

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
DECEMBER 11, 2008**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Randall Endo at approximately 1:35 p.m., Thursday, December 11, 2008, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

A quorum of the Board was present. (See Record of Attendance.)

Chairman Randall Endo: Good afternoon, the meeting of the Board of Variances and Appeals will now come to order. It is 1:35 p.m. and let the record reflect that we have a quorum present of seven Board Members. If there is no objection from the Board, we will take one item out of order. Because it's going to be a quick one, we will take Item C-1, is that correct, the Kehalani Holding Company Appeal and Item C-2, which is a similar appeal? If the parties could make an appearance on that matter?

C. APPEALS

1. **BLAINE J. KOBAYASHI of CARLSMITH BALL, LLP representing KEHALANI HOLDING COMPANY, INC. appealing the Director of the Department of Public Works' issuance of a Notice of Violation (V 20080036) for the construction of a "shack dwelling" on property located off of Pi'ihana Road, Wailuku, Maui, Hawai'i; TMK: (2) 3-4-032:001 (BVAA 20080010)**
 - a. **County of Maui's Hearing Memorandum; Exhibits 1-7**

2. **BLAINE J. KOBAYASHI of CARLSMITH BALL, LLP representing KEHALANI HOLDING COMPANY, INC. appealing the Director of the Department of Public Works' issuance of a Notice of Violation (V 20080037) for the storage of junk cars and debris on property located off of Pi'ihana Road, Wailuku, Maui, Hawai'i; TMK: (2) 3-4-032:001 (BVAA 20080011)**
 - a. **County of Maui's Hearing Memorandum; Exhibits 1-7**

Ms. Mary Blaine Johnston: Deputy Corporation Counsel Mary Blaine Johnston appearing on behalf of the Director of the Department of Public Works, DSA.

Chairman Endo: Good afternoon.

Ms. Johnston: Martin Luna's attorney representing Kehalani Holdings LLC and I've been talking with him for the last few days, and we've agreed that at this point in time we'd like to continue the hearing on the two appeals that are before the Board, and possibly set it over for the Thursday – the second meeting in January. Represent that their – Mr. Luna's clients are undertaking to try to address the issues raised by the notices of violations. So whether or not we ever have to actually hear the appeal, it may become mooted at some point. So we request that we continue the hearing until the second meeting of January. I think that's the 22nd.

Chairman Endo: Did you already discuss the date with the Planning Department?

Ms. Johnston: Well, I emailed Trisha, but she didn't get my email so-

Chairman Endo: Okay, so let's hear from Ms. Kapua`ala on the date then.

Ms. Trisha Kapua`ala: I'm just retrieving my calendar. On the 29th - January 29th-

Ms. Johnston: Whatever the last meeting is in January.

Ms. Kapua`ala: It appears we have the status conference for the Maui's Best Gift and Craft Fair, and there's one more item. Ms. Johnston, again it's to discuss how to deal with the motions?

Ms. Johnston: No, no, today was actually gonna be a hearing on the appeal. And we decided rather than going forward and taking - well, it looks like your calendar is very full today anyway. You might not get to us, but also, his clients are taking steps to address the issues. And we feel with extra time, we possibly-

Chairman Endo: Okay, so if nobody objects, we'll agree to allow your switching of the date with the proviso that of course the Planning Department can reset it again if the docket's too full.

Ms. Kapua`ala: I think it should be fine.

Chairman Endo: Okay.

Ms. Johnston: And just to be- You handed out the photographs, right?

Ms. Kapua`ala: Yes, I did.

Ms. Johnston: The photographs of the property were not available at the time I filed my memo. The inspector went out and took them afterwards. So just some pictures. So I've given you just one set. I think they're about ten or 12 photos that are valid in both appeals since it deals with the same property. So just for your information, you might want to put it together with the rest of the information for the next time we come back. Thank you very much.

Chairman Endo: Okay. Does anyone have an objection to postponing the matter till January 22nd? No? Okay, so we'll do it that way. So now going back to the agenda in the regular order, the first item for a variance, Ms. Kapua`ala?

B. VARIANCES

- 1. MICH HIRANO of MUNEKIYO & HIRAGA representing STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES requesting variances from Maui County Code §§19.62.060(A)(3)(a) and 19.62.060(G)(1) to allow development of portions of the ground floor of the Ma`alaea Small Boat Harbor ferry terminal building, including the ferry passenger waiting room, women's and men's restrooms, storage/janitor room, electrical/communication room,**

mechanical room and elevator, and three (3) electrical meter buildings to be located below the 11 feet mean sea level base flood elevation for property located at 101 Ma`alaea Harbor Road, Ma`alaea, Maui, Hawai`i; TMK: (2) 3-6-001:002, 049 and 050. (BVAV 20080004)

Ms. Kapua`ala read the agenda item into the record and presented a video of the project site.

Mr. Mich. Hirano: Thank you, Trisha. And good afternoon, Chair Endo, and Board Members. My name is Mich Hirano with Munekiyo and Hiraga. And our firm is assisting the applicant—the Department of Land and Natural Resources—with the flood development variance that's before you today.

We've prepared a power point to just provide some information and additional information regarding our variance application. And I'd like to just reference the report that was prepared by the staff that overall I think we meet all the variance conditions and criteria for the variance. However, there is the issue of hardship that the staff had pointed out that we would like to address today to bring some additional information and justification of hardship in support of the variance application.

So just to follow up with the video that you just saw, I would like to provide some information about the site. This is a project that is being developed by the Department of Land and Natural Resources in partnership with the Federal Transit Administration. A number of years ago, the State Department of Land and Natural Resources was successful in receiving some grant funds to improve ferry facilities throughout the State of Hawaii. And these funds were applied to foster the – and facilitate the inter-island ferry facilities and the ferry transportation route between Maui, the Island of Maui, the Island of Lana`i, and the Island of Moloka`i. And there have been tremendous amounts of funds applied to these projects. The Manele project, and I don't know if any of the Board Members have been there recently, but it's a beautiful harbor now, but has been improved by the State facility – by State funds and in – with help from the Federal Transit Administration. Funds have also been earmarked and have been nationally set aside for the Ma`alaea Harbor Improvements. And the project went out to . . . (inaudible) . . . because of a time constraint. And being because these were Federally lapsing funds they – and State funds, they had to commit the project funding in order to secure those monies and not have the State funds lapse. And the State also supplemented this project for the ferry terminal improvements with sewage pump-out facilities, which has been a needed project that has been identified as a very important aspect to maintain water quality in the Maui coastline. So this project is part of an overall project that involves a sewage pump-out and ferry improvement facilities.

So as Trisha mentioned, we are seeking a variance from two sections of the Maui County Code relating to flood hazard areas and standards of development. The first section of the code states that:

New construction and substantial improvements except those in Flood Zone AO shall have the lowest floor, including basement, elevated to, or above, the base flood elevation.

In the second section of the code that we are seeking a variance from is that:

New construction and substantial improvements shall be elevated on adequately anchored pilings or columns and securely anchored to such pilings or columns so that the lowest horizontal portion of the structural members of the lowest floor excluding the pilings or columns is elevated to or above the base flood level.

This is a regional orientation map, a regional location map. This is Ma`alaea Harbor. Honoapiilani Highway is around here. This harbor was built in 1952 as a commercial harbor. It's zoned light industrial, and community plan designated light industrial. And it also has a portion in this area that's zoned park. Here's an aerial overview of the harbor. This is what is referred to as the "south mole" of the harbor. It's approximately 90 feet wide. It has a rock mound, rubble breakwater on the western side of the south mole. And this area is about 1,100 feet in length and 90 feet wide. Most of the commercial vessels are moored along fingers from the south mole. And these are the tour operating boats operating out of Ma`alaea Harbor. This is the northern area of the harbor, and this is the east breakwater.

The ferry terminal building is located right around – at the tip of the south mole. And there are three electrical meter buildings that are approximately in these locations throughout in the harbor. And those are the buildings that we are seeking the variance for. And the variance is really because of that terminology about the lowest floor elevation being above 11 feet mean sea level. Structurally, the buildings have been engineered to withhold and withstand tsunami-forced wave action. So structurally, the building is well designed. So the terminology of the 11-foot base elevation is the one that is creating the problems for the applicant. Again, this is just an engineering site plan showing the location of the ferry terminal building. And these little dots, it's hard to see, but those are where the electrical meter buildings will be.

This is the Federal Environmental Management Area Agency's flood zone map. And the dark area is V Zone – Zone V18, which is velocity with wave action, and the base flood elevation is 11 feet mean sea level. So as you can see all this dark area is within the V Zone. So to move the facilities outside the flood area really is not practical because you do need to be close to the ocean to – for the ferry building to be actually functional. And as well, the electrical meter buildings need to be able to be easily serviced to the fingers and the vessels, the marine vessels, which are moored and anchored along the south and north area of the harbor.

This is sort of the building elevation for the new ferry terminal. The picture that you saw in the video is the existing facility. It was used actually as a ferry terminal in the 1970s and 1980s, early '80s. The Sea Flight was operating the ferry operation out of that facility, and then they went out of business. The Coast Guard then moved into it for a time being. And then the Coast Guard relocated to the other side of the harbor. And the Harbor Agent's Office is on the second floor of that building. And the Harbor Agent – for the future, when this building gets built, it'll be really the headquarters for the Division of Boating and Ocean Recreation for the District of Maui. So the first floor will be the ferry terminal building. And the second floor will be administrative offices for the Department of Land and Natural Resources, Division of Boating and Ocean Recreation. With this building elevation, you see that right now, this is at grade. This is where the existing terminal is right now. The existing building is at the same elevation. And the 11-foot flood elevation is about at this level on this building. So we've marked it there. It's hard to see, but it's about at that level.

This is the electrical meter buildings. They're very small buildings. They're approximately 7 feet

by 14 feet, and 8 feet in height. And this is the flood elevation for the electrical meter buildings.

This is the floor plan of the ferry terminal. And I don't think you can read this, but we just kinda called out if we had to raise the building to the 11-foot base elevation for the first floor. And as you can see on the first floor, it's just an open area for the ferry passengers. There'll be some furniture brought into it. Passengers, during inclement weather, can bring their – you know, can get away from the weather, get out of the weather, and as well, they can – It's a big open area. They have luggage. And oftentimes, people on Lana`i, residents of Lana`i, come to Maui, they go to Costco. They go to the – you know, shopping. They go to the services, government services, health services that aren't available on Lana`i, but they're usually coming back with cargo. And so, it's important that the facility be easily accessible.

And so if we had to build – raise the building, and these are the exit points, you would need to ramp up, and provide ramps at this particular location for ADA, and to provide alternative access to the building. You would also have to have a series of nine steps down from this level to the ferry level to load and unload passengers to and from the ferry terminal to the ferry vessel. So we did a schematic for you on the next slide just to show you the type of ramp that will maybe have to be wrapped around the building. And this ramp will also interfere with the free movement and easy movement between the building and the loading dock. We feel that that really is a hardship to the functionality of the building because the purpose of the building would be that people can use that building freely, easily, in and out. That the flow of passengers, when the ferry is ready to unload and ready to load can move easily and freely between the building, or the terminal to the ferry with not only themselves or their children, young babies, but also with cargo that they may have purchased on Maui or taking back to Lana`i. So we feel that that is a hardship for the applicant.

