

BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MARCH 12, 2009

APPROVED

Maui County Board of Variances and Appeals
Meeting Date: MAY 28, 2009

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, 1:31 p.m., Thursday, March 12, 2009, 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.)

Mr. Randall Endo: At this time, we'd like to open the matter up for public testimony on any agenda item for today's agenda. Is there anyone in the public who wishes to testify on any agenda item? Seeing none, we now close the public testimony and move to the first item. At this time, we'd like to ask Deputy Planning Director Kathleen Aoki to come forward and make a presentation.

B. RESOLUTION THANKING OUTGOING MEMBER: WARREN SHIBUYA

Ms. Kathleen Aoki: Good afternoon, Members, I am here today to read a resolution for Warren Shibuya:

Whereas, The Maui County Board of Variances and Appeals was established in 1983; and

Whereas, Warren Shibuya has served the County of Maui since April 2004 as a member of the Maui County Board of Variances and Appeals; and

Whereas, Mr. Shibuya has served as Vice-Chairman from April 2006 through March 2009; and

Whereas, Mr. Shibuya has served with dedication, performed his duties in the highest professional manner, and provided valuable guidance in serving the needs of the people of Maui County; and

Whereas, Mr. Shibuya's term of office will expire on March 31, 2009; now therefore,

Be it resolved, by the Maui County Board of Variances and Appeals that it does hereby express its deepest gratitude and appreciation to Mr. Shibuya for his service during the past five years; and does hereby extend its best wishes in his future endeavors; and

Be it further resolved that copies of this resolution be transmitted to the Honorable Charmaine Tavares, Mayor of the County of Maui, and the Honorable Danny A. Mateo, Chairman of the Maui County Council.

We thank you very much for your service and look forward to another five years with the Maui Planning Commission. We should have a little room somewhere for you to have a little office. You truly are a very important person in this community. And just besides the Planning Department, I think the community as a whole really appreciate all the volunteerism that you do. So thank you.

Mr. Warren Shibuya: Thank you very much, Kathleen. And I look forward to serving the County and

the planning effort. And I'm also planning to serve the County in both efforts for sustainability and renewable energy. We want to develop this before I pass on. Okay, thank you.

Ms. Aoki: You're welcome. Thank you.

Chairman Endo: Thank you, Kathleen. Would the Planning Department call the next item on the agenda?

C. UNFINISHED BUSINESS

- 1. ELLIOT AND 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 gallons per minute for a two-hour duration for the Luke Family Subdivision located on 233 Anuhea Place, Kula, Maui, Hawaii. (BVAV 20080006) (Deferred from the February 12, 2009, meeting.)**

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

Chairman Endo: Okay, at this point when we left off, we were in the midst of deliberation. And we had taken a vote or two, none of which made it. I think there was a vote to deny. It failed. I'm not sure if there was a vote to pass, but in any event, there wasn't enough votes to make a decision in either way. So we're here today to continue discussion, but perhaps – I mean, the minutes are available as well as all of the parts of the record are available to all the Members, so everybody's allowed to vote on the matter. But just to recap the basics, maybe we could have both sides come up and just five minutes, if you don't mind, just summarize the basics of the case. And then if you want to make any, you know, key argument, you can make it also. So perhaps we should start with the applicant for the variance.

Mr. Elliot Luke: Good afternoon, Chairman Endo, Vice-Chairman Shibuya, and Members of the Board. My name is Elliot Luke, one of the property owners of 233 Anuhea. We are requesting a variance to Maui County Code, §16.04B.140. This is the third time I stand before you asking for your support and consideration. Some of you were not here in February 12th, our last meeting, and it was suggested at that time that we look into a possible solution, and that is of a family subdivision. This would be in Maui County Code, 18.20.280. When we first made the decision some years ago to give the property to our children, I was working in Honolulu. And I asked my wife to look into it, and she did. And at that time, I was really looking at a family subdivision: a way to just transfer title to the children. Lots of confusion. And she came away with the impression that we were not allowed or we did not qualify to do a family subdivision. Our son, and daughter-in-law, and their three children has been living behind our garage in a 600 square foot area for six years. I've been pushing them for many years to try and buy a place. Long story short, we decided to pass on this property and encourage them to build. In the process, in pulling a building permit, I believed at that point, we were – we couldn't qualify to be a family subdivision, and therefore we were told at that time that we couldn't do it. When we checked with the Fire Department because there's – we then we applied for subdivision and there was about 21 different contingencies that we had to fulfill, when we checked with the Fire Prevention Bureau at that time, they also didn't think we would qualify as a family subdivision. Lt. Paul Haake said usually DSA does not send me family subdivisions to review. So if your application comes to me, you are not doing a family subdivision

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as defined by DSA. I – you know, there may have been some confusion. I know that I did a lot of research on this. And I looked back in some of the records, and there was a situation in which Lance Nakamura – I'm sorry, in which a memo was sent to Gilbert Colomo-Agaran. And this was a case in which the Goo Family was trying to do or qualify for a family subdivision. And I don't want to go through the whole thing. And this was dated November 5th 2004. But anyway, it states in here:

However, Lance Nakamura has informed us that Lt. English has orally revised the Department of Fire and Public Safety comments regarding water supply for fire protection. It is the Department of Fire and Public Safety's current position that the Department of Fire and Public Safety will not recommend approval of the subdivision unless water supply for fire protection is installed prior to subdivision approval.

This particular memo is written out and signed by Brian Moto. And his analysis in the very end does state that the Goo Family would qualify for a family subdivision. And so, it seems to me that there may be some – everything is not crystal clear, and there may be some confusion as to what can qualify for family subdivisions.

We met with DSA, and we were told that everything that we had done so far would be thrown out the window. We would have to reapply. Anything that was grandfathered for us would be thrown out the window. And basically, we had spent a lot of time, and energy, money getting to this point. We have really, with the exception of actually paying for the back taxes and penalties for our land going from a pure agricultural piece of property to one in which they have a home, everything else has been completed.

So in looking at the family subdivision, we at this time cannot go back and restart this whole thing again. It just takes too much energy. We need to proceed and convince you Members of the Board of the trueness of our intent and our honesty.

I would like to ask the Board to look at the original docket BVAV 2008006. And this is the Board of Variances and Appeals County of Maui. This is the original document that was put out and signed by Jeffrey Murray, the Fire Chief in which they go over the various analyses and reasons why we need to abide by that particular County Code. If you look at page 3, and it states,

Variances from restrictions imposed by Maui County Chapter 16.08 may be granted by the Board of Variances and Appeals when, 1) a strict application in operation or enforcement of the code provision or provisions appealed from would result in practical difficulty or unnecessary hardship to the applicant.

I will submit to you that putting in this particular tank and bringing it up to the current standards now, many of which – many of our older subdivisions, we don't have the infrastructure. They are not at this 500-gallon per minute standard. And – but anyway, this would be an unnecessary hardship because we do not plan on building another human structure on this property until we get our water issues resolved. Again, we worked with three different Water Directors. Our neighbors down the street, the church, Hale O Kaula, has – and the members that own six lots in this particular subdivision have drilled a well, and are planning to – they're getting it tested right now, but they are planning on providing a private water system for their lots. We requested to join in and pay for our share, but was denied. They will not let anyone else except a church member be part of this well.

