

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MAY 28, 2009**

APPROVED

Maui County Board of Variances and Appeals
Meeting Date: June 10, 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, 1:32 p.m., Thursday, May 28, 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.)

Chairman Randall Endo: Good afternoon, the meeting of Board of Variances and Appeals will now come to order. Let the record reflect that it's 1:32 p.m., and that we have a quorum present of five Members of the Board.

B. ELECTION OF CHAIRPERSON AND VICE-CHAIRPERSON FOR THE 2009-2010 YEAR

Chairman Endo: The first order of business is the election of new officers, and at this point, let's state for the record that I am serving as Chair Pro Tem for purposes of conducting the election unless there's an objection, and I'll be happy to let somebody else conduct the elections. Is there any objection? Seeing none, I'll conduct the election, and then we can proceed after that. But before we do the election, we probably should allow public testimony as to the election only. So there is anyone in the public who wishes to testify as to the election of new officers for the Board of Variances and Appeals? Seeing nobody stepping up, we will now close public testimony as to that first agenda item.

At this point, we will open up – well, we'll take nominations, as many as we want, and then we will go and vote in the order of the nominations. So there are two positions open: Chair, as well as Vice-Chair. So we'll take care of Chair, first.

Mr. Kevin Tanaka: I so nominate Randall Endo as Chair.

Chairman Endo: Okay.

Mr. Harjinder Ajmani: Second.

Mr. Stephen Castro, Sr.: Second.

Mr. Endo: Okay. Technically, it doesn't need a second, but so noted. Any other nominations? Okay. In that case, we will– Is there discussion? No? Okay, in that case, all those in favor of Randall Endo as Chair, please say aye. Opposed, please say no.

The vote was taken to:

Elect Randall Endo to the Office of Chairperson

Chairman Endo: Okay, selection is successful. And now I'm acting as Chair of the Board of Variances and Appeals. Okay, so now we will elect the Vice-Chair. So nominations for Vice-Chair of the Board?

Mr. Castro: I nominate Kevin.

Chairman Endo: So nomination for Kevin Tanaka. I'm pretty sure I brushed up on my *Robert's Rules* and don't need a second. So that's one nomination. Any other nomination? No? Okay. In that case, all those in— Oh, wait a minute. I've got to go back. I've got to vote for myself because we only had four voting Members. So I vote for myself as Chair of the Board of Variances and Appeals in order to cast the fifth vote for myself. So is there any objection? I know it's a little bit odd for the procedure. No? Okay. So now we will vote on nominations for Kevin Tanaka as Vice-Chair. Any discussion before we do that?

Mr. Tanaka: Is it appropriate to nominate somebody who's not here or—?

Chairman Endo: You can nominate anybody on the Board.

Mr. Tanaka: I just wanted it on the record my . . . (inaudible) . . .

Chairman Endo: Okay. Any further discussion? Hearing none, all those in favor of Kevin Tanaka as Vice-Chair, please signify by saying aye. Okay, and the Chair votes aye. So we — oh, wait. You have to vote, too.

Mr. Tanaka: Oh, boy.

Chairman Endo: Yeah.

Mr. Tanaka: Aye.

The vote was taken to:

Elect Kevin Tanaka to the Office of Vice-Chairperson

Chairman Endo: Okay, so the motion is carried with five aye votes. We have Vice-Chair, Kevin Tanaka. Congratulations. And now we'll move on to our regular business. Trisha?

C. PUBLIC HEARING - VARIANCES

1. **JENNIFER M. P. E. OANA and BRADFORD R. ING of ING & JORGENSEN representing JOHN W. & GERALDINE S. B. ENRIQUES requesting variances from §§16.08.060(A), (E)(3) and 19.30A.030(C) to allow an existing pool pump house to remain approximately three (3) feet from the side boundary line, with a roof projection of approximately two (2) feet from the boundary line, whereas a six (6) foot side yard and three (3) foot roof projection to the lot boundary are required, for property that is located at 231 Kee Road, Makawao, Maui, Hawaii; TMK: (2) 2-4-003:021 (BVAV 20090002)**

Ms. Trisha Kapua`ala read the agenda item into the record, and gave a power point presentation of the project site and the immediate surrounding area.