We feel that the hardship is caused by the physical restrictions of the site due to the narrow width of the south mole as well. And as you can see, this is the picture of the existing ferry building. You'll notice that it has to be fairly close to the edge of the dock. This area is very restricted. There's parking on both sides. This is a cargo loading and unloading area, so it has to be free for vehicular movement. And to have ramps around this building would really block access to the building. It would also cause hardship for people who would be using that facility and unloading cargo, loading cargo. As you can see as well, the area is very restricted. It's 90 feet in width at this point. There's parking on both sides, and there's usually quite a bit of traffic and pedestrian traffic throughout the site.

The improvements—we'll resurface this south mole with concrete pavement. There'll be a sidewalk as well along this side. So the electrical meter buildings actually are up against this area to service these vessels here. So again, with the electrical meter building, you would have to raise that to the 11-foot level, and put the equipment above that. And that in itself would create a hardship for the functionality of that building and the servicing of that building to move the equipment in and out. Service repair personnel would have to ramp – climb a ramp or negotiate a ramp with equipment and take it up or take it in. So we do feel that there is a hardship and the design functionality of the building is compromised.

Again, this is the existing building. You can see that it is on-grade. And that's where the ferry service – the ferry terminal as well would like to be on-grade.

So the hardship is really—in regards to the building purpose, it should be a building that is easy and safe, a building that provides easy and safe movement of passengers and freight between the ferry terminal and the ferry vessel; complies with the Maui County Code 19.62.060 regarding the base flood elevation of 11 feet; prevents the function or efficient use of the building for the purposes intended.

And just as a final note with respect to this application, the application meets all the criteria for the variance approval. With respect to the conditions of the variance, it meets those conditions as well. And the Department of Land and Natural Resources agrees to comply with all proposed conditions of approval. In that regard, though, we would just like to note that there is a condition for insurance provision and hold harmless. And for State facilities, the State self insures their facilities. So they will be doing a self insurance for this building, but they would certainly indemnify the County and hold the County harmless for the variance, if approved. Thank you very much.

We have members of the Department of Land and Natural Resources, the Division of Boating and Ocean Recreation; and the project architect; and project engineer; and structural engineer available to answer any questions that the Board Members may have. Thank you.

Chairman Endo: Mr. Hirano, at this time, I'd like to open the matter up for public testimony as to this item, the Item B-1. You'll be limited to three minutes in testimony, and I'll let you know when your three limits are up. Is there anyone who wishes to provide public testimony on this agenda item? Seeing no one volunteering, I will close the public testimony as to this agenda item. Mr. Hirano, are you willing to waive reading of the staff report?

Mr. Hirano: Yes.

Chairman Endo: Okay. At this time, I guess we should hear the recommendation of the Planning Department, and then we'll open it up for questions from the Board – questions and deliberation.

Ms. Kapua`ala: Based on its analysis, the Department of Planning finds that the applicant has successfully addressed the considerations and conditions for Maui County Code, Sections 19.62.140(C) and (D), with the exception of 19.62.140(D)(2)(b). Pursuant to this section, the Department finds that a determination that failure to grant the variance would not result in exceptional hardship to the applicant.

Based on the foregoing findings of fact and conclusions of law, the applicant has not met all of the requirements for the granting of the subject variance. Therefore, the staff recommends denial of the subject variance. In consideration of the foregoing, the Department recommends that the Board of Variances and Appeals adopt the Department's staff and recommendation reports prepared for this December 11, 2008, meeting; and authorize the Planning Director to transmit said findings of fact, conclusions of law, and decision and order on behalf of the Board of Variances and Appeals. I'd like to note that the word "not" was amended and entered into the record. There was – that should've been entered in the last sentence of the second page.

Chairman Endo: Thank you, Ms. Kapua`ala. And let the record reflect that we do have Deputy Planning Director Aoki present at this meeting. Okay, at this time, we'll let the Commissioners ask questions or our Board Members ask questions of the applicant or staff. James?

Mr. James Shefte: Yes, I have two questions. What is the size of the present terminal building—square footage, approximately?

Mr. Hirano: Well, the new terminal building footprint is approximately 36 feet by 60 feet. And the — and it's on the same footprint as the existing building, yes.

Mr. Shefte: Right. And in looking at the photographs that you had, and I've been down there several times over the years, there is a lot of traffic congestion. With putting these electrical buildings in there and a sidewalk, is that going to impact parking in a negative way?

Mr. Hirano: Not the — there is a strip between the parking area and the fingers of the boats, and so the sidewalks will be placed in that area. And the electrical meter buildings, I don't think will be impacting parking as well.

Mr. Shefte: So we won't be losing any parking?

Mr. Hirano: There will be no parking lost as the result of the improvements, no, sir.

Mr. Kevin Tanaka: It was kind of hard to tell, you know, you were talking about ADA accessible, the amount of ramping that would be necessary to get up to that 11 feet.

Mr. Hirano: I'd like to just have the architect, John Adversalo, just explain that, if possible.

Mr. John Adversalo: Actually, okay, the ramp is over 60 feet as required for our — so we need an intermediate landing. We figuring out — I mean, just — that we need two ways of egress for this building. I think one is from the back side and one is from the front side. So you had anything specific you wanted— So it's actually two sets of ramps that would be—

Mr. Tanaka: That would probably span just about the entire—?

Mr. Adversalo: Yeah, you're talking about a big hunk of this. And plus, I think the structural engineer pointed out that we have to be — the elevation gotta be above the structural horizontal member. So we actually — what you see on the plan is we have to go higher than that. We're almost like a floor above this entire— So you're actually looking at three levels, practically. I think we're about . . . (inaudible) . . . feet above the — well, this the back side and this will be — this is facing the north side towards the ferry. So we have to incorporate a ramp right here. So as you exit, you have to come down this stairs.

Chairman Endo: Member Shefte?

Mr. Shefte: Yes, one more question concerning that—couldn't you just substitute elevator instead of for the ramp? Wouldn't that meet the qualifications for the—?

Mr. Adversalo: Not for exiting.

Mr. Hirano: No, not for exiting.

Mr. Adversalo: And plus, I was told that, yeah, you can't use any – like, the elevators go all the way down, too, to that level.

Mr. Hirano: The other – it's kind of not a problem, but an elevator, it would only go four or five feet in the elevator—a very short drop. And there is an elevator designed in the building, but it's really to access the second floor. So it would be somewhat dysfunctional just to do that half like five feet of floor level. I think the main consideration here as well is looking at the risk to life by doing this variance. And the building has been structurally designed to withstand tsunami. So it's a concrete building. And it will be structurally safe for that. So it's not – I think the variance being applied for is not to reduce the cost of the building or to take any shortcuts with respect to the design and the safety features of the building. It's really I think an operational efficiency type of issue. Thank you.

Chairman Endo: Member Ajmani?

Mr. Harjinder Ajmani: Yes, I have a couple of questions on this ferry building. Does it have any other openings below the 11 feet other than the doors? The windows are above the 11-foot level? Above the flood level?

Mr. Hirano: It looks like the windows here will be above the 11-foot. We can go back to the elevation. This is the 11-foot flood elevation. So the portions of the door – the windows, maybe the portions of the windows might be below on the front.

Mr. Ajmani: Would it be better if the windows are above the flood level so no water enters through there?

Mr. Hirano: I would like Royce Fukunaga who's the civil engineer.

Mr. Royce Fukunaga: My name is Royce Fukunaga, Fukunaga and Associates. We are the prime consultants for the project. I think what Mich was pointing out was that when we looked at the building, obviously we knew that there was an 11-foot height, tsunami height, to be met. And when we looked at trying to meet that, it would've meant that we would have had to lift the whole first floor above that tsunami height. Right now the current building is at finished floor elevation of six and a half. So we're talking about a four and a half foot difference between the existing terminal ground floor level and that tsunami height. Now, lifting the building to meet that requirement would've meant us having to lift the ground floor up to elevation 11 or even higher because the horizontal beams would have to be higher. So we'll probably have to lift the finished floor to about elevation 12. That would've meant at least a staircase of nine to ten steps for access from the loading dock to the entry to the waiting area. And the ramping required for handicapped access would've required I think over 60 feet of ramping, which would have to wrap around the building otherwise, we would have had to run it into the area that's currently used for parking. So that being the case, we looked at the consequence of not – of leaving the finished floor at the existing level that the current terminal building is sitting at and to address the human safety issue. So instead of putting the finished floor higher up– And normally what happens is for the area that's below the flood height, you would have to put breakaway walls so that it doesn't impede the flooding. In this case, there are no neighbors to this building. So there's no danger that any structure below the flood height would deflect that tsunami force into a neighboring structure. And the building at the first floor level is designed to withstand that tsunami force. So basically, the damage that we would be

anticipating would be to the openings which are the doors, the windows, and any internal furniture, but the building itself is designed to withstand the tsunami force. Really the safe zone, if there was a tsunami that was expected, of course, the whole south mole would have to be evacuated. But if perchance, the warning did not come soon enough, the safe zone would be the second floor which is above the tsunami height, about four or five feet above that tsunami height. And the anticipated damage would be to the openings on the ground floor and any internal furniture. So by doing that and designing a structure that was resistant to tsunami forces, we felt that we had addressed the safety issue. For anyone who might not be able to evacuate the south mole, they would still be able to evacuate to the second floor.

Mr. Ajmani: And the location of the windows does not impede any of the safety issues?

Mr. Fukunaga: No. It would be an issue that we've discussed with the State as a cost to be borne for replacement.

Mr. Ajmani: I see. I have a similar kind of question for the electric meter buildings. These are – what you have in there are transformers and meters?

Mr. Fukunaga: These are meters. What this project is providing is new electric service to each of the slips. And each of the slip is now metered electrically, separately. What the project provides is a sewer pump-out to each slip on the south mole in addition to a new electric service, and additionally, a hose bib, so water service, sewer service, and electric service. The meter buildings are required to house the meters because the tenants at each slip are gonna be charged separately for the electrical service. So the meter buildings are there to house the individual meters for each of the slips.

Mr. Ajmani: So these meters will – are they weatherproofed meters so that if there is a tsunami wave or something it will not create an electrical short-circuiting and those kinds of issues?

Mr. Fukunaga: Well, what we're saying is that these – the meter building is basically a non habitable structure. It's not gonna be there to house any humans. So if – in the event of that tsunami – we anticipate that there will be probably substantial damage to the meter buildings and the meters are gonna have to be replaced. We're not trying to flood-proof the meters. But for us to try and raise the – similarly, raise the meter building to the 11-foot height would require all the steps, and probably a ramping because we also discussed with the State. They indicate that the meter buildings should be handicapped accessible. So it gets to be kinda ludicrous when you think about having to provide handicapped access which is a ramp to a building that's sitting five feet maybe above the existing ground. So in that case, we're saying – and we've discussed with the State that in the event of a tsunami, they'll anticipate that the meter buildings are gonna have to be replaced.