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The lot below us will have water from the well. The lot above us – two lots above us will have water from the well. We are currently working with the Water Department in trying to get water for the rest of the remaining lots in this particular subdivision. Water is the root of the problem. Water– This subdivision, now I know better, this subdivision should've never happened without water. The waterline is in. The standpipes are there, but it has never gotten water. All around us, Kamehameha Schools, Kulamalu, Kula 200, and I think Maui Land and Pine may even be trying to sell some of the property on the other side of the gulch, they all have water. They all have fire protection. Hale O Kaula, a church at the end of the cul-de-sac, they have enough water to take care of fire protection for their needs.

Putting up a tank, a 60,000-gallon tank, and producing 500 gallons per minute is really a waste of our natural resources, our family's financial resources that can be better put to solving the main problem which is water. And getting water to this property is not gonna be cheap. If the County – if we are not able to come to a resolution with the County Water Department, then we will probably have to drill our own well and provide a private water system for the remaining lots. If that happens, we would share in the cost and have to provide necessary water for fire protection for all the lots. We will not have need for the tank that we would be required to put up now until that – until we get to the water situation or – resolved.

You know, I've gone back and I've looked at files after files after files, and I have found situations not with the current Fire Department, but situations in which the County Water Department has given exceptions, one in which they gave an exception – they gave actually an exception to Maui Land and Pine out in Kapalua for a lot that they were developing because they weren't planning on putting buildings on this property. They signed the documents and did not have to bring up to County Code. Hale O Kaula was given a – was asked to sign a document right down the street which is a hold harmless document, and I don't know what exactly that is, but if you read the minutes in terms of their particular lawsuit against the County, the Fire Department had no problem in them building or expanding the church down there at the end of the cul-de-sac by signing a hold harmless agreement. I guess I went about this the wrong way. I should've hired an attorney and had someone other than myself speak and do this, but it is what it is.

Let me go back again to this particular document that was signed by Chief Murray. If you look at the analysis on page 7, again, it's unnecessary hardship to the applicant. And let me tell you in these particular times, raising money is a hardship. And I know that from an economic standpoint, that cannot be one of the reasons why you can permit this variance to happen, but at the same time, I think you have to be realistic about what is currently going on in Hawaii and the rest of the world. If you go to page 8 and you look at the staff analysis, again it states, "We concur that if no buildings are built then there will be no injurious to the adjoining lots or buildings." We are not going to build. We would sign something. We would put something that would run with the land that we will not build until the requirements are met. No one from this subdivision has come up to oppose this particular variance. And again, lot owners below us and above us will have water in the near future, and will be providing their own fire protection. There are other lots in this subdivision that are currently using County water and do not have the necessary requirements for fire protection. There is a tank on the very top of the road. The cover is almost sinking down to the bottom because I don't think – once you put it in, I don't think that there's any accountability to that except that the owners have to be accountable to the tank. So if they don't keep that tank full of water for fire protection, they would have a problem, but I don't think that the Fire Department has any means of review.

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Again, I ask for your consideration. The rules and regulations again are designed for the good of all. Our situation is unique. And we have, I believe, a set of exceptional set of circumstances. Please consider our situation, and give us a solution or time to get water to the property without unnecessary hardship. We ask for your support. Any questions?

Chairman Endo: Mr. Luke, everything that you said was perfectly understandable for me. I was present at the prior meetings and everything. But for the benefit, though, of the people who were not here, I think what I would like to do is just make a few statements, and you tell me if it's correct or not.

Mr. Luke: Go right ahead.

Chairman Endo: Okay. You basically own this 8 – .8-acre parcel in Upcountry Maui, Kula. It doesn't have water. It's on Anuhea Place. You're currently in the process of getting a three-lot subdivision. You want to give one lot to each of your children.

Mr. Luke: Yes.

Chairman Endo: There are no structures right now, but you have a building permit. So one of your children is in the process of building a house on one of your lots.

Mr. Luke: He's completed the house.

Chairman Endo: He's completed the house?

Mr. Luke: Yes.

Chairman Endo: Okay, so when he got that house, he got the building permit requirements. They had to put in a 30,000-gallon tank.

Mr. Luke: Correct, well he was required to put in a 25,000-gallon tank. He went to 30. And he was required to put in a sprinkler system which was approved, and that he did.

Chairman Endo: Okay, so that's going forward. But now that you're trying to do the subdivision, the subdivision process kicked in different requirements. The Fire Department says under their code, or under the code, you have to put in a fire flow which amounts to a 60,000-gallon tank so you can get the 500 gallons per minute for a two-hour duration.

Mr. Luke: That's correct.

Chairman Endo: Okay. So that's what you wanna get out of. And you'd rather just keep it at the level that you have right now, the 30,000-gallon tank, whatever you have now for that house.

Mr. Luke: The 30,000-gallon tank and the sprinkler system was a requirement by the Fire Department or Fire Prevention Bureau for my son to be able to build his house. And that is done and approved, and has been inspected and approved by the County, and that's just for that particular dwelling.

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Chairman Endo: Right, but you can use that water tank if you wanted to, for other parts of the property. Well, that's a separate issue, I guess. The other point that you were raising was that you don't presently intend to construct on any of the other two lots. And you had made prior representations at other meetings that at the time that you were to pull a building permit for any additional structures, correct me if I'm getting it wrong, you would then be agreeable to comply with the full subdivision fire flow requirements.

Mr. Luke: That's correct.

Chairman Endo: Okay. So I just wanted to give that background, the basic facts. Okay, so at this point, are there any questions? If there are no questions, I want to let the Fire Department make a statement at this time. Any questions? Or you can ask them more questions later. Okay.

Mr. Richard Rost: Thank you, Mr. Chair. Richard B. Rost for the Department of Fire and Safety. We just heard Mr. Luke talking about one of the requirements for a variance: that being the hardship aspect. What he didn't really address is one of the other requirements which is, "The granting of the variance shall not be detrimental to public health, safety, or welfare." That's on page 7 of the same document that he was referring to. The last time we had Mr. Paul Haake of the Department of Fire and Public Safety testify about why this would be a safety concern to the Fire Department to allow the subdivision without the adequate water for fire control, Mr. Haake talked about how the 500-gallon per minute requirement is actually the lowest of any zone. The other, for example, the rural is the next highest and that's a thousand gallons per minute, so this is not an especially onerous requirement. And he also testified about what the Fire Department would be required to do in the event that there was a fire and without the – without adequate water available on the property. And that entailed running hoses from the nearest other water source which the Fire Department considers to be a safety hazard. So essentially, on that requirement, the granting of the variance not being detrimental to public health, safety, or welfare, it's the department's position that the applicants have not met their burden on that.

Now, we've just heard Mr. Luke talk about not wanting to do the family subdivision because it would take too much energy. Well, that's understandable. There doesn't seem to be any rush for them to finish – to get this subdivision approved immediately either, so I don't think they've – there's a compelling reason here why they can't simply go through the family subdivision application.

The other thing that I'd like to address just briefly, there's been discussion of trying to graft on a requirement that they not build anything further on the property as a condition of the variance, which would sort of make it like a family subdivision, but if you look at the family subdivision provision of the code, Section 18.20.280, there are a lot of other requirements in there besides simply not building anything further. There has to be an agreement executed with Public Works, and the Water Department, and things of that nature. And Public Works and the Water Department are part of this so, I think trying to graft requirements on to make it a pseudo family subdivision might be a little more difficult than would be – you would think at first. So on that basis, the Fire Department would simply request that the variance be denied.

Chairman Endo: Any questions for Mr. Rost?