Ms. Kapua`ala: So here today we have Jennifer Oana and she has a power point. Thank you.

Ms. Jennifer Oana: Good afternoon, Chairman Endo, Members of the Board. My name is Jennifer Oana and I'm the attorney representing Dr. and Mrs. John and Geraldine Enriques.

So this is the property information: it's at 231 Kee Road in Makawao. And our request to you today is a request for a side yard setback and roof projection variance. You folks should have a tax map key map in your packet. And I'm sorry I didn't highlight it, but the subject property is right here.

Chairman Endo: Excuse me, before you continue, why don't you put it on full screen instead of the small screen? Thanks.

Ms. Oana: This the subject property right here. And if you can see the arrow, this is the subject project on the peninsula. And you can see the hatched marks, that's where the cliffs are. So our request is for a side yard setback and roof projection variance from the property . . . (inaudible) . . . to allow a pool pump house to remain in its present location. And this is the photo of the pump house.

Now, there are three code requirements that we're in violation of. And the first one is the Comprehensive Zoning Ordinance for side yard setback which requires a 15-foot setback from the boundary. The Housing Code side yard setback requires a six-foot setback from the boundary; and from the Housing Code, the roof projection should be no nearer than three feet from the boundary. Currently, the pump house wall to the boundary is approximately three feet, and the roof projection is approximately two feet. So here's some pictures of the pump house, and you can see there is a fence over here and that's where the boundary is. And so it's three feet from the wall of the pump house. Here's another picture, and another, and one more.

So as you know, the requirements for granting a variance, there are four requirements, and we'll talk about each of them individually. The first one is that the strict application operation or enforcement of the code provision appealed from would result in practical difficulty or unnecessary hardship to the applicant. Dr. and Mrs. Enriques have studied this situation and . . . (inaudible) . . . the pump house and reconstructing. However, upon reviewing the layout of the land, and because of the unique nature of the land, and where the existing structures are, which includes the house, a garage, and the pool, there is no other location to build a new pump house. The second requirement is that the granting of the variance shall not be detrimental to the public health, safety, or welfare. And in fact, it is beneficial to the public health, safety, or welfare as keeping the pool will add extra or potentially the only fire protection. Now we need to keep the pump house to service the pool. The pump house houses the mechanical and electrical equipment. So without the pump house basically, the water will just remain green and stagnate, and actually, bug-infested. And so the pump house is essential to keep the pool. And then again, the pool would

be extra or additional fire protection. The nearest fire hydrant is on Makawao Avenue. And when I drove out there the other day, it was pretty much on the corner of Kee Road and Makawao Avenue. Dr. Enriques has previously informed the Makawao Fire Station that the pool water is available for their use if they need it, and he was advised that if he sees a fire in the area, to call them and to remind them that he has 30,000 gallons for their use.

The third requirement is that the granting of the variance will not be injurious to the adjoining lots and the buildings thereon. And here there is no injury to the adjoining lot. As you noted in the . . . (inaudible) . . . as well as the Google map, there's cliffs and gulches that border the sides of the peninsula. And the bottom of the gulch is approximately 75 feet below. Furthermore, setbacks are basically required so that light and ventilation can – so that light and ventilation won't be interfered with, with regards to other neighboring houses or whatnot. And here, there are no neighboring houses or dwellings. They're pretty far away so any potential issue for a neighbor, there is none here. Furthermore, setbacks are required. So if there is a fire, you know, a fire will not jump from one house to the next. And again, there are no dwellings anywhere near this area.

We have contacted all of the adjoining property owners prior to even our notice for this variance. And again, Myra and Robert Carvalho, Mr. Robert Carvalho is actually here to testify. A&B Property, Alfred Allencastre, and Bernadette Fernandez have submitted letters in support. We also do have another neighbor here in support of the variance, Mr. Crozier.

So here's some pictures. There's about three or four of them. My clients took a picture of the pump house from across the gulch. So if you can see the little cursor, this is actually the pump house, and then you can see the gulch.

The fourth requirement is that the granting of the variance will not be contrary to the purposes of the code and the public interest. And the purposes of the code is to provide minimum requirements for the protection of life, limb, health to property, safety, and welfare of the general public and the owners and occupants of residential buildings. And I don't believe that granting this variance would be in violation of the purpose of the code.