Mr. Ajmani: I see because I would've thought that that building, the floor could be above 11 feet because it's not – there shouldn't be any ADA requirement there. There is.

Mr. Fukunaga: There is. As far as the State, because they're a public employer, they need to provide handicapped access for any employees who are gonna have to have access to the meter buildings.

Mr. Ajmani: So you have wheelchair access for the reading of the meters? There's enough room around them to--?

Mr. Fukunaga: That's something that we've discussed with them, and apparently that might be a requirement.

Mr. Ajmani: Okay, thank you.

Chairman Endo: I have a question. What is the current first floor elevation on the existing building?

Mr. Fukunaga: Six and a half. And we're maintaining a slightly higher elevation to improve the drainage.

Chairman Endo: So was the current building -- did it get a variance or did the laws change in the flood zone or--?

Mr. Fukunaga; I think when the building was built initially, there probably was not a tsunami height designation. It came in with the flood insurance program. So the original terminal building was built in 1952. So it was built without the restrictions on tsunami heights.

Chairman Endo: Okay. Any further questions? Okay.

Mr. Tanaka: Sorry. Trisha, the Planning Department's recommendation is denial of the variance. The reason for that? I'm sorry.

Ms. Kapua`ala: The reason is pursuant to that section that they found that they did not meet--

Chairman Endo: The hardship section.

Ms. Kapua`ala: Which requires the applicant to show evidence of hardship. And the justification provided was in our analysis justified hardship to the public. It's a hardship for the public to access the first floor via a ramp or stairs. It's -- we couldn't see that it was a hardship on the applicant to provide that.

Mr. Tanaka: Thank you.

Chairman Endo: Okay, anybody? Member Shefte, no? Member Kamai?

Mr. William Kamai: Yeah, in looking at the -- it says, "In passing the variance application, the Board must insure that the following conditions are met." And in every one of the staff's response in analysis, it says, "We concur in terms of showing that the variance is good and sufficient cause." "A determination that failure to grant the variance would result in exceptional hardship to the applicant." The only response is about the ADA compliance. And in accordance to the engineer that that would be a hardship. And I agree with that, too. That would be kinda ludicrous to have a ramp wrap around this building just to meet the minimum requirement for a building if it's built below the actual sea level requirement.

And all the other analysis by the staff it says they're in agreement in every category. "The determination that the granting of the variance will not result in increased flood height—"We concur." "The variance shall not be issued within a designated floodway." The staff analysis—"The project is not within a floodway." No. 4, "The variance may not be issued for new construction." "We concur that—" the staff analysis says, "We concur that the ferry terminal is located on the parcel that is less than one-half acre. The three 112 square foot electrical meter buildings are located on a 32 acre parcel." In No. 5, "Variances may be issued for the repair or rehabilitation of historic structures." Again, "The above criteria does not apply." Variance No. 6, "Variances will be issued for new construction, substantial improvements." Again, "The staff concurs with the applicant." And if it's based upon the ADA requirement alone, I'm gonna agree with the applicant and say that it is a financial hardship on the State to provide the ADA accessible ramp if they're required to exceed the 11-foot minimum height.

Chairman Endo: Okay, are you making a motion, Member Kamai?

Mr. Kamai: You had something to say?

Ms. Kapua`ala: Well, variances cannot be based on economics or financial reasons. It cannot be based on the applicant's circumstances. It must be based on the land because variances run with the land and not with applicants. If the finding of fact is that it's a financial hardship, then that could be challenged easily in court.

Chairman Endo: Okay.

Ms. Kapua`ala: The staff made this finding based on what the applicant submitted up until the drafting of the staff report. So today's testimony would be new and entered into the record.

Mr. Hirano: Chair Endo? I think Trisha mentioned that it was based on the land, and we were saying as well that the mole is narrow, and there are some constraints with the physical layout of the mole which compromises what you can do with the building. The ADA accessible ramps are not a financial hardship, but I think that they interfere with the functional efficiency of the building.

Chairman Endo: Okay. Alright. Member Kamai, do you want to want to make a motion now, or you want to wait, because you can make a motion, and we can still discuss it?

Mr. Kamai: Yeah, I'd like to make a motion that we approve this variance.

Chairman Endo: Okay, it's been moved to approve the variance. Is there a second?

Mr. Shefte: Second.

Chairman Endo: Okay, it's been moved and seconded to approve this variance. And later on, you can supplement as far as describing that they've met the requirements as part of the motion for finding of hardship. Okay, so that's the motion on the floor. Member—

Mr. Shefte: I just had a comment or two that not only is this building and facilities' improvements are greatly needed, and failure to implement them in a timely manner really causes an

inconvenience and a hardship to the public, but to the people who use those facilities. And if the only barrier to this is this ramp, and if there's a way around it, and it seems like the applicant has designed the building in such a way that they've really addressed all those issues, I'll be voting in favor of it.

Chairman Endo: Okay.

Mr. Ajmani: Yeah, I think the kind of function this building is serving is like Member Shefte said is well needed, and I think will be kind of very stupid to build that kind of ramp around the building to get to the building which will lose its function. But I just have one observation and one comment for the County—is there anything in the hardship clause which says that if it's a little bit less it can be waived, or does it have to be the six and a half feet or 11 feet? Or is there something in between that height that will allow for everybody to be happy? Is there a such thing possible?

Ms. Kapua`ala: Well, the code is strictly applied. The lowest cross member must be at the 11 feet – above the 11 feet elevation. The only body that has the authority to grant any mid compromise is you—the Board of Variances and Appeals. The request before you, though, is to be on-grade.

Mr. Ajmani: Just from a civil engineer or somebody here, will that increase any safety issue if we raise it say, another foot or two? Or is it – does it have to be six and a half feet or 11 feet to—? I'm just questioning.

Mr. Fukunaga: Yeah, well, as far as like Trisha said, as far as the code is concerned, the 11-foot height is a hard number. It's not approximate. So were we to meet the 11-foot flood height requirement, we would have to raise the building so that the lowest – the bottom of the lowest horizontal member would be above the 11-foot height. As far as doing anything in-between, it would require – like to meet the 11-foot height, we've shown that we're talking about something in the order of nine or ten steps to access the entry level to the waiting area. That is a concern, just a safety concern, I think. And we have the Harbor Master here who we've had discussions with, and will attest to the concern with having steps to access the loading dock for an operation that would probably involve maybe a lot of people every day. So we're trying to keep it as close to the existing floor level that now exists at the existing terminal building.

Mr. Ajmani: No, I think I don't really want the building to be 11-foot high. That'll create all kinds of functional issues and problems. I'm just basically inquiring if that 11-foot height is for a reason because of safety for people, protecting people, and so on. And if there's any increase in safety by raising it somewhat, then I'm just inquiring about it whether in your experience or your expertise, is that something worth into or not?

Mr. Fukunaga: No, we're just trying to just meet the regulatory requirement. If we put anything – build anything below the 11-foot height, it would require a variance because the 11-foot height is really set by the Federal government. And to have any dispensation from that height would require going back to the FEMA or Flood Insurance Administration who administers the flood heights.

Mr. Ajmani: I see. Okay, thank you.

Chairman Endo: Mr. Hirano, since part of the motion is that there is a finding of hardship, could you

summarize again the one or couple of items that you feel create the hardship?

Mr. Hirano: Yes. The hardship's caused first by the physical constraints of the property—the south mole. It's a long narrow piece of land—90 feet wide. And therefore, it's restricted in terms of the amount of use that it has especially in light of the building that's 36 feet wide. So we feel that the hardship is caused by physical constraints on the land because of its narrowness. And secondly, the efficiency and functionality of the building is to allow safe and easy access between the ferry terminal and the ferry vessel. And to raise the building would, I think, compromise that safe and free access to and from the building to the vessel. So the ferry – so the hardship is really that the applicant can't meet the full requirements of the building's purpose.

Chairman Endo: Okay.

Mr. Hirano: The other thing I would just like to add in terms of the consideration—there were some conditions that were recommended, if approved by the Department, and that was in respect to the insurance. And as I noted that the State government is self-insured. So if this motion is successful in passing, if an amendment to that to just say, "or other similar instrument," or "other similar way of insurance" would allow the State to continue to self-insure the facility.

Chairman Endo: Okay. What I'd like to do then is restate the motion as I believe it could be, and then the maker can agree or change if he'd like. So the motion is to approve the variance essentially adopting the Planning Department's report except with regard to hardship. And that the Board finds that there is sufficient hardship due to the physical constraints of the property. And the hardship that would be created in the ability and efficiency and functionality of the building if it was required to be raised to the 11-foot mean sea level elevation. And also, that part of the motion be that the conditions would be the standard hold harmless condition which is an indemnity provision, but without the insurance requirement. Is that correct, Member Kamai?

Mr. Kamai: That's exactly what I meant to say, Chairman Endo.

Chairman Endo: Alright. Okay, thank you.

Mr. Shefte: Second.

Chairman Endo: Second also. Okay. So that's the motion. Trisha?

Ms. Kapua`ala: Thank you, Mr. Chair. The staff would like to suggest this language be entered into record via the condition regarding the hold harmless:

In consideration of the Board's granting of the variance, the applicant, the applicant's heirs, assigns, and successors, and interests hereby agree to be responsible for and hold the County harmless for any damage or injury caused by the State's agents, officers, and employees in the course of their employment to the extent of the applicant's liability for such damage or injury as determined by a court or otherwise agreed to by the applicant. And the applicant shall pay for such damage or injury to the extent permitted by law and approved by the State legislature.

Chairman Endo: Alright. Does that sound correct, Member Kamai?

Mr. Kamai: Absolutely.

Chairman Endo: Okay. So that's the motion. That is the standard – you were reading from portions of the standard condition in the rules, correct?

Ms. Kapua`ala: This is what we approve when dealing with the State. And we'd also like to request that the State submit evidence of insurance, of self-insurance, to the Department of Planning, if that could be another condition, please?

Chairman Endo: Is that okay, Member Kamai?

Mr. Kamai: Absolutely.

Chairman Endo: Alright. So if there's no objection, all of those things will be added into the motion. Seeing no objection by the Members, that will be the motion. Any further discussion?

Mr. Tanaka: I agree, but my question is, the other improvements—we're discussing a building and the – apparently, two electrical buildings. As part of the overall project, these are the only three structures that are affected by this flood—?

Mr. Hirano: That's correct, yes.

Mr. Tanaka: Yeah, I just wanted to . . . (inaudible) . . .

Chairman Endo: Okay. Any further discussion? Seeing no one raising their hand, all those in favor of the motion, which is to grant the variance as previously stated with the conditions as stated, please signify by saying aye. All those opposed, please say no.

