NO. 28377

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE MATTER OF THE APPLICATION OF ROBERT BLAINE BOETTNER and DONALD GENE BRANSFORD, Applicants-Appellants/ Appellees/Cross-Appellees, and EDWARD R. KENNEDY, JAMES WHITCOMB, JAMES GILMUR, DUKE McELROY, DAWN ROBERTS, FENN SHRADER, and the MAUI MEADOWS HOMEOWNERS ASSOCIATION, Intervenors-Appellees/Appellants/Cross-Appellees, LAWRENCE CHRISTOPHER, Intervenor-Appellee/Appellee/Cross-Appellee, BOARD OF VARIANCES AND APPEALS, COUNTY OF MAUI, Agency-Appellee/Appellee/ Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(Civ. No. 05-1-0095(3))

ORDER

(By: Recktenwald, C.J., Watanabe and Foley, JJ.)

Applicants-Appellants/Appellees Robert Blaine Boettner and Donald Gene Bransford (Appellees) move to dismiss for mootness the appeal of Agency-Appellee/Appellant, Board of Variance and Appeal, County of Maui (Board) and the appeal of Intervenors-Appellees/Appellants Edward R. Kennedy, James Whitcomb, Lawrence Christopher, James Gilmur, Duke McElroy, Dawn Roberts, Fenn Shrader, and the Maui Meadows Homeowners Association (Intervenors). Appellees also move the court to find, pursuant to Rule 38 of the Hawai'i Rules of Appellate Procedure (HRAP), that the Board and Intervenors filed frivolous appeals. For the reasons that follow, we grant the motion to dismiss the appeal for mootness and deny the motion to find the appeals frivolous.

I.

On June 5, 2003, Appellees submitted to the Board an application for height variances from the Maui County Comprehensive Zoning Ordinance (CZO) and the Maui County Housing Code (Housing Code) for a building being constructed in the Maui Meadows subdivision. On July 25, 2003, the Maui County Planning Director (Planning Director) notified Appellees that their application was complete and that a public hearing on the application would be held by the Board on September 11, 2003. Thereafter, the Board commenced proceedings to consider the application and allowed Intervenors to intervene. On April 20, 2004, Appellees filed a motion for a determination that the application for variances be deemed approved for the reason that the Board did not issue a written final decision on the application within 120 days from the date the application was deemed complete by the Planning Director. On January 13, 2005, the Board entered Findings of Fact, Conclusions of Law and Decision and order denying Appellees' motion (Board's decision). Appellees filed an appeal to the Circuit Court of the Second Circuit from the Board's decision. On December 1, 2005, the circuit court issued an order that reversed the Board's decision and specifically determined that Appellees' application for height variances was deemed approved as a matter of law. Judgment was entered by the circuit court on July 28, 2006. This appeal and cross-appeal followed.

II.

A.

Appellees contend that this appeal and cross-appeal are moot because: (a) On May 8, 2007, Planning Director issued a letter concluding that the height restrictions for structures constructed in the Maui Meadows subdivision are determined by the Housing Code and not the CZO; (b) on June 6, 2007, the Maui Meadows subdivision and the Maui Corporation Counsel issued an opinion letter concurring with Planning Director's decision; and (c) at a September 11, 2004 hearing before the Board, Appellees withdrew their request for height variances from the Housing Code since the County of Maui had testified that Appellees' home and cottage complied with the Housing Code.

The Board maintains that its appeal does not address the merits of the application for variances, but rather, whether the circuit court erred when it deemed Appellees' application for variances approved as a matter of law. Intervenors argue against dismissal on the grounds that the parties did not litigate the mootness issue before the circuit court and briefing is complete.

The supreme court explained in Lathrop v. Sakatani, 111 Hawai'i 307, 141 P.3d 480 (2006) that

> the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.
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> Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so.

Id. at 312, 141 P.3d at 485 (brackets deleted, quoting Wong v. Bd. of Regents, Univ. Of Hawaii, 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980)). The supreme court also stated:

> It is well-established that:
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> > The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation, remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal--adverse interest and effective remedy--have been compromised.
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> *Id. at 394, 616 P.2d 201, 203-04 (1980); see also Okada Trucking Co. V. Bd. Of Water Supply, 99 Hawai'i 191, 195-96, 53 P.3d 799, 803-04 (2002); Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81-87,734 P.2d 161, 165 (1987).*

Lethrop v. Sakatani, 111 Hawai'i at 312-13, 141 P.3d at 485-86.

Dismissal of an appeal is the appropriate remedy where the case is moot, unless the case "involve[s] questions that affect the public interest and are capable of repetition, yet evading review." Id. at 314, 141 P.3d at 487 (internal quotation marks omitted).

In this case, as a result of the decision of Maui County officials that a height variance from the CZO was not needed for construction on property located within the Maui Meadows subdivision where Appellees intend to build and the withdrawal by Appellees of their application for a height variance from the Housing Code, this appeal no longer presents a live controversy which would allow us to issue a decision that

can be carried into effect. For even if we were to rule in favor of Appellants and determine that the circuit court erred in deeming Appellees' application approved, the case would have to be remanded to the Board for further proceedings; and since Appellees withdrew their application for a height variance from the Housing Code and are not required to obtain a height variance from the CZO, there is no longer any need for the Board to act on Appellees' application.

We also conclude that no exception to the mootness doctrine applies to this case. Applications for height variances from the CZO and Housing Code are based on the unique circumstance of an individual applicant. The Board claims that this appeal should not be dismissed as moot because the main issue involves the applicability of the automatic approval sanctions imposed by Hawai'i Revised Statutes (HRS) §91-13.5 (Suppl. 2004)[1] for untimely decisions by the Board, an issue

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[1] At the time Appellees' application for height variances was filed with Agency-Appellee/Appellant, Board of Variance and Appeal, County of Maui (Board), HRS §91-13.5 (Supp. 2004) stated:

> **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.
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> (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.

capable of repetition yet evading review. We note however, that in 2006, HRS §91-13.5 was amended to allow county agencies to be exempted from its requirements. HRS §91-13.5(f) (Supp. 2006), Act 280, 2006 Haw. Sess. Law 1155. Therefore, no exception to the mootness doctrine is applicable.

B.

Appellees further move for a ruling that the Board and Intervenors filed frivolous notices of appeal. For an appeal to be frivolous, it must be "so manifestly and palpably without merit as to indicate bad faith on the pleader's part such that argument to the court was not required." Child Support Enforcement Agency v. Doe, 109 Hawai'i 240, 253, 123 P.3d 461, 474 (2005) (quoting Rhoads v. Okumura, 98 Hawaii'i 407, 413, 49 P.3d 373, 379 (2002)). We cannot conclude that the appeals in this case were manifestly and palpably without merit. Consequently, the notices of appeal were not frivolous.

III.

For the foregoing reasons,

(d) 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.

(e) 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, 3421, 342J, 342L, and 342P.

IT IS HEREBY ORDERED that the motion to dismiss the appeal for mootness is granted, and this appeal is dismissed.

IT IS FURTHER ORDERED that the motion to find the Board and MMHA filed frivolous notices of appeal is denied.

DATED: Honolulu, Hawai'i, December 11, 2007.

Chief Judge

Associate Judge

Associate Judge