

NO. 23109

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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EDWIN CHA SON NOH and MARIAM CHUN NOH,  
Appellants-Appellants,

vs.

PETER T. YOUNG, in his capacity as chairperson of the Board of  
Land and Natural Resources of the State of Hawai'i, and  
the BOARD OF NATURAL RESOURCES OF THE STATE OF HAWAI'I,  
Appellees-Appellees.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIVIL NOS. 98-1897 and 99-0302)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.,  
and Circuit Judge Alm, assigned by reason of vacancy)

The appellants-appellants Edwin Cha Son Noh and Miriam Chun Noh appeal from the judgment of the first circuit court, the Honorable Eden Elizabeth Hifo (formerly B. Eden Weil) presiding, filed on December 20, 1999 in favor of appellees-appellees Timothy Johns,<sup>1</sup> in his capacity as Chairperson of the Board of Land and Natural Resources [hereinafter, "the Board"], and the Board, based on the circuit court's decision and order, filed on October 20, 1999. Specifically, the Nohs argue that the circuit court erred in affirming the decision of the Board, filed on December 29, 1998, on the bases (1) that the Board abused its discretion in finding that the height limitation contained in the

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<sup>1</sup> At the filing of the lawsuit, Michael Wilson was the chairperson of the Board of Land and Natural Resources (BLNR). Timothy Johns succeeded Michael Wilson. Peter T. Young succeeded Timothy Johns. Thus, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 43(c)(1), he has automatically been substituted as a party in the present matter.

Nohs' deed, which was issued by the State of Hawai'i, was not "unduly burdensome or impractical" and (2) that the Board's denial of the Nohs' request for a variance from the height limitation was arbitrary and capricious.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we affirm the circuit court's judgment.

The Building Requirements clearly instruct that the Board's first consideration in reviewing an application for a variance is whether the applicant has demonstrated that "strict compliance with all of the . . . building requirements . . . would be unduly burdensome or impracticable with respect to any one or more lots." (Emphasis added.). Based on the evidence that the Nohs built a house on their property in compliance with the Building Requirements and lived in their house for twenty years before they sought to build an additional story, we do not believe that the Board abused its discretion in determining that the height limitation set forth in the Building Requirements is not "unduly burdensome or impracticable" for the Nohs. Cf. Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 234, 953 P.2d 1315, 1332 (1998) (noting that an applicant who seeks a variance from the City and County of Honolulu's zoning code must demonstrate "unnecessary hardship," i.e., that he or she "would be deprived of the reasonable use of such land or building if the provisions of the zoning code were strictly applicable"; "'reasonable use' of the land, within the meaning of the City Charter, is not necessarily the use most desired by the owner"). Moreover, the problems of which the Nohs complain were self-created, inasmuch as the Nohs were aware of the Building

Requirements when they built their house and could have anticipated the problems that might arise from excavating twenty feet into the hillside. Cf. id. at 235, 953 P.2d at 1333 (noting that the plaintiff created its own problem by selecting a property and constructing a building on it in such a way as would require a variance to accomplish plaintiff's purposes).

Assuming arguendo that the Nohs had established that the height limitation was "unduly burdensome or impracticable," however, we still do not believe that the Board would have abused its discretion in denying the proposed variance. The Building Requirements instruct the Board to balance the needs of residents vis-a-vis each other, as well as vis-a-vis the general public, in considering applications for variances. Contrary to the Nohs' assertion, the public's view of Diamond Head is clearly a legitimate concern of the Board based upon the Building Requirements. The photographic exhibits submitted by the Nohs themselves demonstrate that, because their lot is one of the uppermost lots of the subdivision on the slope of Diamond Head, any increase in the height of their house would raise the profile of the subdivision as a whole and intrude upon the public's view of Diamond Head. We do not view as arbitrary or capricious the Board's determination that protecting the public's view of Diamond Head, perhaps the most recognizable landmark in the State of Hawai'i, was more important than the Nohs' desire for a better view and increased breeze.

In sum, we hold (1) that the Board did not abuse its discretion in concluding that the Nohs had failed to establish that the fifteen-foot height limitation was "unduly burdensome or impracticable" and (2) that the Board's denial of the Nohs'

request for a variance from the height limitation was not arbitrary or capricious. Therefore,

IT IS HEREBY ORDERED that the circuit court's judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, January 24, 2003.

On the briefs:

Roger S. Mosley, of Case  
Bigelow & Lombardi, for the  
appellants-appellants  
Edwin Cha Son Noh and  
Miriam Chun Noh

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Timothy Johns and the Board  
of Natural Resources of the  
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