It was moved by Mr. Kamai, seconded by Mr. Shefte, then

VOTED: To Grant the Variance With the Conditions as Previously Stated.

**(Assenting: W. Kamai, J. Shefte, K. Tanaka,
S. Castro, R. Ball Phillips, H. Ajmani.)
(Excused: W. Shibuya, S. Duvauchelle.)**

Chairman Endo: **Okay, the motion is carried, and the variance is granted.**

Mr. Hirano: Thank you very much, Board Members.

Chairman Endo: Okay. Moving on to the next item.

- 2. PAUL HORIKAWA, ESQ. representing BINHI AT ANI requesting a variance from Maui County Code, §19.36.010 to delete the requirement to provide 20 parking stalls for a second floor conference room and storage room addition**

**for the Binhi At Ani Filipino Community Center located at 780 Onehe'e Avenue,
Kahului, Maui, Hawai'i; TMK: (2) 3-8-007:124 (BVAV 20080005)**

Ms. Kapua`ala read the agenda item into the record and showed a video of the project site and the immediate surrounding area.

Ms. Kapua`ala: Thank you. Mr. Paul Horikawa?

Mr. Paul Horikawa: Hi, good morning. It's not good morning. Hi, good afternoon, Mr. Chairman. My name is Paul Horikawa. I represent the applicant in this matter—Binhi At Ani. I will note that we have a few people who are present who will – who wanted to go testify in this proceeding. We also have Lisa Rotunna-Hazuka, the archaeologist, who prepared the report and who's gonna explain what's on the property. And at this point what I wanted to do, Mr. Chairman, is because we have some older people who are quite nervous about testifying, what I wanted to do is take their testimony first. And what I'm gonna do is incorporate that testimony into – in demonstrating to you how the criteria for the variance has been satisfied. Lisa is also going to be testify. A lot of what she has to say, you know, goes to the elements that have to be satisfied in order to grant the variance. So with your permission, Mr. Endo, Mr. Chairman, what I'd like to do is have some of the people testify, if that's okay with you.

Chairman Endo: Yeah, that's fine. Before we do that, though, are you gonna waive reading of the staff report?

Mr. Horikawa; Yes, my client will waive reading of the staff report. There was several people I did wanna recognize who are here. And there's Norma Barroga who is President of Binhi At Ani. We have Roger Madariaga who is the Vice-Chairman. We have Fred Dagdag. We have Pepito Ragasa who is kind of a cornerstone of the community. We have Attorney Tony Ramil. He may be shy. He may not testify today, but they are present and here in support of the request that's before you today, but what I'd like to do is call on Norma to come up first and—

Chairman Endo: Okay, we've got this list, though, of people. I think most of those people are on this list, but do you want to – if you want to coordinate you who call up in your order, that's fine with me.

Mr. Horikawa: Well, I'll let you go off your list. How's that, Mr. Chairman?

Chairman Endo: No, it's up to you.

Mr. Horikawa: I'd like to have Norma come up first.

Chairman Endo: Okay, so we'll let Norma Barroga testify first. Before she begins, though— She can come up, though. Yeah, come on up. You're limited to three limits. There's about 11 or 12 people who have signed up to testify. And I would just request, this is just a suggestion, that if you're going to say similar things to the person who's already spoken, try and just say that you agree with what they're saying, and kind of try and be brief just so that we can try and finish your matter today, because I know otherwise, you'll have to pay your expensive attorney more money to come again at a next hearing. So that's just a – I mean, if you feel really strongly that you want to read your

statement, feel free to go ahead and read your whole statement, but it's just a suggestion as we try and get through this matter. Okay, so the first person to testify will be Norma Barroga.

Ms. Norma Barroga: Chair Endo and Members of the Board, thank you for this opportunity to speak before you today. My name is Norma Barroga, President of the Binhi At Ani, a 501C3, non profit organization. Binhi At Ani is governed by board members who serve as volunteers. On behalf of the Binhi At Ani board, we are respectfully requesting for your approval to waive the requirement for 20 parking stalls in relation to the Binhi At Ani's proposed building expansion at our existing facility located at 780 Onehee Avenue in Kahului.

The Binhi At Ani Filipino Community Center was built with funds from the State, County, and donations from the community. The Binhi At Ani Filipino Community Center is a dream come true which was first conceptualized in the late 1970s when the land was finally donated to the Binhi At Ani by A&B in 1984.

The construction of the center was delayed for five years due to the discovery of burial sites on the property. The whole area in the back of the building cannot be disturbed due to these burial sites. The whole place in the back is sacred and must be preserved in respect to the remains that are there right now. More recently we had a conversation with Charlie Maxwell who agreed and was adamant that the back portion of the property must not be disturbed. The Binhi At Ani is also working with the Archaeological Services of Hawaii in monitoring the burial sites.

We are happy to inform you that since the opening of the Filipino Community Center in 2005, we have been providing a venue for social functions with the County of Maui. In fact, we have a memorandum of agreement with the County that allows the Kaunoa Senior Program to hold their Filipino – to hold their program at the Filipino Community Center during the day on Mondays and Wednesdays and we don't charge them for that. We also have other organizations that use the center on a regular basis. We have Aiola Balubar's Halau Hula Keola Alli'iokekai, Trent Sera's Kajukenbo, Randy Cabanilla's Ola Na Escrima, Unity Church and the Marshallese Church. Maui Waena Intermediate School also uses the center for their award assembles and social functions for teachers and students. In addition, Maui Waena uses the center for their required Hawaii state testing for our students. The conference or classroom setting would be more appropriate for student testing than a big hall that we currently have. We want to provide the best possible testing environment for our children which is one of the good reasons for having the proposed project.

The Binhi At Ani Filipino Community Center's vision is to provide services to the community such as language and culture classes, dance lessons, technology literacy and tutorial programs. These are some of the classes that members of the community have requested. I'm certain that you share the same vision of providing services to our residents to improve their quality of life.

The proposed expansion will be classrooms that will be used for conferences, workshops, or meetings that are normally held during the day. I work for the Department of Education, and I'm aware of the fact that sometimes teachers do not have a place to hold their meetings and workshops. Other departments such as the Department of Health and other State and community-based organizations also use the center.

For the past four years, we have not had any concerns or issues related to parking because we

have a memorandum of agreement with the Maui Waena Intermediate School to use their parking lot for overflow parking. We are good neighbors to the surrounding properties and we are not aware of any concerns or issues about parking.

For the sake of the community, I humbly ask for your support to approve the Binhi At Ani's request to waive the requirement for 20 parking stalls because we can guarantee you that with proper scheduling of events, parking will not be an issue. Besides, we cannot use the whole back of the property for parking. Thank you very much for listening today. I also have other letters with me, but maybe I can just provide you copies. There's one from Councilmember Gladys Baisa as a citizen.

Chairman Endo: We have a copy of that.

Ms. Barroga: I have a copy of that. And also, another written testimony from the Principal of Maui Waena Intermediate School, Mr. Jamie Yap.

Chairman Endo: Okay, we have that, too.

Ms. Barroga: And this is from Councilmember Gladys Baisa.

Chairman Endo: Okay, if it's new, you can give it to the Planning Department Staff, and they'll make copies, but they have all of those. Alright, any questions for Ms. Barroga? Seeing none, thank you. Okay, the next person on the sign-up sheet is Fely Dumayas.

Ms. Fely Dumayas: Good afternoon. You got my report. It said good morning. I was prepared this morning, but anyway, Norma kinda touched based on this— Yeah, thank you. Norma kinda touched upon most of the subjects that I was going to present today, and so if you read it through, and you have questions, you may ask me when the time is proper. I'll be back here. Okay?

Chairman Endo: So you submitted a letter?

Ms. Dumayas: Yes.

Chairman Endo: You folks have it? Okay. Thank you. Any questions for Ms. Dumayas? No? Thank you. The next person on the list is Helen Garcia.

Ms. Helen Garcia: Good afternoon. My name is Helen Garcia, a resident of Kahului for the last 26 years. I am thankful for this opportunity to speak in support of Binhi At Ani's proposed building expansion project. Please waive the requirement for 20 parking stalls and to allow Binhi At Ani to build the needed classrooms on the second floor of the existing facility.

I am a member of the Jehovah's Witness Congregation. Our house of worship is located right next to Binhi At Ani Filipino Community Center. I attend prayer services next door to Binhi At Ani and I have not seen any problem with the parking situation at Binhi At Ani. The users of Binhi At Ani Filipino Community Center have been good neighbors to us at the Jehovah's Kingdom Hall next door. I, therefore, ask that you approve Binhi At Ani's request. Thank you very much and aloha.

Chairman Endo: Any questions for Ms. Garcia? No? Thank you. Next person on the list is Paul Horikawa. You want to waive—? Okay. Next on the list is Vince Bagoyo.

Mr. Vince Bagoyo: I'll make it brief, Chairman Endo, Members of the Board. My name is Vince Bagoyo and I'm testifying in support of the request of the Binhi At Ani. I have been involved with the Binhi At Ani in its inception from the very beginning. And I really – you know, the vision was to – a place of fellowship, gathering, and even a place of worship. So the request for the variance is really needed to move this project forward. I just wanna ask you to approve it as quickly as you can, and appreciate your time. Thank you so much.

Chairman Endo: Thank you. Any questions for Mr. Bagoyo? Thanks. Next person to testify is Roger Madariaga.

Mr. Roger Madariaga: Good afternoon, ladies and gentlemen. I'm Roger Madariaga, a board member of the Binhi At Ani and the project manager of this proposed second story addition of this building project.

In the environmental impact assessment review report that was drafted by Munekiyo we stated in there that this proposed project will be used during the daytime from 8:00 to 5:00, and that a maximum of 50 people will be allowed. And that this time of the day it is an indisputable fact that when you go to the Binhi At Ani facility, the parking during the daytime should never be considered an issue. And besides, in that environmental impact assessment review, it was mentioned in there that there will be an in-house monitoring of our office so that any function would not conflict with big events and parties that may be held in the center during the daytime. So when we use these facilities for those intended purposes, those – the parking will not be a problem because these events and functions for those conference rooms will only be in those designated times. And it will never be in conflict with the evening functions.

Ladies and gentlemen, I will humbly ask for your support because we do recognize the importance of having these facilities to accommodate the needs and growth of our community. Thank you.

Chairman Endo: Thank you. Any questions? No? Thank you, Mr. Madariaga. Next we have Fred Dagdag followed by Randy Cruz.