Mr. Rost: Mr. Haake's here as well.

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Chairman Endo: Or Mr. Haake?

Mr. Rost: He'd like to make a statement, if that's acceptable to the Board?

Chairman Endo: Sure.

Mr. Paul Haake: Hello, Board, my name's Paul Haake. I do the plan review for residential permits and subdivisions. I was the one who did the review of the Lukes' subdivision application. And all the requirements – the requirements are 500 gpm for a two-hour duration, and that's a – you have to flow the water. So it's just not in a tank and it just comes out. You have to flow the water out so it's a pressurized system, and then you need roads that have access to that property. So that's where the requirements came from.

As far as the building permits, the building permit that the Lukes applied for like they say they have a sprinkler system and the 30,000-gallon water tank, that seems kind of excessive when you think about it: 30,000 gallons and a fire sprinkler system, but what they came in for at that time is two different things we have here. We have a subdivision process and we have a building permit process. So on the Lukes' property, when they applied for the building permit, they don't have any water. So you have to provide fire protection. So some of your options are to bring in a water source, so they could've done a tank, or they could've done a fire sprinkler system. So what they did was they chose a fire sprinkler system. Now, I think what they tried to do was kill two birds with one stone. So they already needed a tank for the fire sprinkler system, so they figured, let's put up a 30,000-gallon tank that we could eventually use it for the subdivision process. We wouldn't require a 30,000-gallon tank for the fire sprinkler system. It would just be enough water to provide for the fire sprinkler system which is about probably not more than a thousand gallons. But – so they chose to put up the 30,000-gallon tank figuring they could use it later for the subdivision process. Well, in the meantime, the requirements for the subdivision rose up to 500 gpm. So now it's a 60,000-gallon tank. And I don't think they understood the fact that you needed to flow the water, not just provide that amount. So I could see where they were going, but they missed a few things in the – while they were planning for that home.

You know, as far as it being dangerous to allow it, in the immediate moment, it won't be. But in the subdivision process, before, you could have a whole bunch of land, and just cut it up without worrying about how you cut it up, and go and sell it, made a whole bunch of money, and be gone. And then we'd have people coming in for building permit applications, and we'd find out that they have no access, they have no water. So after all of this problems, somebody said, hey, you know what? We need some requirements. So initially, they did different water and road requirements for your land use. So for ag, initially, it was 250, but what we found out was in Olowalu, the requirement was 250 gallons a minute. And, you know, from that last fire in Olowalu, we were like, oh, you know, maybe 250 gallons is not enough. We said residential is a thousand. The minimum amount of water for a residential, for a home, is a thousand gallons per minute. So we had to come in with some type of amount. So initially was 250, but then thinking that people were gonna do farming, and there would be a lot more space between homes, and so you'd only need to protect one structure, so 250. But then, we find out that instead of farming, people are building a bunch of homes on these ag lots. So in 2006, the requirement for the ag properties went up to 500 gpm. Still not meeting the minimum thousand gpm for a home, but because you have a water source and pressurized pipe, you know, you can – it still does the job. So back to when people were cutting up land and just selling it, so we had water requirements and then we did road requirements.

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So everybody needs to have a 20-foot wide road access to their parcels so that nobody's landlocked, nobody just has a skinny eight-foot access to their lot, so if you have a fire, everybody's gonna call the Fire Department, and we're gonna go. We're not gonna say, oh, you know what? You only have a six-foot driveway, we're not gonna go there. So we came up with these requirements. Unfortunately, for the Lukes is to provide these requirements, it costs money. And it's a hardship on them, but it's a requirement that everyone needs to follow. In their subdivision, they have a whole bunch of other property owners that are facing the same deal, and none of them are here to object because if the Lukes get passed, then those people are gonna be next in line, and then we'll have a whole place with no water. So I think what we have to do here is remember that we have these requirements, and they're in place for a reason, and they were well thought of, and we should stick to them otherwise, it just goes back to how it was. Any questions?

Chairman Endo: Questions? No? Thank you.

Mr. Haake: Thank you very much.

Chairman Endo: All right.

Mr. Barbara Luke: Randy, can I answer to a couple of the things that he said?

Chairman Endo: Sure.

Ms. Luke: Hi. Good afternoon, everyone. I just wanted to answer to a couple of the things that Paul said. And one was that when we sought the subdivision process, we thought we could use the 30,000-gallon tank that our son had to build, but in actuality, you know, we saw that our son was in such cramped quarters, and we just encouraged him to get a building permit and build a house. It just happened that it took a year. Because there's no water to the property, it did take longer for him to get a permit. And then when he did do it, the economy changed. So he just said, "I can't do this. You know, I have a State job, and I just can't afford to do this." And we kept saying, "No, no, no. You know, you can't afford anything else in Maui County. You need to, you know, just go ahead. Go make it." So, you know, he waited for several months almost until the permit expired. And then in the process, we had a medical emergency back in '05, and that's how we started talking about giving the land to our children. And it just didn't happen that we decided to do everything at once. I checked with various agencies to see what we had to do to do a subdivision as we have never done it before so we were clueless. And so I always said, oh, we're doing a family subdivision. So when I talked to County people, they'd say, oh, this is what you have to do. You have to provide the, you know, birth certificates and such, but it's on paper only. You can't build. And so I'd say, oh, you know, our son is going for building permit. And they said, well, once a permit is pulled, you cannot do a family subdivision. And so, you know, that's how we got started on this thing. So it took a long time. You know, we kinda started researching it in '05 and early '06. And then it sat in the County for verification of ag I think in Francis Cerizo's Department. And finally I think it was in October '07 that we got the preliminary approval letter with the conditions. And I just looked it over. When I saw the fire flow, then I tried to contact Paul. It took me some time to reach him and then to start to kind of understand what we needed to do. And so we did not put up – you know, our son put up the tank. That's for his house. You know, we didn't know what was required until we got the letter. But as far as in our neighborhood right now, there are people using a water meter that takes water from Kula 200. We are not doing that. We have not tapped into the County illegally to use water. There are people using this waterline. So I don't know if they're counting on

us today to get a decision because they've been using water for several years. You know, they've just been using it. And there's another person who they moved a meter to their lot, mysteriously. They weren't on the list. They didn't get approval to do it from the Water Department. They have water. So, you know, we're trying to do this the right way, and it's very difficult when you do, do it the right way. And I think that's why a lot of people just go ahead and do it whatever way, but we're just saying, we're honest people. We're hardworking people. And we don't want to just get rid of the fire flow requirement. We want to comply with that. We want to just do the subdivision so that that's done, and no one's – there will be no building on the property. And right now, if you don't do a subdivision, you can build two homes without, from what I understand, bringing this fire flow thing into the picture. There's one home on the property. We don't live on the property. And the property, by the way, is considered Pukalani. And it's – the neighborhood is bordered by Kulamalu; and then at the lower end, the makai side, Kamehameha Schools; and the mauka side, Kula 200. And the other side, the mountain side, is Maui Land and Pine. And, you know, I'm just saying, you know, we want to comply with it, and we are going to work as hard as we can. And it is going to cost us money, yes, to get the water, the proper water in there so that we have the proper fire flow. A 60,000-gallon tank will take many loads, truck loads, each, 8,000 gallons of water, probably from Central Maui to fill it up and it's going to sit there. And, you know, if we have to do it, we'll have to do it. But I think anyone would say, it would make more sense to get the proper water there. We're working on it now. And I believe it's going to happen. But in a sense, this is more like a deferral of this requirement, in my mind. And like I said, we will not build until we have that further. Thank you.