Now for Title 19, the comprehensive zoning district requirements for the granting of a variance, there are three of them, as you know, and we'll talk about each of them. The first one is, there's an exceptional, unique, or unusual physical or geographical condition existing on the subject property which is not generally prevalent in the neighborhood or surrounding area. And the use sought to be authorized by the variance will not alter the essential character of the neighborhood. As you've seen in the video, and on the map, and on the photos, the subject property is on a peninsula. It's approximately, 80-foot wide, and 1,600 feet in length with cliffs and gulches on both sides of the peninsula with an approximately 30-foot high cliff.

And this is just a closeup of the tax map. And then you can see where the cliffs are over here on this map. So if you see this little rectangle, I drew this in, and that's approximately, where the pump house is. And this is just the topo map of the property. And I believe you all have the copy of this in your packet. And then here are the three or four pictures I wanted to show: again, the pump house, and then the gulch right next to it. And here's another one. And this one, you can kind of see how deep and how high it is, and then another one.

The second requirement is strict compliance with the applicable provisions of the title would prevent reasonable use of the subject property. Again, Mr. – Dr. and Mrs. Enriques have thought about

what they have to do to be in compliance, and they were contemplating just that one time. However, they would like to keep their pool because the fire hydrant is really too far from their home. Demolition and reconstruction of the pump house would be required, but they can't build the pump house in any other location.

The third requirement is that the conditions creating the hardship were not the result of previous action by the applicant. As the Department of Planning stated in their staff report, this is an exceptional and unique situation and property with the peninsula and cliffs and gulches on both sides. Furthermore, as we noted in our application, Mrs. Enriquez and Dr. Enriquez hired Go Swimming, a swimming pool contractor to build the pool, build the pump house. They entrusted them to get all the necessary permits. And it was only a couple years ago when Dr. Enriquez was applying for subdivision approval to subdivide his property for his son that they learned of the violation and immediately they wanted to correct it. That's all that I have. If there are any questions. . . . (inaudible) . . .

Chairman Endo: Okay, before we do that, let's see. Are you amendable to waiving the reading of the staff reports of the Department of Planning and the Department of Public Works?

Ms. Oana: Yes.

Chairman Endo: Okay. And are they part of your presentation, or are they public testifiers?

Ms. Oana: Dr. Enriquez is part of our presentation, and then . . . (inaudible) . . .

Chairman Endo: Okay, because I want to do a call for a public testimony. So why don't you just have your presentation first, and then I'll do a call?

Dr. John Enriquez: That's quite an election you had. I wish all elections were like that. That's like fast, you know. I'm Dr. Enriquez. I'm half owner of the property. And my wife, Geraldine there, is the other half owner. And our property is long and narrow having wide and deep gulches on either side. And it's on a very narrow peninsula.

When we applied for a permit to build a house in 1979, the Fire Department had concern regarding the lack of available water for fire protection since the nearest fire hydrant was 2,000 feet away up Makawao Avenue. We then told them we would build a pool. We didn't hear from them but we still got our permit, so I guess it was okay. We contracted with Go Swimming to build the pool and the pump room. They would draw the plans and then get the permits. We entrusted to follow the County codes. Apparently, they did not since now, 30 years later, the Planning Department, upon reviewing our request for a one-lot subdivision, sent us a letter saying the pump room was too close to the neighbor's boundary. We had to move the pump room. My wife and I measured the pump room's distance to the boundary and agreed it was too close. We were undecided on what to do.

On one hand we could demolish the pump room which in turn we would have to demolish the pool since— We thought about it and the cost of operating the pool was \$400 a month. And nobody swims in it for the last four years since my daughter left for college. So we thought maybe we'd demolish it once and for all. But then we thought of our safety because the fire hydrant was 2,000 feet away, what would happen if there was a fire in our gulch or in our house? We contacted a pool contractor. We told him that we want to demolish our pool. But when he came there, he said he wouldn't demolish it because it was too nice. So I says, well, I'll find somebody else. We then contacted the Fire Department, the Makawao Fire Department, to ascertain if a fire truck

