DHT project that Appellee Director did not provide the public or the ZBA.

In order for the court and the ZBA to determine whether or not the Director made a clearly erroneous decision in view of the reliable, probative, and substantial evidence on the whole record they must review the more complete record - the one the Director reviewed before making his decision. See *In re Director, Department Labor & Industrial Relations v. Kiewit Pacific Co*., 104 Haw. 22, 27; 84 p.3d 530, 535 (2004 Haw. App.) citing *In re Ainoa*, 60 Haw. 487, 490, 591 P.2d 607, 609 (1979).

The U.S. Supreme Court has held that "judicial review should be based on the full administrative record before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S. Ct. 814 (1971). The Ninth Circuit recognizes four exceptions that have evolved to permit the appellate court to go beyond the administrative record. *See Public Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982) "The fourth and final exception arises when it becomes obvious that the agency, in rendering its decision, relied on documents or materials which are not included in the record." See also *Topliss v. Hawaii County Planning Comm'n,* 9 Haw. App. 377, 283, 842 P.2d 648, 653 (1993 Haw. App.), *Kilauea Neighborhood Ass'n v. Land Use Comm'n.,* 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (1988) ("An agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision.")

The Record on Appeal starts the day the contested case appeal was filed, January 3, 2011. In defending his Decision during the contested case proceedings, the Director had the opportunity to select among the many documents in DPP's 2010 administrative files those that supported his Decision and append them to his pleadings. Appellants, as members of the public,

didn't have open access to the DPP administrative files. They attempted to access the DHT project files with a blind request to the DPP to review them. However, they had no way of knowing whether or not the DPP produced the complete administrative record in response to their request. Appellants learned of the existence of some documents only later when they showed up as exhibits attached to the Director's pleadings.

Appellants brought the ZBA's attention to at least some of the un-acknowledged documents in their exhibits, their testimony, their arguments and in their proposed FOF, COL, D&O. Appellants learned from a former DPP employee about a file the agency had not produced presumably because it considered it unrelated to the September 23rd hearing. They subpoenaed the file, but it was too late to append a document from the file to their position statement so they attached it as an exhibit to their proposed FOF. (RA Part 7 @ 402)

The ZBA has an obligation to consider the language in the Decision and the whole administrative record, not just the statements of a few witnesses, and make affirmative findings of fact that the Director's FOF, COL and D&O addressed and met all parts of all three prongs of the City Charter's variance test and that the Director's findings were supported by substantial, sufficient, and non erroneous material facts. "A decision of an administrative agency is clearly erroneous if it is not supported by substantial evidence in the record, or if the court is left with a definite and firm conviction that a mistake has been made in view of the reliable, probative, and substantial evidence on the whole record." *Homes Consultant Co., Inc. v. Agsalud,* 2 Haw. App. 421, 425, 633 P.2d 564, 568 (1981). (*See also Price v. Zoning Board of Appeals,* 77 Haw. 168, 176, 883 P.2d 629, 637 (1994) (citing *In re Hawai`i Elec. Light Co. ,* 60 Hawaii 625, 630, 594 P.2d 612, 617 (1979).

The question of what constitutes the "whole record" in a contested case that must be made available to the public, independently reviewed by the ZBA prior to making a contested case decision, and included in the Record on Appeal is of considerable public importance and is a reoccurring issue that so far seems to have evaded comprehensive judicial review.

H.R.S. §602-58(b)(1)

> H.R.S. §602-58 (b) The supreme court, . . . may grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the supreme court upon the grounds that the case involves: (1) A question of first impression or a novel legal question;

In this appeal the question of first impression, and a novel one, is whether an unfulfilled 1965 agreement between the Applicant and the State to extend the beach in front of the Applicant's property seaward 180 feet provides a legal basis for a variance from LUO § 21-9.80-4(g)(2), which requires building setbacks to be measured from the current certified shoreline.

At the September 20, 2013, court hearing, Kyo-ya, the intervenor Applicant, stated:

> Regarding the beach agreement, I think it's very clear. And the applicant takes a different position, by the way, than the Director did. The State granted title, absolute title, in 1965 to Kyo-ya's parent company, Kokusai Kogyo, to property that is now Waikiki Beach in this area. Kyo-ya has paid property taxes on it. And that beach extends seaward under the ocean.
>
> The second issue was about the hypothetical shoreline. First of all, our property extends 180 feet seaward. The actual shoreline is more than 220 feet [seaward of the current certified shoreline]. It would be more than 225 feet, if the State complied with the 1965 agreement. So the suggestion that it would be 180 feet, it would be 220 feet.[1] Because of that, no variance would be needed for the building originally proposed. However, the building proposed was not approved.