Chairman Endo: Any questions for Mrs. Luke? Okay, I guess I would – I think the family subdivision thing can be kind of confusing especially, for the Members who were not here and who didn't read all the minutes super carefully, and hear all the testimony from Lesli Otani from DSA. So for the benefit of those people, I'm going to try and summarize it. And then I'm going to ask Planning to tell me if it's wrong.

Okay so basically, normally, it is only for paper transfers and it has to be to your immediate family: so like basic, parents to their kids. And once construction has commenced, then it does trigger the deferred development of all the subdivision improvements. But the trick is that you could build your house pre doing the family subdivision. So basically, you can build your structure as one lot. So therefore, you can have one building, and then do the family subdivision, cut it up. So you can actually have – so that's the mix up wherein the Lukes went and they said, oh, you already got a building permit. You can't do it, but actually, they can. You can do it for your original permitted structures as one lot basically, prior to doing the family subdivision. So that's why I believe the gist of what Lesli said was they can convert it, but they gotta go back to preliminary. They gotta resubmit, go to – get all the comments again. And then some of the roadway dedication, some of those types of requirements were slightly different. They weren't exactly the same as what they're doing now. So I didn't remember all the exact details. But there were some differences in how they would play out. But that's my understanding. Francis, is that your understanding, too?

Mr. Francis Cerizo: Yes.

Chairman Endo: Okay. So now we're deliberation. Since nobody objected during the discussion, there was reference to documents that weren't actually put into evidence: some letters, and things, and memos. Is there any objection from either party or from the County to accepting those as part of the record? Or you want to look at them first?

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Mr. Rost: No. That's all right. I'm not going to object to that.

Chairman Endo: Okay. So if you could submit a copy of those to the other side and to the Planning Department, we'll consider that part of the record, the documents you referred to in your first – Mr. Luke's first presentation, because those weren't part of the things previously. Okay, does anybody have questions for staff, or the parties, or a motion?

Mr. Kevin Tanaka: I have a question.

Chairman Endo: Okay.

Mr. Tanaka: Mr. Rost, you know, you talked about rather than making it an amendment and adding verbiage to the variance application, because there are differences between the family subdivision application and this process, I'm just trying to think of a way of possibly being so that it can be a, you know, what you said, a pseudo family subdivision, how involved is it?

Mr. Rost: Well, I'm just going on what the County Code has in its requirements for a family subdivision. And one of the things is no building permit or additional water sources shall be requested by the applicants or the people they transfer the property to. And then there's also supposed to be an agreement between the applicants, the people they transfer it to, Public Works and the Water Department. And that's supposed to be recorded and run with the land. So in order to – it's gonna be somewhat tricky to get all those things implemented in this proceeding because Public Works and Water aren't here. They only agreed to this – they only enter into those agreements once someone's gone through the proper family subdivision process. So I'm not entirely sure as to how that would – how something like that could work. I mean, that was the reason I was trying to argue the Board should deny the variance and say go try to get a family subdivision because it's gonna be somewhat difficult to implement those requirements in this proceeding. You know, if the Board wants to do that, you can try, but it's gonna be tricky, I think.

Mr. Tanaka: Thank you.

Chairman Endo: Member Shibuya, do you have a question?

Mr. Shibuya: No.

Chairman Endo: Any comment from the Planning Department?

Ms. Kapua`ala: No, sir.

Chairman Endo: It looks like everybody's deliberating in their head.

Mr. Tanaka: If I can just – for the record, my feelings, I guess.

Chairman Endo: Sure.

Mr. Tanaka: The reason I brought up the question to Mr. Rost is, you know, if possible, if the Board could be accommodating. I do agree in both sides that apparently what happened is if he had gone through the family subdivision application process, it would've been a lot smoother sailing. But I

do agree with the Fire Department in that it is a public safety issue both to whoever's there and the Fire Department as well. I don't know if this - how this Board feels. In my mind, I'm thinking that it would, you know, what Mr. Rost had said about it's a difficult process to create a pseudo family subdivision by the granting of this variance. I just wanted my feelings expressed to the Board.

Chairman Endo: Okay. Member Shefte?

Mr. James Shefte: Yes, I'd like to say also that I would like to be able to see the Lukes get this variance just because it's a family situation where we'd all like to see the property be able to be shared amongst their family members. But at the same time, I think we have to defer to the Fire Department because they're the experts in this situation. And if we were to grant to the variance, I think it sets a precedence that could have negative effects in the future. So I'm kind of here and there, but those are my feelings.

Mr. Stephen Castro, Sr.: I got a question for Mr. Luke. You indicated that properties around you got together a hui and drilling a well?

Mr. Luke: Hale O Kaula Church which is down at the end of the cul-de-sac have drilled a well. They have gotten water. They are now getting the water tested. They will be providing water to properties below me and above me. And they are going to have to, you know, abide by whatever the code is at the time concerning fire protection as well as water if they plan on doing anything further with their properties. Now, because of what has happened, we have been encouraged, and either we're gonna get to a conclusion or a solution with the Water Department, or we're gonna have to drill our own well as well. And we're trying to get together with the other nine property owners to share the cost of drilling a well, and then being able to provide water for the remaining lots in the subdivision. But the church and the other lot members are all church members. They are not permitting anyone else to participate in their well.

Mr. Castro: I'm not sure how that process works, you know, being allowed to drill. Is that - their well is not - anything to do with the Water Department at all?

Mr. Luke: I think it's a private water system. I think you need to do - have - I've done a little research on that, and I think you have to have approval by the State. And then you - they've gone through - they have actually drilled the well, and they are now having it tested. But I think the servicing - I was reading in one of the - some of the minutes from the Water Department that they can - I think it was Kushi from the County stating that they can have their own private water system as long as it's for 14 or 15 connections or less, and that there would be no - the State does not have any kind of requirements or regulations over that particular water system. This whole thing is really complicated.

Mr. Castro: So with that well, there's less than 14 properties?

Mr. Luke: There is six properties right now.

Mr. Castro: Thank you.

Chairman Endo: Warren?

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Mr. Warren Shibuya: Mr. Luke, I just wanted to find out if there is in this group, this community that you live in, is that – is there a community association?

Mr. Luke: No.

Mr. Shibuya: So the probability of having a group get-together and funding a central water source is probably nil.

Mr. Luke: That's correct. There was a – and some of you might have heard of it, there was a situation that passed, and the County certainly was involved, and it was with the – the church's name is Hale O Kaula. And they filed a lawsuit against the County. They – the Department of Planning probably is quite aware of what occurred, but they utilized a legal organization from Washington, D.C. They used money from – resources from the Beckett Fund, and they were able to get permission to expand their church at the end of this particular cul-de-sac. Some of the members, lot members, on this particular – in this particular subdivision did not necessarily approve of a church being at the end of a cul-de-sac by the road, and so there was a lot of pilikea.

Mr. Shibuya: And that pilikea still exists?

Mr. Luke: I think so.

Mr. Shibuya: Yes, unsaid, but it's there. Okay now, the problem I have here is that I support the Lukes' effort here. However, I do support the County's opportunity, or at least you have the opportunity to obtain the family subdivision. And of course, the provisions, if you apply for it today would be stricter than it was before when you first started this process.

Mr. Luke: That's correct.