could enter our driveway because in 2002, there was a medical emergency at our house. And the fire truck came down because the ambulance was busy. And they didn't come down our driveway. They parked at Kee Road and carried the oxygen about 900 feet to our house. So I called the Fire Department and said, well, come on down, and look, and make sure that you can come down because if we might need it, if we need it, and I won't have my pool. When Captain Beerman came down, he stated that the truck couldn't enter the driveway because when they came down on the medical emergency, it was at night and they were afraid to coming down because maybe they couldn't come down and turn around. I then told him that I had 30,000 gallons of water. And he said if there was a fire at our house or the surrounding areas to call 911 and tell them about my 30,000 gallons of water. He said to call all the time because personnel changes. He said make sure you call them and tell them about my water. At that time, we decided to ask for a variance because upon visiting my neighbors, all of them said they want the pool because just about a month or two previous to that, there was the Kihei fire and pool water was used to douse the fire. So they said they want the pool. And then we believe we're doing the right thing by asking for a variance because if we had to demolish the pump room, the pool has to go.

The pump room has not infringed on anybody's privacy in the past and will not now in the future because it's adjoining a very steep gulch. And it's about 75 feet deep and wide. And we believe that having the pool there is a – safe for our community. On both sides of us since Maui Land and Pine has discontinued planting pineapple, they have brush and weeds now. There's a fire hazard there on both sides of us up above on Makawao Avenue and across next to the Veterans Cemetery. So we hope that the Board of Variances and Appeals will allow the pump room to remain where it is, where it's been for the last 30 years. And I thank you for if you can approve the – letting the pump room stay where it's at. If's there any questions you have regarding what I just said, I–

Chairman Endo: Thank you, Dr. Enriquez. Okay, at this time, we'd like to open the matter up for public testimony as to this item only unless you need to leave early and want to testify as to further agenda items, you can do so also. So at this time, please come up and state your name and which item you're testifying on. And you'll be limited to three minutes for your testimony.

Mr. Franklin Crozier: Hello, Mr. Chairman, Members. I'm John Enriquez' neighbor. And I– Oh, my name is Franklin Crozier. I'm John Enriquez' neighbor. And I don't see anything wrong with the pump house 'cause from where I live, I need a binoculars to see if – and I'm his – I'm one of his closest neighbors. And I remember once I got injured. I was kinda banged up falling off a horse. And John Enriquez invited me over if I wanted to jump in the pool and kinda loosen up. I did. I was cured because the water was too cold – plenty. I'm here in – on behalf of John Enriquez. Thank you.

Chairman Endo: Thank you. Any questions? Actually, could you write your name on that testimony list there? Thank you. Any questions? Okay.

Mr. Castro: Mr. Chair, actually, I had two questions. And I think one was already answered in regards to the access.

Chairman Endo: Oh, wait, I'm sorry. Is it a question for the testifier, though?

Mr. Castro: No, no, no.

Chairman Endo: Okay, yeah, if you can hold your questions until we finish public testimony. Is there anyone else who wishes to testify?

Mr. Robert Carvalho: Hello. My name is Robert Carvalho. I'm the guy that own the gulch. I have absolutely no problem with what he have there. I have known what he had there for like – since he built it. And it's not in my view, and you really can't see it unless you really get directly up to it. So I'm in favor of his variance on that.

Chairman Endo: Thank you. Any questions? What is your current use of the gulch area?

Mr. Carvalho: Cattle. I just – cattle ranch.

Chairman Endo: Okay. Thanks. If you could also sign the sign-up sheet. Thank you. Is there anyone else here who wishes to testify? No? Okay, we'll close public testimony. And your presentation is over, right, Ms. Oana?

Ms. Oana: Yes.

Chairman Endo: Okay, so at this point, we can ask some questions, preliminarily, and then we'll go and get the recommendations from the Departments.

Mr. Castro: I guess my only concern is during your absence, will the Fire Department have access? If you go on vacation, work, you know?

Dr. Enriques: It's open.

Mr. Castro: It's open.

Dr. Enriques: Yeah.

Mr. Castro: Thank you.

Chairman Endo: Hari?

Mr. Ajmani: Dr. Enriques, this is a house – you bought that property and built the house 30 years ago?

Dr. Enriques: Yes.