[1] The Director's Decision, page 8, paragraph 1, lines 5-9, also erroneously finds that the existing shoreline is at Line B (RA Part 6 @ 266), whereas the 1965 agreement attached to the Decision indicates that it is located at Line A. (RA Part 6 @ 275) The certified shoreline is still at Line A. Line B, which indicates the former property line, is 75 feet seaward of Line A and is underwater.

> And regarding the 1965 agreement, we did argue. . . at the hearing on the variance that our position is the Director could not deny the variance. Legally cannot deny the variance, because the City derives all of its power from the State. The State had entered into an agreement, approved by the Legislature, and granted title, and assumed unequivocal obligations, that the State has never disowned. The State acknowledges that it has these obligations.
>
> Our view is that the law on this particular land, this particular parcel, is set forth in the 1965 agreement, and that the effect that a zoning ordinance would deprive of our rights, as the State - - if the State had not full performed, that our view is the County simply doesn't have the authority. I note that the Director rejected that decision. But that's a position we maintained, and we maintained on appeal to the Zoning Board of Appeals. It's an independent grounds for sustaining the Director's decision. (TR 9-20-2013 @ 64-66)

LUO § 23-1.3 defines "certified shoreline" as "the shoreline as marked on the ground and as shown on a shoreline survey which has been certified by the state department of land and natural resources under Hawaii Administrative Rules, Title 13, Chapter 222, entitled "Shoreline Certification." The definition employs the past tense. The current certified shoreline in front of the Moana Surfrider Complex was last certified on December 2, 2009, two months before Kyo-ya submitted its PD-R application to build a tower that encroaches 74.3% into the existing shoreline setback zone, which HRS § 201A-41 allows the counties to establish.

"Shoreline" is defined in HRS § 205A-1, last amended in 1986. In *Diamond v. Dobbin*, page 2, SCWC-30573 & SCWC-11-0000345 (2014 Haw. LEXIS 39) the Supreme Court held that the "Board of Land and Natural Resources (the BLNR), must consider the historical evidence of the upper reaches of the waves" in determining the actual location of the shoreline. During the contested case hearing, Dr. Charles Fletcher, the expert witness on Waikiki Beach erosion, testified: “I’m not sure if it is physically possible to extend it four times further wide than it is now. I’m not sure it may ever have been that wide within the human era.” (RA Part 10 @ 123)

The Director's Decision seemingly presumes that an unfulfilled agreement with the State can somehow alter the location of the shoreline as defined by statute and case law and certified in 2009 by DNLR. There is no basis in law that allows a private contract between a corporation and the State to trump a City ordinance that clearly sets the relevant mark for setback purposes as the "certified shoreline". If and when the State decides that it has a contractual obligation to extend the beach per the 1965 Agreement, and it does so, and a new shoreline is certified, at that point Kyo-ya can resubmit its PD-R application to build a tower that does not conform to the current certified shoreline. However, since that has not happened the Director's determination was erroneous and the Circuit Court and the ZBA abused their discretion in upholding that error.

The question of first impression is whether an unfulfilled 1965 agreement between the Applicant and the State to extend the beach in front of the Applicant's property seaward 180 feet provides a legal basis for a variance from LUO § 21-9.80-4(g)(2), which requires building setbacks to be measured from the current certified shoreline.

This case involves questions of fundamental public importance regarding the legal limits of the variance process. The variance in this case is so large it undermines the purpose of the zoning ordinance altogether. Appellants respectfully request the transfer of this case to the Hawaii Supreme Court.

Dated: Honolulu, Hawaii, April 10, 2014.

/s/ Linda M. B. Paul

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NO. CAAP 13-0005781

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

SURFRIDER FOUNDATION; HAWAII'S THOUSAND FRIENDS; KA IWI COALITION; AND KAHEA – THE HAWAIIAN-ENVIRONMENTAL ALLIANCE Appellants, vs. ZONING BOARD OF APPEALS, CITY & COUNTY OF HONOLULU; DIRECTOR OF THE DEPARTMENT OF PLANNING & PERMITTING, CITY & COUNTY OF HONOLULU; KYO-YA HOTELS & RESORTS LP; AND 20,000 FRIENDS OF LABOR, Appellees.	CIVIL ACTION NO. 13-1-0874-03 (RAN) (Agency Appeal) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellants' Jurisdictional Statement and Certificate of Service was duly served this date by the JEFS system to the following parties as listed below:

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