Mr. Shibuya: And as Mr. Haake mentioned, the Fire Department– This is not an exact science, not the kind that I was with in putting satellites into space, but it is experiential. It's something that is experienced in a previous fire, and then you have to respect that because they're really trying to protect the public. And so I can – I've been very hard on quasi-type standards and allowing for that because of this. And I fully support and I'm very grateful that the Fire Department is willing to come up with these standards, but it seems like it escalates over a period of time. And yet, it makes the earlier approved lands out of not in compliance with the current code. And we haven't taken the effort to update that. So that's a County problem. And so my concern is really torn like Jim Shefte. Yes, if we approve this, it sets the wrong precedence. If we make a change here, it'll be arbitrary and it would be– And I would like to make a change, but you don't have a community that is together. And so the possibility of a solution, of a group solution, is not even over the horizon, is not even existing. It's not a smidgen of effort that's available.

Mr. Luke: I think for the remaining nine property owners, there is the possibility of getting together, and that's what we're working on. And we are really working on a solution for the balance of the property owners. I don't think it's possible to do it for all 15 lots, but I think for the majority of the lots that are not owned by church members that a solution will be forthcoming.

Mr. Shibuya: Okay. On this exhibit that we've received, can you identify the nine on these for me? Are they within–? If there's some logical pattern that I can foresee an easement or a line being

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drawn in from Fosters down to Molina down to Thuro, Murray, Larson, to the Lukes' place, then it makes sense.

Ms. Luke: Okay, I can identify nine: our Lot 34; across the street, 33; above that 21; 22; 23; 24; 18; and 17; oh, and 31, I'm sorry, Mr. Riddle at the bottom, 31.

Mr. Shibuya: Members, I just circled it. So, it seems like there is a possibility of having a water easement.

Ms. Luke: Does everyone have those numbers? I can read it again.

Mr. Shibuya: I have them, but go ahead. Why don't you read it again?

Ms. Luke: Okay, our lot is 34. And then I'll go around down to the cul-de-sac: 31, and then around, 33, 21, 22, 23, 24, 17, and 18. And all of these people are in agreement that they want to work as a group to get the water. Some are elderly, so they're really depending upon us to put the time and energy into it.

Mr. Shibuya: And that given this opportunity, would you pursue it to a good conclusion?

Ms. Luke: Oh, we are pursuing it, yes.

Mr. Luke: The well has been dug on Lot No. 32 where it says, "Hale O Kaula."

Ms. Luke: And they did get water, and we were told that that water's being tested.

Mr. Shibuya: Okay, thank you.

Mr. Luke: One last statement: we're not trying to put aside this Maui County Code concerning fire protection. Right now, if we don't go through a subdivision, you know, as it stands, we have what is permissible by code, Maui County Code. As it stands, we have enough water, more than enough water and sprinkler system for protection for the existing home. We're not putting up any new human structures, and I've said that in the past. And, you know, it was said that other people might come, might try and come before the Board. I don't know that anyone else in this subdivision would have the same set of circumstances. I don't know of too many people that can go through this kind of a process, subdivision process, spend all their money, and not be a developer and sell the land. You know, you develop the property. You put up whatever you need to do, and then you spread the cost out to all the property purchasers, and that's the way it goes. And let me tell you, I honestly believe now that's probably the easiest way to go. Giving property to your children is probably one of the hardest things. These laws and these codes are not designed to help out the family, and not designed to help out the family that want to stay in an agriculturally kind of an environment. There is no – I mean, it's almost impossible. You sell the land to a developer. You take your money, and you give the kids the money, and that's it. I mean, that's the easiest process to go through, and that's being forced upon all the local families. Thank you.

Mr. Rachel Ball Phillips: I can see both sides of this issue. I can certainly appreciate the Lukes' situation. And I can understand the Fire Department's need to impose rules for public safety. However, in this case, I would hope that we could come up with a compromise that would allow the Lukes to move forward with their subdivision and still provide some compromise with the Fire

Department. It seems to me that it would actually be fairly easy to impose a restriction that if they were to do future building that they would have to bring it up to code. And it seems to me that that would address that requirement. So I'd like to make a motion that we approve the variance with the condition that no future building of any dwellings be allowed unless the fire flow requirement was met, along with the standard hold harmless and insurance requirements. And I'd like the insurance to be in effect until the fire flow requirements can be met.

Mr. Shibuya: I'll second it.

Chairman Endo: Okay, it's been moved and seconded to grant the request for a variance with the standard conditions on insurance and indemnity, and hold harmless agreement, and also with the condition that I think I might want to rephrase it just for clarity. I mean, essentially what we've been saying is, okay, upon the request, if they want to build anything further, so any future building permits, then they would have to meet the Fire Code requirements, right? But in essence, that's the same thing as saying that the variance will then terminate at that time, because by wiping away the variance, then they obviously have to meet all of the subdivision requirements that were previously waived. Is that cleaner, you think, or the other way is better?

Mr. James Giroux: I think there's a couple of ways of skinning that cat, I guess, depending on where you want to go. If you want to model this more towards the family subdivision model where you're going to say that there shall be no further construction until there's the adequate fire protection, or you can have – the other way is you just file a deed and just say permanently that there's no construction whatsoever, you know. And one – I guess if you do it the first way, it's a little bit more flexible. And you may want to talk to – get more input from the Department of – maybe from Public Works on what is the procedure that is more likely to – I guess so the County can actually process the subdivision, and also be able to monitor any subsequent building on the property, because I think that's where the problems would most likely arise that if they have the subdivision, that means that they have three properties. On one property, there's a home. I believe there would also be allowed to build another home on that property. And then there would be two properties that you wouldn't want any structures on until you got your 60,000 gallons. Again, that number may change in 20 years, so you've got to keep that in mind also.

Mr. Tanaka: Under the definition of a family subdivision and all that comes with it, all requirements that come with it, including fire flow, that's – the intent is it's a family subdivision. And okay, we'll grant the variance, then nothing will be built on the other two parcels until that time comes that when they do intend to, it's still within their family, and will meet all requirements, including fire flow.

Chairman Endo: Well, I guess the – okay, well, procedurally, we can do two things. We should finalize what the motion is first, and then we can talk about you just said. So let's hold on to what you just said, Kevin, and finalize what the motion is. I'm going to take back what I said. We should just go with exactly what Rachel said. So the motion has been moved and seconded to grant the variance, and the condition, in addition to the standard conditions is that at such time that they want to build anything further that requires a building permit, at that point, they will be required to put in all of the Fire Department subdivision requirements that are being waived or being deferred at this – by the granting of this variance. I think that's the simplest thing. Okay, so that would be the initial motion. What Kevin is saying is, oh, why don't you make it a little bit broader and say, well, we just defer all subdivision requirements similar to family subdivision? But I think the reason we don't need to go there is because they almost did everything already. They're at the very end of the

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steps. They've fulfilled all the other requirements. They're not trying to get out of any roadway dedications, lot-widenings. Any other subdivision requirement, they already did it already. So at this point, all we're talking about really is their last step which is the Fire Department's requirements. Is that correct, Mr. Luke?

Mr. Luke: That's correct.

Chairman Endo: Okay.

Mr. Shibuya: And I understand that they are intending to have a group working towards and with probably with the Water Department to install a waterline that would benefit not only just the nine that are very interested, but the entire community. And I think that's admirable and I would support that.