Mr. Ajmani: So you have been the owner all along?

Dr. Enriques: Yes.

Mr. Ajmani: Okay. Thank you.

Chairman Endo: Any other questions? No? Okay, so we can deliberate some more, but let's get – there's a recommendation from the Planning Department, and I believe there's no recommendation from Public Works, but we'll just confirm that now.

Ms. Kapua`ala: That's correct.

Chairman Endo: Do we have letters in support or opposition, Trisha?

Ms. Kapua`ala: Yes, as stated in the Department of Planning's staff report, the applicant submitted four letters. It's included in your packet as Exhibit A, four letters in support of the subject variance.

Chairman Endo: And no letters in opposition?

Ms. Kapua`ala: No, sir. Based on its analysis, the Department of Planning finds that:

1. There is an exceptional, unique, or unusual physical or geographical condition existing on the property which is not generally prevalent in the neighborhood or surrounding area;
2. Strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property; and
3. The conditions creating the hardship were not the result of previous actions by the applicant.

Based on the foregoing findings of fact and conclusions of law, the applicant has met all of the requirements for the granting of the subject variance. Therefore, the staff recommends APPROVAL 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 the May 28, 2009, 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.

Chairman Endo: Ms. Kapua`ala, is your recommendation with regard to the entire variance, or only with regard to title – the zoning variance?

Ms. Kapua`ala: It's only in regard to the Title 19 zoning variance. In analyzing the Department of Public Works' staff report, and the Public Works' staff can confirm this, it seems as though the – no. 1 of the five criteria is – has not been met.

Chairman Endo: The Public Works' criteria?

Ms. Kapua`ala: Yes. Public Works has – I'm sorry, four criteria. And from what I can construe off of the staff's analysis, I know for sure, and I can't say the same for no. 2, 3, and 4 that no. 1, the Criteria No. 1 is a negative response, that the applicant has not met no. 1.

Chairman Endo: Thank you. Mr. Chun, does the Department of Public Works have a recommendation?

Mr. Jarvis Chun: No, we don't provide the Board a recommendation.

Chairman Endo: Okay, but you have your analysis in your report.

Mr. Chun: That's correct.

Chairman Endo: Is there anything further you wanted to add or—?

Mr. Chun: If you read the background on page 7 and 8, Items 13 and 14, the Building Code has additional fire-resistive requirements for the structure.

Chairman Endo: So you're saying assuming we grant this variance on the — which is a subdivision, triggered by subdivision, they'd still have to get another variance for Building Code or is that included?

Mr. Chun: Well, the applicant did not request for it, a granting of a variance from the Building Code, but if you — I'm not sure if — you can check with Corporation Counsel, but if the Board can waive these additional requirements. It appears that the Housing Code criteria and the Building Code criteria for granting of a variance are the same, if that'll help.

Chairman Endo: Ms. Oana, do you have any — is that correct, or are we misreading something in terms of the Building Code on the fire protection in terms of the Item 13?

Ms. Oana: (Inaudible)

Chairman Endo: Yeah, Jarvis Chun had pointed out Items 13 and 14 on page 7 and 8 of the Public Works' staff report. And so the initial question is whether or not your initial request — your request for a variance includes that topic or was that inadvertently omitted?

Ms. Oana: It was omitted. So I would ask the Board to, if it's possible to — I don't know if this is appropriate or not, but I would ask the Board while you're deliberating on the three issues for the variance that we submitted if you could waive the requirements for 13 and 14. And I believe no. 13, the Department did say that it appeared to meet the one — our fire-resistive requirement. I'm not sure about no. 14, though.

Chairman Endo: Jarvis, you have any comment on that?

Mr. Chun: Based on a site inspection done on the property, it appears the wall that is parallel to this property line is constructed out of hollow tile. Based on our Building Code standards, that would most likely qualify. You know, we didn't see the construction. We didn't see the actual internal makeups, but it'll qualify as a standard one-hour wall.

Chairman Endo: In which case, it can be within five feet of the property line?

Mr. Chun: Correct, correct.

Chairman Endo: Okay.