Mr. Fred Dagdag: Chairperson Endo, Members of the Board, good afternoon, ladies and gentlemen. My name is Fred Dagdag, and I am testifying on behalf of the Binhi At Ani who is requesting a variance to delete the requirement to provide 20 parking stalls for a second floor conference room. Our facility is a popular site for conferences, workshops, family celebrations because of its central location, size, and affordability. In 2007, Binhi At Ani applied successfully for Federal and State grants in the substantial amount of \$750,000 specifically for the purpose of constructing the second floor. If construction falls through, we are in danger of losing the funding which would be a significant lost in this difficult economic times. Binhi At Ani and the Maui community cannot afford to lose this funding. The evidence in this form of topography maps and photographs have been submitted to show you visually how impossible the terrain is to negotiate due to the steepness of the slope in the back of the property. In addition, Binhi At Ani has a cultural mission related to respect in honoring people's cultures. Because of this, and to preserve our positive relationships with the community and keeping with the laws of the State, Binhi At Ani is

fierce in its commitment to protect the burial sites located on the property.

In 2006, I was president of the Maui Filipino Community Council when I assisted in negotiating a memorandum of agreement that was executed between Binhi At Ani and Maui Waena Intermediate School. The MOA described the annual sharing of parking as needed. The document was signed by Mrs. – which is our President, Norma Barroga, and Mr. Jamie Yap, which is the Principal, with the full knowledge of Mr. Ken Nomura, the Department of Education Superintendent at that time. This is entered into evidence. The school is able to provide for more than 20 parking spaces required as Binhi At Ani has access to the school's parking area during afterschool hours and weekends when the campus is not being used. In exchange, the school can use the Binhi At Ani facilities for its workshops and school functions. This agreement, to use this Maui Waena parking area satisfies the requirement for 20 parking stalls needed for the urgent construction of our second floor conference room. For this reason, I urge you folks to delete the parking requirement. Thank you very much.

Chairman Endo: Thank you. Any questions for Mr. Dagdag? Seeing none, thank you. Next, Randy Cruz followed by Pepito Ragasa.

Mr. Randy Cruz: Hello, good afternoon, Mr. Endo. I'm just here to support all my community to all the testimony about the Binhi At Ani program. And I'm asking for your grant to all my reasons to please sign about this contract 'cause it's not only for our community like Filipino, but it's for our own good, too, for County of Maui. That's all I can say.

Chairman Endo: Thank you. Any questions? Seeing none, thank you. Next, Pepito Ragasa followed by Luz Ramil.

Mr. Pepito Ragasa: Dear Members of the Board of Variances and Appeals, good afternoon. My name is Pepito Ragasa, a resident of Kahului for more than 60 years. I also serve as board member for the Binhi At Ani board. Thank you for allowing me to speak before you today on behalf of the Binhi At Ani. I would like to ask you to please grant the request to waive the requirement for 20 parking stalls in connection with the proposed building expansion at the existing Filipino Community Center. I wholeheartedly support the proposed project. My family, relatives, and friends use the Binhi At Ani Filipino Community Center for events, functions, such as family parties and celebrations. The Binhi At Ani Filipino Community serve our community residents well regardless of ethnic and background. The center is available to Filipinos and non-Filipinos. In talking with people in the community, I'm aware that there is an increased demand for a conference room or a venue to hold meetings. I am aware that there is an increased demand for a conference room or a venue to hold meetings and workshops. People in the community have expressed their need for a place to hold meetings, trainings, worship. I humbly request that you grant the request to waive parking whenever we use the facility. Let us all work as a team in making sure that we have a facility that we'll use for different purposes which will serve the needs of people in the County of Maui. Thank you, aloha, and mabuhay.

Chairman Endo: Any questions? Thank you, Mr. Ragasa. Next is Luz Ramil.

Mr. Tony Ramil: Good afternoon, Mr. Chairman. I am not Luz Ramil. I am the husband. So if it is okay for me to speak on her behalf?

Chairman Endo: Sure.

Mr. Ramil: Actually, we don't really have anything to add because the previous speakers have pretty much covered I think what my wife was supposed to say. And I'd just like to emphasize, though, that, you know, this new addition, second floor addition, I think primarily will be used during week days and during the day, primarily. And, you know, there are already 94 parking stalls in that building. And I don't see any problem of parking during the slated, I think, use of this facility because as I said there are already 94 existing parking stalls there. And during the nighttime, even if both – if this addition will be completed and even if there will be another gathering in the bigger hall and the upper one, I – we have not had an experience with more than 100 people gather in the bigger hall during the daytime. I think the big events in the big hall usually takes place during the weekend maybe Saturdays or even Sundays. So even if you have maybe in the big hall maybe something going on at the same time with the proposed addition, I don't think there will be a problem of parking because as I already said, there are already 94 parking stalls for the facility. And not only that, if there should be any real problem, I think there is the Maui Waena parking area that could be used. But we don't really foresee any problem of parking when this proposed addition will be completed. The other thing that I think my wife wanted to say was that as Mr. Dagdag already pointed out, we already have \$750,000 waiting to be spent for this facility. And you know, we certainly would like to use this money not only during this difficult economic times, maybe \$750,000 goes into the community could help a lot. Thank you very much.

Chairman Endo: Any questions for Mr. Ramil? No? Okay, next we have—I can't read the handwriting too well—I think it's Lucille Peros? She left? Okay. Next we have Phillippe Barroga, Jr.

Mr. Phillippe Barroga, Jr.: Good evening, Members of the Board. My name is Phillippe Barroga, Jr. I'll make this really brief because a lot of the folks that have already testified before me have covered most of the points that I was going to cover in mine also. But I'm a member of the Binhi At Ani's first board of directors. And basically, I'm here to talk in favor of the second story addition. The parking that we're being asked to add to the property as you've already heard is near impossibility because the area in which the parking would be placed in is an area we cannot touch. This area as you've seen in the photographs encompasses almost an acre of land, and is steeply inclined. And if you disturb that area, and as you've heard, there are a lot of burial plots there, we – I have been told we may be fined heavily by the Burial Council or whomever supervises those things. So with that in mind and with the Maui Waena parking lot as our spillover lot with our 94 spaces that is already there, I am – I humbly request that you grant our variance. Thank you.

Chairman Endo: Thanks. Any questions for Mr. Barroga? Seeing none, thank you. Okay, that was the last person who signed up on the public testimony sign-up sheet. Is there anyone else who wishes to testify on this matter? Otherwise, at this point, seeing none, we'll close public testimony as to this agenda item, and let Mr. Horikawa continue with his presentation.

Mr. Horikawa: Well, Mr. Chairman, what I'm gonna do is I'm gonna let Lisa present – she's the archaeologist, and because we have to show that the property's unique, she's gonna speak to the skeletal remains that were found on the property. You know, the staff report does make a recommendation and a finding on this issue, but what I'd like to do is just have Lisa speak about those issues, and why we cannot proceed as suggested in the staff report. And then I'll come on and basically add a few comments on why we believe or why my client believes the – we have met

the requirements of – for granting the variance. And then . . . (inaudible) . . .

Chairman Endo: That's fine.

Ms. Lisa Rotunna-Hazuka: Good afternoon, Lisa Rotunna-Hazuka, archaeological consultant for Binhi At Ani. We started this project in around 2000. And we were doing the archaeological monitoring of all the grading and construction activities.

And early in 2000, we did find not only displaced skeletal remains, but also intact burial features. And from about 2000 to I think it was 2003, we probably had two redesigns of the building and the parking lot because of the numerous burial features we were finding. As burials are found, we'd go to the Burial Council. We discuss the situation—how – what we found, how many we found, the disposition of the burials. And at most of the meetings, the Burial Council was, okay, you know, the dune is gonna contain burials. Can you redesign the building? Pull the building away from the sand dune? Redesign the parking lot? Reduce the number of stalls? Whatever you have to do to not impact the dune feature? So that's what Binhi At Ani did. And that's part of the reason it took so long to get this building built.

I have another map here, which basically the map that I passed out to you is a close-up of this map here. Everything in pink shows the intact burial features. If you notice on the map that I gave you, it's this parking area here. And it also shows two items in pink which are native Hawaiian burial features. These burials have been preserved in place. So nothing can happen in this area where these burial features are. Also, we have several burials very close to the back of the building and the retaining wall that were found in what we call "in situ" in their original position.

So this is like an early rendition in 2001 of how the building was supposed to be placed on the lot. And if you can see here, there's large retaining walls. And this building here, here's the entry feature, which is this entry feature here, and you can see how it's been pulled further towards Onehee Road.

I also passed out to you a letter from the State Historic Preservation Division. And in the fourth paragraph, I just underlined the main – I just highlighted the summary:

Because of the significant findings, the landowner redesigned the building and retaining walls. In addition, the number of parking stalls was reduced to accommodate preservation in place for most of the primary intact burial features.

So that's it in a nutshell.

Chairman Endo: Okay. Mr. Horikawa?

Mr. Horikawa: Yeah, I just wanted to provide some background on the project and address the merits as to why we believe that the variance should be granted. You know, it's kind of interesting how time passes so quickly. I remember back in the late '80s, I was working for Corporation Counsel when the Maui Lani Project was coming through. And I remember Vince, who's already left, lobbying the then owners, A&B, for the lot for the Binhi At Ani. And I don't know how he did, but somehow he was able to convince A&B to donate that two-acre lot that's where the facility is

located. And – well, the lot was donated in 1989. And then after that they had to go through the community plan amendment to get it zoned public/quasi-public, and then have the community plan amendment, and a – the zoning changed. So they were really put through a tremendous task. Later that year, after it had been re-zoned and the property had changed the community plan designation, they applied for a building permit, and when they were in this process of grading, they discovered all of these bodies. And so you may have driven by and just seen a vacant lot and wondered what happened. Well, Lisa kind of filled you in on what happened. And they were in negotiations and meeting with the Burial Council which finally resulted in these plans coming out.

If you look at the – the map that's on the wall that's entitled "Draft Map," the pink indicates the areas where the bodies were found. And the X's in that area indicate the parking stalls that had to be deleted in order to construct this facility. It's interesting, and we'll get to that later on. There was a wall, a retaining wall, that had been planned to create the additional parking, but as a result of finding bodies in that particular area, according to Lisa who was at the meeting, the Burial Council said, no, you're not gonna touch the wall. And so that idea of building the retaining wall to create additional parking had to be scrapped.

But in any event, we're here before as noted by Mrs. Barroga, and Mr. Dagdag, and others. You know, they're here with a grant from the government to basically construct an addition to the existing bathroom and office buildings in the area to your left on that drawing where the – where those – where the existing office is located. It will be a second story addition. And as noted in the documents that were presented to you, SHPD did approve the monitoring plan earlier this year for that building. It's not – it will be in an area that – where there has already been construction, so it is not anticipated to have an adverse effect on any of the current burials. The three conference rooms average an area of approximately 700 feet or so, not quite. But, you know, there'll be three conference rooms. There'll be some storage areas. There'll be an elevator, as well as a stairway to get up to the second floor.

In meeting with the Department, it was determined that 20 parking stalls were needed to construct the – this improvement. And you have a copy of it in your file as part of the application. So this is basically what we're here before you today about, but moreso on the parking requirement. You know, it's with that background that I wanted to provide to you to discuss the elements that have to be satisfied in order to – for you to grant the variance. And I'm gonna discuss these requirements in the order that's set forth in the staff report.