Chairman Endo: Just to make a quick comment, in order to make – assuming that this were to pass, we would want the conditions to be – to run with the land, so we would want it to be recorded against all properties so that if anybody tries to buy, or sell, or do stuff with the land, it'll show up real quickly on the title report. So I was assuming that that would be part of the motion so this restriction would be recorded against that property. Is that—?

Ms. Phillips: Sure.

Chairman Endo: You understand. Your—?

Mr. Shibuya: That was my understanding.

Chairman Endo: Okay. So if nobody objects, we'll just incorporate that as part of the motion. Okay. Planning Department? No? Any further discussion? No? The Fire Department wants to make a statement? They can come up. Come up to the microphone, though, please.

Mr. Scott English: My only concern is, which happened before in the past is, can we put something in there that they cannot sell the properties because they sell the properties, new owners come to us pleading, why can't we build? So if we can put a condition that they cannot sell either if it's for true, for the kids?

Chairman Endo: You mean except for the kids, you mean?

Mr. English: Well, if the land is gonna be to their kids, then they cannot sell it to someone else, and then when the new people come to build, and then we're the ones holding them back, and it happened many times, and then we're the bad guys again. So if we can get clear that situation so they cannot sell unless it's to their family members.

Mr. Tanaka: Yeah, that's why I kinda brought up the family subdivision whereas it's understood within the family. But what you were saying is that it goes with the property so any—

Chairman Endo: Yeah, if anybody – if a third party were to buy it, I'm not saying that they would or not, but if they were, then they would be on notice that, hey, you're kinda lolo if you thought you could build when you never check your title before you bought it.

Mr. English: It happened before and then we were in the situation a couple of times because of that.

Chairman Endo: Well, let's ask the Lukes if – what they feel about it.

Mr. Luke: That particular document, if it runs with the land, in doing a title search or anything else, it would be seen by any perspective purchaser. And before the deal would be closed, the – whoever is doing the title search would be able to tell the purchaser, hey, by the way, you know, this runs with the land. And if you're gonna purchase this property– I mean, I'd be willing to sign whatever because we're not planning on selling it anyway. I know that the Fire Department and probably a lot of people are jaded because of a lot of things that have been said by developers and haven't been done. But, you know, it doesn't matter to me, but definitely, what I think what you're doing in terms of putting a document there that runs with the land, that would prevent further questions about what can be done to the property.

Chairman Endo: Yeah, I guess one of the rationales for Scott English's thing would also be that we're trying to make it something like a family subdivision. So if you were to model it after that, you would only be allowed to transfer it to your children under that provision. And then once they did sell it to somebody else, all the deferred requirements would kick in. So it raises an interesting question.

Mr. Giroux: Randy, there's a couple ways. In your condition, you can fashion the condition to state – there could be an additional condition that states that the variance is being granted based on the representations made by the owner that it – this property is a parent who intends to transfer the property to a spouse or child. If that condition is not met, if it's alienated outside of that, then that variance will not be – it's not going to be – I guess, it can be rescinded.

Chairman Endo: Okay, so basically if that is the pleasure of the Board, then somebody would have to make a motion to amend the main motion to add that as an additional condition.

Mr. Shibuya: It could be a friendly amendment, could it not be?

Chairman Endo: Well, I'll only allow it if it looks like it's guaranteed unanimous consent. That's when you do a friendly amendment.

Mr. Shefte: I would move for that.

Chairman Endo: Okay, so you're moving to amend to add the transfer only to family members?

Mr. Shefte: That's correct.

Chairman Endo: Okay.

Mr. Castro: Second.

Chairman Endo: Okay, it's been moved and seconded to amend the main motion to grant the variance to add a further condition that a condition of the variance is that the property can only be transferred to the intended immediate children of the applicant or spouse. Or what we could do is, if this motion passes, we'll get a list of the people, and we'll just put it into the record. But, yeah,

so, immediate family members.

Ms. Phillips: So, Randy, I have a question. If the Lukes transfer it to their children as intended, then that requirement is fulfilled, and the children, are they bound by that as well?

Chairman Endo: Yeah, no, they are. The purpose of the proposed amendment is that the children would not be able to sell it to anyone. They won't be able to sell it on the market. Or if they do, then that would end the variance, and then they'd have to put in all of the water requirements.

Ms. Phillips: Oh, okay, they could sell it as long as they put the requirements in.

Chairman Endo: Right, at that time, the deferred--

Ms. Phillips: Yeah, it would be overly restrictive to prohibit them from selling at all. I can understand them having to put the requirements if they sell.

Chairman Endo: Oh, right, right. Is that--? I mean, that was my understanding.

Mr. Shefte: That's fine. That's good.

Chairman Endo: Is it? Okay. Any further discussion on the motion to amend the main motion?

Mr. Shibuya: Well, I just would like to point out the fact that I believe in the family subdivision, the spouse is not included. I think the family means blood family, and it has to be brother, sister, or children, direct children of the parent.

Mr. Rost: The County Code actually says, "It shall be limited to the following persons who are related to the applicant by blood, adoption, or marriage: spouse, children, brothers, and sisters."

Mr. Shibuya: Oh, it does include spouse. Thank you very much. Okay. Ready for the question.

Chairman Endo: Okay. Any other discussion? Seeing no one raising their hand, we'll now -- all those in favor of the motion to amend the motion to add the condition that transfers can only be made to family members as a condition of the variance, please say aye. Opposed, please say no.

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

VOTED: To amend the motion to add the condition that transfers can only be made to family members as a condition of the variance.

(Assenting: J. Shefte, S. Castro, K. Tanaka, W. Kamai, R. Phillips, W. Shibuya, S. Duvauchelle.)

(Excused: H. Ajmani.)

Chairman Endo: **Okay, the motion is carried and the main motion is amended.** I don't need to restate it, do I, Trisha? You got it, right?

Ms. Kapua`ala: Oh, yes.

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Chairman Endo: Okay. Okay, so we're back to the main motion. Further discussion? No? Okay. All those— Oh, actually, before we take it up, I actually had a minor thought. We said that they can't do any further building, right? But what we mean really is any further structures that could be either a barn, or used a dwelling, or anything like that. But if they wanted to just do a retaining wall here or there, and that triggers over whatever so much feet they gotta do a building permit, you wouldn't want them to have to do the — that's kinda minor kinda stuff, minor accessory things. Do we want to have an exception for that or—?

Ms. Phillips: That would be fair.

Mr. Shibuya: Yes.

Chairman Endo: We do? Okay, so who wants to describe that?

Ms. Kapua`ala: Mr. Endo, for clarification, before you move, I'd like to restate the conditions of approval just so I can— Before you make your — you move to approve this, I'd like to understand that I have it clearly.

Chairman Endo: Okay.

Ms. Kapua`ala: That the typical: the variance shall be applicable only to the request as approved by and reflected in the record of the Board which means the applicants' application dated September 3rd, 2008. The standard hold harmless agreement, including the one million-dollar insurance requirement. And is this insurance requirement to expire upon the future development of single family homes by the Lukes' children? I'm not sure if that was adopted into the record. The third condition, I kinda construed based off of your statement as well as James that there shall be no further construction of single family dwellings on the subject subdivision without the provision of adequate fire protection. And fourth, the variance granted based on the representation made by the owner that transfer of property shall be to the spouse or child to the family. Is that—?

Chairman Endo: Yeah, I think that was all generally correct except when you talked about meeting the fire requirements. That one sounded a little vague. I think it's supposed to read once they want to do a further structure, then they would have to comply with all of the subdivision requirements required by the Fire Department, the ones that they're deferring right now. Just want to make it real specific.