Mr. Chun: If I could clarify on no. 14, further? The Building Code setback for this building would be five feet and they're at three feet right now. The projection that is permitted at five feet for this building, if it was built at five, would be 12 inches into the property – toward the property line leaving four feet. It's a little confusing. There is Building Code setback for fire-resistive requirements, and there's also Zoning and Housing Code setback requirements. So actually there could be three possible setbacks, yeah? The Building Code does not address extreme topographical elevation changes as what the applicant has stated. So that just being said, if the Board feels that there's enough spacing, you know, between this building and the so-called adjacent property and the changing grade, the extreme changing grade, then that maybe will meet the justification, yeah, for granting, yeah.

Chairman Endo: Okay, thank you.

Mr. Chun: I hope that kinda clarifies. It's kinda confusing, yeah.

Mr. Tanaka: So the granting of this variance would have to, I mean, specifically word it so that you're addressing Zoning and Building Code and–?

Chairman Endo: Yeah, if we granted the variance as requested, it has the sections that they're seeking the variance from, and we would incorporate the various reports, and then also make some additional remarks to make sure that we have enough findings in the record to support our decision. But then the issue of the Building Code, is that actually going to be still a part of the subdivision issue? Is that going to have to be addressed in order to get subdivision or is that taking it at a different stage?

Mr. Chun: I think the building was un-permitted. So the trigger– Well, one of the requirements of subdivision is to submit documentation of all structures receiving a building permit. And it appears that during their due diligence, the applicants did not find a building permit for the structure. So that's where an after-the-fact permit was submitted. And that's where we are today. So–

Chairman Endo: So they pulled the building permit to do an after-the-fact, but they haven't finished it yet?

Mr. Chun: Correct. So I guess the Department of Planning and the Department of Public Works have found that it was deficient in setback. So in order for the subdivision to go forward, they would need a granting of an exception from the Board, or they would have to remove that structure because they would not be able to get a building permit, and Subdivisions would not finalize their subdivision without it, in a nutshell.

Chairman Endo: Okay.

Dr. Enriquez: I just wanted to say that the building is tile and the roof is monier tile.

Chairman Endo: Okay. I think procedurally at this point we should ask our Deputy Corporation Counsel to give us advice as to Ms. Oana's oral request to amend their requested application for a variance to include all the things brought up by Mr. Chun.

Mr. James Giroux: If there's no objection from the Departments, I guess what needs to be made clear is that there is an amendment on the record. Your rules allow you to do analysis over variances for standards for building, fire, housing, electrical, and plumbing. So I want to just direct you to your Section 12-801-75. And that gives you your standard so you'll – what would need to be made clear is – because the staff is going to use the reports and the application in writing the findings of fact, conclusions of law. So they need to – if you're going to allow them to amend their application, that needs to be included in their documentation of the order. So that just needs to be clear that the analysis was made and that you use the proper standards.

Chairman Endo: Okay. So you don't think there's any – because it's fairly similar in what we'll be deciding upon today, it's not like a Sunshine Law violation or anything?

Mr. Giroux: No, it looks like the facts in question are the same. It just looks like there's further code issues that raise the same analysis and the same factual basis. So I think it would be covered by the Sunshine Law.

Chairman Endo: Okay.

Mr. Chun: Chair, no objection from the staff.

Chairman Endo: Okay. How about from Planning?

Ms. Kapua`ala: No objection.

Chairman Endo: Okay, in that case, then, let's vote on that first, then, and then we can vote on the actual request. So the Chair will entertain a motion to– Okay, is there any objection from any of the Members to so amending the application to include this additional issue of the Building Code as mentioned in paragraphs 13 and 14 in pages 7 and 8 of the Public Works' report?

Ms. Rachel Ball Phillips: Chair, I have no objection, but before we do any voting, I just wanted to go on the record as stating that I do have a business relationship with the applicant's attorney, but I have no personal involvement in the issue at hand. So I just wanted to go on the record with that.

Chairman Endo: Okay. Thank you. Is there any other – are there any objections to allowing the amendment of the application for a variance? Seeing none, we will now consider it so amended. So at this point, we can deliberate and somebody can make a motion.

Mr. Tanaka: So move to approve with amended – with the amended issues brought up – I lost my train of thought. How do I–?

Chairman Endo: The amended application.

Mr. Tanaka: So move to approve with the amendments.