The first requirement is that there be an exceptional unique or unusual physical, or geographic condition on the property which is not generally prevalent in the neighborhood. And that we – and that the use authorized – the use sought to be authorized by the variance will not alter the essential character of the neighborhood. Based upon Lisa's testimony – and the interim monitoring report is part of your – of the application, we would submit that, you know, the finding that there were human skeletal remains, and according to the staff, the report that was – the interim monitoring report that was prepared by Lisa as well as the letter from the Department of Land and Natural Resources, State Historic Preservation Division, there is a verification that there are 23 bodies were found in the dune. We would note that the property is extremely steep. This is a picture of the property. You also saw a picture of the property on the video that Trisha showed us. We would submit those – the finding of the bodies as well as the topography of the property makes this property unique and contain a condition that is not generally in the neighborhood. We would note

that Maui Waena, which was depicted in the movie that you saw by Trisha, you know, it was pretty flat. The property is towards Wakea or in the Kahului direction was also flat. The Jehovah's Witness property is relatively flat, but it also has that particular feature on the slope, but it is not prevalent throughout the neighborhood especially, if you look in the Maui Waena direction. We would submit to the Board that the first criteria—the variance has been satisfied.

The Planning Department's report suggested that the applicant has not explored the possibility of building a retaining wall and then creating additional parking. Well, according to my discussions with Lisa, that proposal was – the original proposal to create additional parking, the Burial Council rejected that, and as a result of those discussions and those meetings, that just cannot happen. The Burial Council will not allow that to happen. So the suggestion made by the staff is well taken. However, that alternative was reviewed and it was rejected by the authorities that have the jurisdiction in this matter. There's also some information – the comment that no information was obtained from the Burial Council or the State Historic Preservation Division regarding the potential impact of any burials on the property. I think Lisa's comment of what had happened before, SHPD – I mean, excuse me, from the Burial Council is pretty clear that they don't want – the Burial Council, I should say, does not want Binhi At Ani going further into that hill. The monitoring report on the recommendation, and this is on page 36 of the report contains a finding that there is a substantial likelihood that additional bodies will be found on that dune. I don't want to put Binhi At Ani in a position where they would, you know, find additional bodies. That's not good for Binhi At Ani. It's not good for the State of Hawaii. It's not good for the Hawaiian culture. There will be a plan to preserve that. I think it's better left – this is just my personal opinion, but it would be better left just preserved in place and not conduct any type of excavation just to determine if there are additional bodies there. History has shown that 23 bodies are there. I don't think my client wants to find any additional bodies in the dune.

With respect to the requirement that my client show that there is – that strict compliance with the applicable provisions of this title would prevent reasonable use of the property, I think – first of all, I think Mr. Ramil's comments were very appropriate in that, you know, the money is there to build this project. You know, the Federal government has deemed that this is a worthy project. The State government has deemed that this is a worthy project. My understanding is that the County – If you look at the interim report, that particular report for this particular project was paid in part by the County. My understanding is that the County may also be participating in the addition, but be that as it may, you know, it goes to reasonable use of the property. But getting into the staff analysis, and the staff, I think, is correct when they say that you have to meet the practical difficulty's test. I think it's – the end result that we reach in applying the factors is a little different. And I'll provide you with my thought on that is –

The first issue is how substantial is the variance in relationship to the requirement. There is a comment that, you know, the applicant is attempting or requesting a complete deletion of the requirement. As you look at that particular – The statement to the large extent is true. I'm not gonna deny that but you know, everything has a context. And I think one of the previous individuals had testified. I believe it was Mr. Ramil who testified that there are 94 parking stalls on the property. And so, you know, if the 94 parking stalls were not there, I think the request, you know, would – you know, there would be some questions about the request. But the fact of the matter is that there are 94 parking stalls that are there right now. The video that you saw earlier this afternoon showed one vehicle on the parking lot. I don't know what day that was.

You have before you two exhibits: we have one exhibit that shows one vehicle here, and we have another photo of Binhi At Ani. These photos were taken on the same day, and they show another vehicle. You know, there were no other vehicles in the parking lot. Oh, okay. I'm sorry, I've been asked to show the photos, Mr. Chairman.

Chairman Endo: Sure. Could you also use the cordless mic?

Mr. Horikawa: Well, I wasn't gonna deviate that much farther from it. But I just wanted to demonstrate that, you know, you had two independent sources of information, which shows that that parking lot is hardly used. I mean, you know, in the context of how substantial it is, we would submit to the Board that, you know, the parking lot as provided by the testimony from the – as you heard previously, is not generally used during the day. I mean, the center is used mostly on the weekends. We would submit that, you know, in the whole context of the parking that's there, and as well as the memorandum of understanding that the applicant has with Maui Waena, you know, the variance is not substantial in relationship to the requirements.

The second criteria is whether a substantial change will be produced in the character of the neighborhood or provide a substantial detriment to the adjoining properties. There was no comment about changing the character of the neighborhood in the staff report. The staff report was more concerned about parking. If the request is granted, additional vehicles would occupy Onehee Avenue and Lalani Circle as noted earlier during the normal daily – day operations which is when this building will be used. Their – the parking lot is not used substantially. I mean, if anything, the evidence from the photographs indicates that there are – there was one car in one day, and two cars on another day. When you have these Kaunoa functions there, they come there by bus, and they're dropped off there, and they're picked up later on. Maybe you have ten cars come in there. My daughter also participates in hula at the center, and maybe you might have ten cars there during the day. But we would submit at this point there will not be a substantial detrimental effect in the neighborhood especially on Onehee and Lalani Circle if the Board were to grant the variance.

The last element that the Board has to consider in considering practical difficulties is whether the difficulty can be obviated by some method feasible for the application to pursue other than a variance. I mean, in other words, has the applicant explored other options to obtain the variance? Well, the board or members of the Binhi At Ani did approach Maui Waena. And the Maui Waena is willing to let them use the parking stalls, but the problem is it's not a set number of stalls, 20 stalls, where we can go before the Planning Commission and say, hey, we would like off-street – we would like approval for off-street parking in that context. As you can see from the photo, many times, the parking lot from Maui Waena especially during the day is full. Okay? It's more on the weekends that they would allow the use. As far as the Jehovah's Witness, there was an approach to ask them if they could have shared use of the parking lot and their response was no. They have an electronic gate that they didn't necessarily wanna share. Those are the only two parking – I mean, lots that have parking stalls within 400 feet of this facility. And we would submit that the applicant has acted in good faith. It has – you know, it did seek other options. We're here before you as a – sort of like a last resort to get approval to construct the building, and – without the necessity of providing the parking.

As far as the last element that must be proven or demonstrated to you, and that is the condition creating the hardship cannot be the result of previous action by the board, as mentioned by Lisa,

probably the biggest factor in Binhi At Ani not being able to meet the code requirement, you know, is the fact that numerous bodies were found on the property. And that, you know, the Burial Council, which has jurisdiction in this matter will simply not allow Binhi At Ani to construct the walls and to expand the parking lot as has been suggested in the report. Secondly, you know, the severe nature of that slope is – it is what it is. God created the lot, and there's nothing we can do about that at this point. I mean, it's possible, but I think the bodies present a bigger problem than the slope itself. But in all, Mr. Chairman, and Members of the Board, we would submit to you that in this particular case, based upon what you have before you that was submitted to you, the testimony of the individuals who are present today, as well as Lisa's testimony, we would submit to the Board that all of the elements for a variance have been satisfied, and we would urge the Board to grant the request that's before you. The architect is also present if you want to ask him any questions. Lisa is also present if you have any questions. We're available to answer any questions that you may have.

Chairman Endo: Thank you, Mr. Horikawa. Before we begin questions, should the staff announce for the record any letters in support or opposition?

Ms. Kapua`ala: For the record, there are six letters submitted in support of the subject variance and no letters submitted in opposition.

Chairman Endo: Okay, those letters would include a letter from Joseph Pontanilla, Michael Molina, Gladys Baisa, Jamie Yap, Cecile Peros, and I think there might be a couple more.

Mr. Ajmani: From Danny Mateo also.

Chairman Endo: Oh, I'm sorry–Danny Mateo.

Ms. Kapua`ala: I have Gladys Baisa, Fely Dumayas, Jamie Yap, Danny Mateo, Michael Molina, and Joseph Pontanilla. And I do not have the seventh one. I'll get a copy, sir.

Chairman Endo: Okay, that's good.

Ms. Kapua`ala: Seven.

Chairman Endo: Alright. So at this point, we'd like to open it up to questions and discussion from the Board Members.

Mr. Kamai: Yeah, this question is for staff. Considering the letter submitted to Tamara Horcajo by Nancy McNann of the Historic Preservation – Manager for the DLNR, do you know if the Planning Department did receive this letter prior to their analysis?

Ms. Kapua`ala: The Planning Department looks like was faxed this letter, and I'm not sure which file this is located in. This letter was not submitted with the variance application. We did not have this prior to the drafting of the staff report. So when we drafted the staff report, we had no written confirmation from any government agency that confirmed that this burial plan was acceptable that – confirming from SHPD that the bodies shall remain untouched. So this – in retrospect, if this was in our possession when we drafted the staff report, we would've been able to concur with the

applicant that there is an exceptional, unique, physical, geographical conditional existing on the property. And that would also satisfy no. 3 which says that because that condition exists, a hardship exists.

Mr. Kamai: Okay, thank you. What about no. 1 where the staff analysis no. 1 that there is an exceptional, unique, unusual physical or geographical condition? Do you think that would apply to it as well?

Ms. Kapua`ala: Yes. This letter addresses no. 1. And because the condition is identified in no. 1, then that condition does create a hardship that result – that were not the result of previous actions by the applicant. So no. 1 and no. 3, the staff can concur with based on the submittal of this letter and the applicant's testimony today.

Mr. Kamai: You think that in your opinion, it would apply to no. 2, paragraph C, whether the difficulty can be obviated by some method feasible for the applicant to pursue other than a variance being that they did consult in trying to build a retaining wall – consider trying to build a retaining wall but that was rejected by the Burial Council?

Ms. Kapua`ala: The staff didn't look at the retaining wall factor. We looked at an approval process other than the granting of this variance. So what we suggested is a feasible option or may be feasible is obtaining offsite parking approval from the Maui Planning Commission. And I'd like to note that that approval can only be granted if a neighboring property within 400 feet has an excess of 20 stalls. So if Maui Waena, or the Kingdom Hall of Jehovah Witness, or any other lot within 400 feet has – only provided the amount of stalls they required, and they do not have an excess of 20 stalls, they would not be able – they don't have any stalls to give Binhi At Ani. We did not go and research how many stalls were required, and how many stalls were provided for the neighboring properties because it's the burden of the applicant to provide, you know, justification for the variance. All we can state is that this is an option other than the granting of the variance. It may be possible to obviate a variance. Based on that, the applicant must provide testimony or documentation saying that they have met that criteria specifically – is offsite parking approval from the Maui Planning Commission a feasible option.