Ms. Kapua`ala: Any structure?

Chairman Endo: That would be the other thing, too. I would be concerned that sometimes they do sham structures. They do like farm — not the Lukes, but I mean just people on ag land. They want to do an ohana unit even though already have one. They just say, oh, this is a tool shed and then they put people in it to rent. So I would be concerned with any kind of structure that could be used to live in or sleep in. That's why I was having trouble trying to figure out what is really minor like a wall or stuff that people wouldn't be living in that we don't really care about it, but we wouldn't want larger structures.

Ms. Kapua`ala: Are there fire requirements for non habitable structures?

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Mr. English: (Inaudible)

Mr. Giroux: So maybe no structure over 200 square feet, something like that?

Chairman Endo: Okay, so—

Ms. Kapua`ala: All applicable fire requirements for structures over 200 square feet?

Chairman Endo: Well, the building permit would be kicked in already anyway, so that would cover, because we're saying any time you need a building permit would be the general rule, right? Because they said they wouldn't build anything farther, so we used the building permit as the trigger with the minor exception that if they wanted to just build a tall fence, retaining walls—

Ms. Kapua`ala: Then fire requirements wouldn't be required anyways even if they did need a building permit.

Chairman Endo: Oh, you still would need a building permit. See, that's the thing.

Ms. Kapua`ala: Sometimes you would still need a building permit.

Chairman Endo: Yeah, you still need a building permit for those, but you don't really need fire stuff for those.

Ms. Kapua`ala: So there shall be no further construction of any structure on the subject subdivision without providing – without meeting the requirements, the standard requirements, by the Department of Fire and Public Safety?

Chairman Endo: Yeah, the current requirements that are being deferred by virtue of this variance today: the subdivision Fire Department requirements.

Ms. Kapua`ala: Okay, thank you, sir.

Chairman Endo: And so the only exception would be minor structures such as walls or fences. Mr. Luke?

Mr. Luke: What about a shed for my goats?

Chairman Endo: Under— How many square would you—?

Mr. Luke: It's not a human inhabitable— It's open. There's no plumbing. There's nothing. It's just a shed for the goats, but it's —

Chairman Endo: Is it over 200 square feet?

Mr. Luke: Two hundred square feet is 10 by 20?

Chairman Endo: Yeah.

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Mr. Luke: Yeah, I have one there now that's around there.

Mr. Shibuya: Habitable in the sense that people would be habiting, right? It's not specifying as animal.

Mr. Luke: What I did say is we would not build any human inhabitable structures, because right now our goats are kidding, and so we got maybe 20-some goats there right now. And with the rains and all, we gotta get them in the structure.

Chairman Endo: Did you pull building permits for those?

Mr. Luke: No.

Chairman Endo: Yeah, so to a certain extent, I mean, if they're on a borderline, but they're so minor that if you got busted, you just tear them down. You don't care because they're so minor structures. They're just little shacks anyway. Then you sort of can get around problem, right, because you're not pulling the building permits, you're not triggering the issue here. But if we want to, we can make an exception for goat sheds. Do we want to do that? Structures to house animals, should we do that?

Mr. Shibuya: Okay.

Chairman Endo: Yeah, let's do that, then. Do you guys want to--?

Mr. Castro: Usually for -- it's not that high either, yeah? I looking at the ranch up here, that--

Mr. Shibuya: Yeah, they're not tall.

Mr. Shefte: Lean-to.

Chairman Endo: Okay, is there any objection to adding animal -- what do you call that?

Mr. Tanaka: Animal shelters?

Chairman Endo: Animal shelters? Okay. Seeing no objection, we'll add that as one of the exceptions.

Mr. Shibuya: Farm animal structures.

Chairman Endo: Farm animals, sure. Okay. Mr. English?

Mr. English: There is permits coming in for 2,000 square foot horse barns. You have to limit the size.

Mr. Tanaka: Well, but if it were a 2,000 square foot structure for a horse barn, wouldn't that fall under a building permit?

Mr. English: Animal shelter, you have to define-- The building permit has the 200 square foot there

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to make chicken coops, make pig pens at 200 square foot. They just have to limit it to 200 square foot and leave it at that. It's already in place.

Chairman Endo: They can make multiple 180 square foot goat things.

Mr. English: Yes, they can make multiple.

Mr. Tanaka: There you go, leave it at 200.

Chairman Endo: Yeah, okay, let's leave it like that. It's simpler then. Because actually that is the issue because you build a barn for the horses, and then you put tenants in there, right? Not for the Lukes, but my general concern. Okay. So go back. Okay.

Ms. Kapua`ala: Another question I have is, does the million-dollar insurance policy have a time limit?

Chairman Endo: There was no stated time limit in the motion?

Mr. Shibuya: No, there was. Yes, she did.

Chairman Endo: Oh, she did? I'm sorry.

Ms. Phillips: Yeah, I actually stated that once the fire flow requirements are met, then the insurance requirement would be discontinued.

Ms. Kapua`ala: Okay, thank you.

Chairman Endo: Yeah, but I guess that raises – it's just a procedural thing. Okay, once they actually build the subdivision fire flow requirements that are being deferred now, all the requirements should be done. They don't have to indemnify the County because basically, the variance is over at that point.

Mr. Shibuya: That's right.

Chairman Endo: You know what I mean, right? All of the conditions should terminate at such time that they build the water requirements currently being deferred by virtue of the variance.

Ms. Kapua`ala: Okay, so is that another condition we shall add that all of the – that the variance shall terminate upon the applicants' – or until the fire flow requirements are met? Please help me word this. Variance shall terminate–

Mr. Giroux: Upon completion of required fire flow–

Chairman Endo: Required fire improvements.

Mr. Cerizo: Subdivision requirements.

Ms. Kapua`ala: Subdivision fire improvements' requirements. We got it. Thank you.

Chairman Endo: Okay. All right. Any further--?

Ms. Kapua`ala: One more thing. I'm sorry. Could you -- could the Board or the original maker of the motion explain why we are granting the variance, how the applicant has met the conditions for the granting of this variance?

Ms. Phillips: Yes, I feel that the applicant has shown: 1) That the strict application operation or enforcement of the code provision appealed would result in unnecessary hardship to the applicant; 2) That the granting of the variance shall not be -- is not detrimental to the public healthy, safety, and welfare; 3) That the granting of the variance is not injurious to the adjoining lots and the building thereon; and 4) that the granting of the variance is not contrary to the purposes of the code and the public interest.

Ms. Kapua`ala: I'm sorry, Ms. Phillips, I guess what I'm looking for, for the purposes of the decision and order the facts that you found justify the granting of the variance. What facts were stated in the record that justified the statements you just made? Or would you just like to agree with the applicants and we just adopt their--?

Ms. Phillips: Yeah, I'd like to go ahead and do that, please.

Ms. Kapua`ala: Okay. Thank you.

Chairman Endo: Okay, and also I think maybe we should make a quick statement that we don't want a whole bunch of other people in the subdivision to come forward and ask for the same variance. So we'll state for the record and maybe ask Mr. and Mrs. Luke to let the other neighbors know that we'll probably be denying any further requests that are similar unless there's extra special circumstances. And we're not granting your variance where you can just get subdivision, you can start building on three lots, and everything. So actually, there's not that much incentive to your other neighbors to do the same thing. In fact, if your neighbors ask, they should be told to go and try and do a family subdivision next time. It should be probably easier from the start.