Mr. Kamai: Is Maui Waena within that 400 feet?

Ms. Kapua`ala: I can – I'm sure they are, yes. Yes.

Mr. Kamai: And that this letter from the Principal showing a willingness to – in fact, I think he said that they drafted a memorandum of agreement that allows the users of Binhi At Ani Community Center to use the parking lots for overflow traffic. Would that constitute the 20 use of the – the extra 20 stalls?

Ms. Kapua`ala: No, not necessarily. Again, they have to have the 20 stalls to give for the Planning Commission to able to approve offsite parking approval to be located on Maui Waena. The parking ordinance does not address time of day. It does not say that any authority – well, the Planning Department does not have the authority to approve stalls because they'll be using the daytime whereas other stalls would be used in the night. Twenty-four/seven, 24 hours a day, those 20 stalls must be provided somewhere it be onsite or offsite, and only if those offsite stalls are excess stalls.

So this letter alone wouldn't be enough for the Planning Commission to approve an offsite parking approval. They would have to show that they have 20 excess stalls. I'm not saying that this cannot be enough for you. You have a different authority.

Chairman Endo: Any further questions, discussion, motion?

Mr. Shefte: Just a quick one—you mean that those 20 stalls have got to be identified specific to that use?

Ms. Kapua`ala: Well, in the past, the Planning Commission does not – most offsite parking approvals have been in Lahaina. And you know that those lots are paid parking lots which – and they do not agree to setting those lots aside specifically for that restaurant or that art studio. So I don't believe—and, James, you can correct me since you also staff the Planning Commission that they don't label stalls. If they were to grant – if they were to allow Binhi At Ani 20 stalls, does the Planning Commission require – would they require those stalls to be specifically and only for Binhi At Ani?

Mr. Giroux: Trish, I think the Planning Department has gone back and forth on this with the various Commissions. So I don't think there's any set policy.

Mr. Ajmani: I have one question for the staff. We have been assuming that 94 parking stalls were for the old building. How was that determined? And maybe there are extra stalls over there to begin with. Did anybody check into that?

Ms. Kapua`ala: Can you restate your question?

Chairman Endo: We can check with the applicant. He wants to know whether or not the existing stalls are in excess of the current requirement.

Mr. Horikawa: The original requirement was 94 and so they built 94. They were going to build 19 additional parking stalls just in case of future use, but those got – those parking stalls as noted in the X were not allowed because of the finding of the burials. I would note that the capacity for the hall is 494. Oh, I'm sorry, 464 people. So the 94 stalls is for 464 people, but by in large, most of the time that hall during the day is empty. So on the issue– I'm sorry.

Mr. Ajmani: No, what is the area of the hall?

Mr. Horikawa: It's 7,600 or something.

Mr. Ajmani: So then it should only need 76 stalls because a hundred square feet per stall requirement somewhere mentioned here?

Mr. Horikawa: Well, but the existing offices also have requirements. The kitchen has a requirement of X amount of stalls. Believe it or not, this area here, this patio, I can't recall the area off the top of my head, but it's just an empty area of – sort of like a patio, but that had an independent requirement of I believe 12 stalls although it's hardly used.

Mr. Ajmani: Yeah, that little pavilion on the left side.

Ms. Kapua`ala: Excuse me, Paul, could you submit a copy of that map for us?

Mr. Horikawa: (Inaudible)

Ms. Kapua`ala: Is it this one? This is a copy of the map that the Board received.

Mr. Horikawa: (Inaudible)

Ms. Kapua`ala: Burial plan? Interim report? Okay, okay. Thank you.

Chairman Endo: Any further questions? Otherwise, the Chair would recommend a motion.

Mr. Shefte: I would like to make a motion.

Chairman Endo: Okay, James.

Mr. Shefte: I move that we grant the variance for the fact that in my view, the applicant has done everything in their power to try and satisfy the requirement, and the fact that they worked out an agreement with the school across the street pretty much satisfies it for almost any situation I think. And therefore, I think the application should be granted.

Mr. Ajmani: I second.

Chairman Endo: Okay, it's been moved and seconded to grant the application for a variance. If I might? Assuming you'd adopt the applicant's reasoning as stated in their written submissions insofar as having why they feel they've met the various criteria for granting of the variance?

Mr. Shefte: Yes, and I would further the motion to include the insurance requirements.

Chairman Endo: Okay. The insurance and indemnity requirements?

Mr. Shefte: Correct.

Chairman Endo: Okay. Alright. It's been moved and seconded to that effect?

Mr. Ajmani: Yes.

Chairman Endo: Okay. Discussion? Okay, at this point, I want to let Mr. Horikawa comment on anything. Do you feel like the insurance is required? Maybe you'd want to argue for just the indemnity in this situation being that they're a nonprofit and all of that or—?

Mr. Horikawa: Well, could I – could we – I did speak to them and I had them speak with their insurance carrier, and we didn't get a reply back. What I would like to do is, you know, if the Board is gonna impose as a condition, so be it, but we would like to reserve the right to come back if it becomes cost prohibitive.

Chairman Endo: Well, I would like to just say before we get there that, you know, I mean, it's good to have insurance and everything, but I mean, when you think about – it's just a parking lot. It's just having a few less parking spaces than required. I mean, you've got to try and think, well, what kind of liability is going to happen from that that it requires extra insurance, because the insurance rider will have to cover just liability arising to the County from us granting this variance request so that they have less parking stalls? So it's not like we're adding – you know, if somebody trips and falls in the building, that's not our fault. That's just regular. They have their own insurance for that. So it would have to be some very unusual circumstance where somebody dies because there's not enough parking in their parking lot or something. So it's kind of – it's almost where I would suggest that maybe we'd consider not having any insurance requirement, but–

Mr. Horikawa: It's not a problem.

Chairman Endo: But that's just a personal feeling.

Mr. Tanaka: Yeah, I agree.

Chairman Endo: You agree? You want to move – make a motion to amend the main motion to delete the insurance requirement?

Mr. Tanaka: Okay, so move to amend.

Chairman Endo: Okay, is there a second?

Mr. Castro: Second.

Chairman Endo: Okay, it's been moved and seconded to amend the main motion to approve the variance to delete the condition with regard to the insurance provision only. They still would have the indemnity provision. So they'll still have to indemnify for any types of liability. Okay, any discussion on that?

Mr. Ajmani: Okay, I agree.

Chairman Endo: Okay. You okay? Okay. Okay, any further discussion? No? All those in favor of the motion to amend to delete the insurance provision, please signify by saying aye. All those opposed, please say no.

It was moved by Mr. Tanaka, seconded by Mr. Castro, then

**VOTED: To Approve to Amend the Main Motion to Delete the Condition With
Regard to the Insurance Provision Only.**

**(Assenting: K, Tanaka, S. Castro, W. Kamai, J. Shefte,
R. Ball Phillips, H. Ajmani.)**

(Excused: W. Shibuya, S. Duvauchelle.)

Chairman Endo: **Okay, the motion is carried, and the main motion is amended as stated. So**

now back to the main motion to approve the variance request. Any further discussion? No? Okay, all those in favor of the motion to grant the variance as stated, please signify by saying aye. All opposed, please say no.

It was moved by Mr. Shefte, seconded by Mr. Ajmani, then

VOTED: To Grant the Variance As Stated.

**(Assenting: J. Shefte, H. Ajmani, K. Tanaka, S. Castro,
R. Ball Phillips, W. Kamai.)**

(Excused: W. Shibuya, S. Duvauchelle.)

Chairman Endo: **Okay, the motion is carried.** Congratulations.

Mr. Horikawa: Thank you very much, Mr. Chairman, and Members of the Board. Thank you very much.

Ms. Barroga: On behalf of Binhi At Ani, I'd like to thank all of you for granting the approval. Thank you.

Chairman Endo: Why don't we take a five-minute recess for those who want to use the restroom? So we'll come back in five minutes.

(A recess was then taken at 3:45 p.m. and the meeting reconvened at 3:50 p.m.)

Chairman Endo: Okay, we're now back in session—the Board of Variances and Appeals. We'll take up the next item. Also, let the record reflect that Warren Shibuya has now joined our group. So I believe we're on Item B-3.

- 3. ELLIOT & BARBARA LUKE requesting a variance from Maui County Code, §16.04B.140, Subsection 903.4.2 (as amended) to delete the requirement to provide fire protection with a fire flow of 500-gallon per minute for a two-hour duration for the Luke Family Subdivision located on 233 Anuheia Place, Kula, Maui, Hawai'i (BVAV 20080006)**

Ms. Kapua`ala read the item into the record.

Ms. Kapua`ala: And I do have a video for the Board. Would you like to see the video?

Chairman Endo: Yeah, sure.

Ms. Kapua`ala: There's also a petition to intervene before you, or would you like to dispose of that motion or see the video?

Chairman Endo: How long's the video?

Ms. Kapua`ala: Three minutes.

Chairman Endo: We might as well watch the video. Did you say 30 minutes or three minutes?

Mr. Giroux: I just – Chair, I just want to caution the Board that because it does look like it is getting into a contested case that you take this as maybe pre-informational information, and that it's not part of the record as far as decision-making. So I just want to caution you as far as that goes.

Chairman Endo: Or you want us to just defer it 'til later then?

Mr. Giroux: If you can – this may help you to decide on how you want to do your procedures because we are going to be getting into the issue of how you want to proceed. So it may help you to have some background, but I don't want you to start asking questions and getting into the minute details of the case.

Chairman Endo: Okay, so we'll watch the video.

Ms. Kapua`ala: Okay. This view is from Anuheia Place at the entrance of the Luke's property. The end of Anuheia Place is a cul-de-sac. They're all ag lots. This fence represents the end of the Luke's property. Now I'm towards the end of the property. That's Anuheia Place. Apparently, there's an active building permit that's on the lot. Another 360 view just so that you can get a feel for the area. Last view—mid-point of the driveway maybe closer to the house than the road. So again this is all of the Luke's property. Ms. Luke was so kind to meet me out there and she said that where these trees are to the right is – past that is where the tank would be located, and that's within the 500 feet from the house. Thank you.

Chairman Endo: Okay, at this time, there's been a motion to intervene by the Fire Department?

Ms. Kapua`ala: Yes, it was submitted recently after the mailing of your packet. You should have a copy waiting for you as you arrived today. The maker of that motion or the author of that petition is here—Deputy Corporation Counsel Mr. Richard Rost—Bear. I know him as Bear. And the Fire Department is also here today and the applicant as well—the Lukes.

Chairman Endo: Okay, why don't we have the applicant introduce themselves, and then counsel for the Fire Department, and then we'll take public testimony, and then we'll act on the motion? I believe in light of the pending motion, we should listen – have them hear the motion first before the presentation because we might not need the presentation today depending on the motion. So if the parties could just come up and introduce themselves for the record.

Ms. Barbara Luke: Hi, I'm Barbara Luke, one of the property owners.

Mr. Elliott Luke: Good afternoon, Chairman Endo, Members of the Board, I'm Elliott Luke, property owner.

Chairman Endo: Thank you.

Mr. Richard Rost: Deputy Corporation Counsel, Richard Rost, on behalf of the Fire Department.

Chairman Endo: Okay. Alright, since you're up now, Mr. Rost, why don't we address your motion to intervene?

Mr. Rost: Yes, thank you, Mr. Chair. The Fire Department has filed a motion pursuant to Rules of Practice and Procedure for the Board of Variances and Appeals, Section 12-801-28(A). And under that rule, all Departments of the County shall be admitted upon timely application for intervention. The Fire Department's applying to intervene because they consider granting this variance to be a possible fire hazard and would possibly endanger the Fire Department's personnel and equipment. And so on that basis, we ask the motion to intervene be granted.

Chairman Endo: Okay. I noticed that the applicant is not represented by counsel. Just for your information, basically, the motion to intervene is to allow them to – allow the Fire Department to participate in this proceeding as a party as opposed to just giving testimony as a public member. And you've received a copy of their motion?

Ms. Luke: Yes, we did, Tuesday.

Chairman Endo: Okay. And if you wish, you're free to come up and speak against, or for it, or you could – or if you feel that you have inadequate time and want to hire an attorney to argue against the motion, we could recess, I guess, or we could consider it anyway.

Mr. Luke: Mr. Chairman, Members of the Board, it was actually a surprise to us that the Fire Department had – or is part of this – submitting this motion. We – I don't think we want to hire an attorney to fight this motion. I think I understand their position. And I think if you have read the matter in front of you, you understand what we're talking about. I think it's something that I'm prepared to discuss and – at this point or at a later date.

Chairman Endo: Okay. Just for your information, assuming that the Board grants the motion to intervene, most likely what would happen then is we would set a hearing date later from now, give the parties both time. The procedure would basically become a little bit more formal once a party has intervened. Essentially you would both be allowed to call witnesses and share exhibits with each other as far as what evidence you're gonna provide to the Body. And so it's just a little bit more like a quasi-judicial type of procedures. So that's likely what would happen once we move on – decide on the motion. That's for your information.

Mr. Luke: I understand that. We're actually here today – we initially submitted an appeal process which we were told that's what we should do. And then they corrected us and told us that we really need to do a variance. Both processes were suggested to us actually by members of the Fire Department. So, you know, it's not that we're trying to scam the rules and regulations or anything like that. We just feel like that we have a very unique situation, and understand the law's the law, and rules and regulations are to protect all, but our situation is very unique and our circumstances are very unique. So but, you know, we will do whatever is necessary to present our side of this particular situation. I don't know if that–

Chairman Endo: That's fine, I mean, that, to a certain extent that's going to the merits of your request for a variance, which is okay, but basically we want to focus more on just the motion to intervene at this point. So what I'll do is if there's other remarks from Mr. Rost otherwise, I'm just

going to just open it up to the Board.

Mr. Rost: No, I don't have anything further. Thank you.

Chairman Endo: Okay. So at this point, then, let's – are there any questions or statements anybody wants to make on the motion to intervene by the Fire Department? Is everybody clear on what we're adjudicating at this point? Hari, you want to say something?

Mr. Ajmani: I just wanted to find out like Mr. Luke said that he had talked to Fire Department about this issue before submitting the variance application. And do they have– I see somebody from the Fire Department here clarifying that – on what was discussed. Can you tell me what was discussed with the Fire Department before?

Mr. Luke: Well, we were looking for some other alternative than having to put up an additional tank because there's no building plan to go on this property except the one that's already there. And so in discussing this with members of the Fire Department, they said that one of the processes that you can go through is a variance and appeals' process. And we did a lot of leg work because we understood at that point that it would be an appeals' process, and then found out later on with Trisha's help that it's really a variance that we need. And now it seems like we're going back to an appeals' process.

Chairman Endo: Oh, no, actually you're not. It's still a variance.

Mr. Luke: Oh, okay. Alright.

Chairman Endo: It's just a procedural change. It's a little bit more formal in the presentation of the evidence, but it's still a request for a variance.

Mr. Luke: Okay. I think if you look at the situation, it's pretty simple. If you look at all the answers to the staff analysis, they all point to that's the code and that's it. I don't know. And maybe that is it. And if it is, then it can be very simple, and all you need to say is denied. But I think that there's another side to it that we would like to share with you.

Chairman Endo: Okay. Any further discussion? Otherwise, I need a motion either to grant or deny the Fire Department's motion to intervene.

Mr. Ajmani: I think I will propose that we accept the Fire Department Prevention procedure, and let them intervene, and bring out all the evidence.

Chairman Endo: Okay. Is there a second?

Mr. Castro: Second.

Chairman Endo: Okay, it's been moved and seconded to grant the Department of Fire and Public Safety's motion to intervene. Any discussion? Further discussion on this item? Seeing none, all those in favor, please signify by saying aye. Opposed, please say no.

It was moved by Mr. Ajmani, seconded by Mr. Castro, then

VOTED: To Grant the Department of Fire and Public Safety's Motion to Intervene.

**(Assenting: H. Ajmani, S. Castro, J. Shefte, K. Tanaka,
R. Ball Phillips, W. Kamai, W. Shibuya.)**

(Excused: S. Duvauchelle.)

Chairman Endo: **Okay, the motion is carried, and the motion to intervene is granted.** So what we'll do now is mostly is just housekeeping procedural items. What we'll like is both parties to come up. A representative from the Lukes and a representative from the Fire Department come up, and what we'd like to do is pick a date for the hearing that's mutually convenient for both of you. And then we'll also set some deadlines for exchanging of exhibits, exchanging of witness lists. And if there's no objections, what I would like to do is to severely limit discovery so that if a party wants to – discovery refers to where you send interrogatories or request for documents from the other side, and it's a lot of overkill in this particular case, in my opinion. So it's not really necessary so that's why we'd limit it. But if a unique circumstance arises, you can make a request by motion for discovery. Okay, so first of all, Ms. Kapua`ala, she's– Okay.

Ms. Kapua`ala: February 12th and 26th would be the next available hearing dates.

Mr. Luke: The 12th is fine with me.

Mr. Rost: Yeah, February 12th is fine.

Chairman Endo: Okay. So February 12 will be the hearing date. And you folks anticipate needing or requesting subpoenas from this Board to subpoena witnesses or documents from anybody?

Mr. Rost: No.

Mr. Luke: No.

Chairman Endo: No? Okay. That makes it good. In fact, do you folks have – so we can gauge how much time we would need, do you have an idea of how many witnesses you would be calling? You're not required to be exact.

Mr. Rost: I would imagine no more than two.

Chairman Endo: Two? Okay. And, Mr. Luke?

Mr. Luke: Probably none.

Chairman Endo: None? Well, yourself.

Mr. Luke: Myself and my wife.

Chairman Endo: Yeah, okay. Okay, so we should be able to do that in one meeting. And what we'll do is two weeks before this hearing date, you'll be required to submit a copy of all of your exhibits to the either side, as well as a set to the Planning Department. So anything you want to show us, any letters, any citation reports, photographs, anything you want to show to us during the hearing, you should share with the other side. That's what we mean by exhibits. And at the same, you also should share a list of your witnesses. So hopefully that won't be too hard. And then what would – you'd basically be restricted to using only that evidence at the hearing unless some very special unique circumstances arise and you can convince us that, oh, you know, something just happened two days before the hearing that's really important and you have special reasons why we should consider additional evidence. You can make a motion at the time, but in general, you would be limited to the exhibits and witnesses that you disclosed to each other as of that date two weeks prior to the hearing. Also, if you want to have discovery of each other, you should make a motion at a prior meeting of this Board prior to the hearing date. And you see anything else you folks think of? No? Anybody on the Board object or have any questions on the procedure items? No? Alright.

Mr. Luke: I don't intend to have – I don't intend to utilize discovery . . . (inaudible) . . .

Chairman Endo: Yeah, I mean, pretty much since you've already submitted your application for a variance, that's mostly all of your evidence already. That's what we'll be looking at. But if you come up – if you have something new that comes up, you can submit that, too.

Mr. Luke: Alright.

Chairman Endo: Alright. Thank you.

Mr. Luke: Thank you.

Mr. Rost: Thank you.

Chairman Endo: Okay, moving on to the November 26, 2008 meeting minutes.

D. APPROVAL OF THE NOVEMBER 26, 2008 MEETING MINUTES

Chairman Endo: Is there a motion?

Mr. Warren Shibuya: I was here, so therefore, I move to accept the minutes.

Mr. Shefte: Second.

Chairman Endo: Okay, it's been moved and seconded to approve the November 26, 2008 minutes. Any discussion? Seeing none, all those in favor, please say aye. Any opposed, please say no.

It was moved by Mr. Shibuya, seconded by Mr. Shefte, then

VOTED: To Accept the November 26, 2008 Meeting Minutes as Presented.

**(Assenting: W. Shibuya, J. Shefte, H. Ajmani, S. Castro, K. Tanaka,
R. Ball Phillips, W. Kamai.)**
(Excused: S. Duvauchelle.)

Chairman Endo: **The motion is carried and the minutes are approved.** Moving on to the Director's Report with regard to BVA's contested cases.

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: There's a list before you. Very briefly, the Maui's Best Gift and Craft Fair status meeting has been scheduled for January 29th. Judge McConnell did indicate that he would submit his final order to serve as – that would replace his appearance on this matter. His final order will be a representation of his instructions or findings for you.

Let's see what else—the Mahinahina Subdivision Appeal. After I drafted this status report, Judge McConnell submitted his final findings or report, recommendation report, for the Board, and his schedule allowed for a meeting with you on March 12, 2009.

Regarding the McCasland TVR, the letter indicating your unwillingness to grant further deferrals and to hear the case at the next hearing was transmitted, and the County has responded to the McCasland's counter proposal regarding settlement. So we are now awaiting their final offer, their counter proposal.

I have a – regarding the Mancini Farm Dwelling, Mancini's Appeal representing Michael Mancini, I have a scheduled telecom conference with Mr. Mancini tomorrow, Friday, the 12th. And he would like to schedule a meeting with the County to settle the case. So we're going to try and schedule that for next year.

And those are all things that happened within the past week since I drafted this status report.

Chairman Endo: Thank you. Any questions for Trisha? No? Alright.

F. NEXT MEETING DATE: January 15, 2009

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 4:14 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Warren Shibuya, Vice-Chairman (3:50 p.m. - 4:14 p.m.)
James Shefte
Stephen Castro, Sr.
William Kamai
Kevin Tanaka
Rachel Ball Phillips
Harjinder Ajmani

Members Excused:

Sandra Duvauchelle

Others:

Kathleen Aoki, Deputy Planning Director
Francis Cerizo, Staff Planner
Trisha Kapua`ala, Staff Planner
James Giroux, Deputy Corporation Counsel