Mr. Shibuya: Or join your group to get the waterline in.

Chairman Endo: Okay. Any further discussion? No? Okay, all those in favor of the motion to grant the variance as stated with the stated conditions, please say aye. Opposed, please say no.

It was moved by Ms. Phillips, seconded by Mr. Shibuya, then

VOTED: To grant the variance as stated with the stated conditions.

(Assenting: R. Phillips, W. Shibuya, J. Shefte, S. Castro, K. Tanaka, W. Kamai, S. Duvauchelle.)

(Excused: H. Ajmani.)

Chairman Endo: **The motion is carried and the variance is granted.** Thank you. Okay, thank you, Fire Department, and thank you, Mr. and Mrs. Luke. All right. For the next item, Trisha?

D. COMMUNICATIONS

1. **MARK M. MURAKAMI, ESQ. of DAMON KEY LEONG KUPCHAK HASTERT representing TROY AND SUSAN McCASLAND appealing the Director of Planning's Notice of Violation (NOV 20080002) for the operation of a transient vacation rental at property located at 451 'Ilikahi Street, Lahaina, Maui, Hawai'i; TMK: (2) 4-6-006:039 (BVAA 20080002)**

- a. **Discussion on Terms of Settlement Agreement**

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

Ms. Kapua`ala: And representing the Department of Planning is Deputy Corporation Counsel Mary Blaine Johnston.

Ms. Mary Blaine Johnston: Thank you. Mary Blaine Johnston on behalf of the Department. We – this is a matter that was set for appeal by the McCaslands. And our office has been working for almost a year, I guess, to put a settlement in place. We have a settlement in place. Trish, is the resolution agreement in their packets?

Ms. Kapua`ala: Yes.

Ms. Johnston: Okay. So you may or may not have had a chance to go over it, but I thought I would just very briefly summarize what the settlement is 'cause you're only seeing a portion of it. There was another sort of companion settlement before the Planning Commission, so I'd like to advise you of that. And then if you have any questions, I'd be happy to answer them.

The McCaslands own three properties on the island: two in Kihei and one in Lahaina, all of which – well, I don't know if the ones in Kihei they were running are transient vacation rentals, I think so, but they were cited for the property in Lahaina both for an SMA violation of running a transient vacation rental without the proper permits. And then they were also cited zoning violations for operating a business where they were not supposed to be operating a business, and that's one before you. The settlement agreement that was reached was that there would be for the SMA violation, the McCaslands will pay the initial fine of \$10,000, and a total daily civil fine of \$4,500, or a total of \$14,500 on the SMA side. On this side, on the Planning side, the agreement is they'll pay an initial \$1,000 fine, and the daily civil fine of \$5,300, or a total of \$6,300. So the total amount they're paying for the two violations is \$20,800. You may have seen that there are a lot of teeth in this resolution agreement that if they are caught doing it again, renting a transient vacation rental again without having proper permits that there are all kinds of penalties, including the voiding of this agreement, which could set them back to having to pay which would be substantial daily fines that would've accrued. So basically, that's what the settlement is. The Planning Commission had to approve their settlement for them. That was about two weeks ago. And that one is waiting. I have not yet seen it. The Mayor has to approve that, and I have not yet seen a copy of that signed by the Mayor. This one has been signed off on by the Mayor so it's in place. So that's it in a nutshell. But if you have any questions, I'd be happy to answer them.

Chairman Endo: What did the Planning Commission have to approve?

Ms. Johnston: They had to approve – on the SMA, they had to approve the settlement agreement.

Chairman Endo: Any questions?

Mr. Shibuya: I like the agreement.

Ms. Johnston: Well, this avoids having to go through the appeal hearing. The appeal has been dismissed as part of this. And also, something that's kind of interesting in here that I think has come up before the Board before is that – and you may want to revisit it at some point in the future is that if they're caught advertising on the Internet is there's a rebuttable presumption that they have started operating the business again. They can come in and say, no, somebody put it up, I didn't know, but that is something that would– Kauai has that. The Council passed that that advertising on the Internet that you're having a TVR is a presumption that you have a TVR. So anyway, if that should come around again, that would make the enforcement side a lot easier to shut people down if they are in violation. Anything? Any questions? Thank you.

Chairman Endo: Thank you.

E. APPROVAL OF THE FEBRUARY 26, 2009 MEETING MINUTES

Chairman Endo: Okay, our next item is our February 26, 2009 meeting minutes. If everyone has had a chance to review, we would have a motion.

Mr. Shibuya: I move to accept.

Mr. Shefte: Second.

Chairman Endo: It's been moved and seconded to accept the February 26, 2009 meeting minutes. Any discussion? Seeing none, all those in favor, please say aye. Opposed, please say no.

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

VOTED: To accept the February 26, 2009 meeting minutes.

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

(Excused: H. Ajmani.)

Chairman Endo: **Motion is carried, and the meeting minutes are approved.** Moving to the Director's Report on the BVA's contested case status.

F. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: Thank you. The only changes are that we now know the date, the hearing date, for the Maui's Best Gift and Craft Fair is August 13th and 14th. That no. 3 on the list, which is the Maui Land and Pine Mahinahina Subdivision Appeal, that final hearing was rescheduled 'til May 28th. It may be rescheduled again based on the parties' availability. They have indicated that they – both will contact Judge McConnell as the parties wish to settle after seeing the Judge's proposed

findings and recommended decision and order. And finally, the Kaanapali Royal Condominiums, Uwe Schulz's Appeal, that Hearing Officer contract has finally been executed, and the appellant's attorney will handle the scheduling of the first prehearing conference. Those are the only changes listed on your report.

Chairman Endo: Who's the Hearing Officer on that one?

Ms. Kapua`ala: That one is also Judge McConnell.

Chairman Endo: Thank you, Trisha. Any questions for the Planning Department? No? Okay. You want to talk about mileage reimbursement? No?

Ms. Kapua`ala: Mr. Shinmoto.

2. Mileage Reimbursement

Mr. Aaron Shinmoto: The Department will – for your information, the Department will no longer be reimbursing for mileage. Basically, it's a budget constraint problem that we have. We were doing it previously as a – call it a – as a courtesy for the hard work that you people put in, but unfortunately, we cannot – no longer do that. So this is just a for your information item.

Chairman Endo: Okay. Thank you.

G. NEXT MEETING DATE: March 25, 2009, Wednesday

Chairman Endo: Okay, our next meeting is on March 25, 2009, and I just want to give everyone a heads-up that I actually will be out of town.

Mr. Shinmoto: Mr. Chairman, excuse me. There'll be no meeting on the 25th. Because you'll be out of town, we decided to cancel the meeting. No, no. Coincidentally, we don't have any cases coming up at that time.

Chairman Endo: Oh, okay. Well, that makes it simpler. Okay, well, Warren, it's been a pleasure having you on our Board. Wish you all the best at the Maui Planning Commission. And this meeting is adjourned.

Mr. Shibuya: Thank you.

H. ADJOURNMENT

There being no further business to come before the Board, the meeting was adjourned at 3:13 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
James Shefte
Rachel Ball Phillips
Kevin Tanaka
Sandra Duvauchelle
Stephen Castro, Sr.
William Kamai

Members Excused:

Harjinder Ajmani

Others:

Kathleen Aoki, Deputy Planning Director, Planning Department
Aaron Shinmoto, Planning Program Administrator, Planning Department
Francis Cerizo, Staff Planner, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of Corporation Counsel