Mr. Ajmani: Second.

Chairman Endo: Okay, it's been moved and seconded to grant the request for a variance as amended orally in this hearing.

Ms. Kapua'ala: Mr. Chair?

Chairman Endo: Yes, Trisha?

Ms. Kapua'ala: The Department of Planning would like to request that the standard conditions of approval be applied pursuant to Section 12-801-76.1 of the BVA Rules of Practice and Procedure stating:

1. That the variance shall be applicable only to the request as approved by and reflected in the record of the Board; and
2. That the owner, its successors, and committed assigns shall indemnify the County hold harmless and maintain an insurance policy in the amount of one million dollars and that copies of the hold harmless be recorded with the Bureau of Conveyances.

Chairman Endo: Okay, is there any objections from the Members to amending the current motion to incorporate the standard conditions just described by Trisha? No? Okay. So we'll consider a friendly amendment to the main motion. So the main motion is to approve the granting of the variance as amended orally with the standard conditions as recited by Trisha. Okay, discussion? I'd like to let the applicant make any comments with regard to the motion in terms of the conditions or anything else, if you want to make a comment.

Dr. Enriques: I have no comment.

Chairman Endo: Okay. Thank you. Okay, Trisha, before we take a vote, do we need to give you more information for your findings or are you good? I'm assuming that we're also going to incorporate both the Department of Public Works and Planning's staff reports as well as your recommendation as part of our findings of fact.

Ms. Kapua'ala: If that is the case, I guess for the purposes of the decision and order, I would appreciate the Board justifying how the strict application, operation or enforcement of the code provisions of Title 16 would result in practical difficulty or unnecessary hardship to the applicant.

Chairman Endo: So basically what we should do is take the Public Works' report on that item and where it says—

Mr. Ajmani: Self-imposed by the applicant.

Chairman Endo: Right, on page 8, on the bottom it says, "The practical difficulty or unnecessary hardship is self-imposed by the applicant." So we strike that as part of our — what we're adopting. So we adopt everything except for that sentence. And instead we adopt the staff analysis on page 9 of the Planning Department's report because they're basically the same issue, I believe, generally

speaking. Does that sound clear to everybody? Is there any objection to that amendment to the main motion? No? Okay, so it's so amended. So that would be our findings. Okay, any further discussion? Okay, all those in favor of the motion to grant the variance as previously described, please say aye. The Chair votes aye. So that's five. All those opposed, please say no.

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

VOTED: To Grant the Variance as Previously Described.

**(Assenting: K. Tanaka, H. Ajmani, S. Castro, R. Phillips, and
R. Endo.)**

(Excused: S. Duvauchelle, W. Kamai, and J. Shefte.)

Chairman Endo: **The motion is carried and the variance is granted.** Okay, Ms. Kapua`ala, do you have another item?

D. COMMUNICATIONS

1. **JAMES B. TAKEYASU, ESQ. representing ANTHONY A. LUM appealing the Director of the Department of Public Works determination as to the requirements of Maui County Code ("MCC"), Title 18, pertaining to MCC, §§18.04.470, 18.04.220, 19.29.030(A)(1), 19.35.010(c)(5), 19.35.050, 18.20.040(B)(3)(a), 18.20.040(A), 19.16.060(C), 18.04.380, 18.16.060(C), 18.16.050 and 16.26.3304, relative to Building Permit Application No. B T2007/1270 for property located at 180 Alanuilili Place, Kula, Maui, Hawaii; TMK: (2) 2-3-019:025-0003 (BVAA 20070004)**

- a. **Letter of Withdrawal**

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

Ms. Kapua`ala: This is simply a letter of withdrawal.

Chairman Endo: Okay. So we don't need to take any action. I wonder if in the future if we could figure out a way where you don't have to read all of that.

Ms. Kapua`ala: Do I have to? Am I able to--?

Mr. Giroux: Just the BVA number.

Chairman Endo: Yeah, the BVA number should be good enough. Maybe just the name and the BVA number.

Mr. Giroux: And the TMK.

Ms. Kapua`ala: Thank you.

Mr. Tanaka: Trisha, what is the reason for the withdrawal? I'm just curious.

Ms. Kapua`ala: You know, I never got to – they never got to contested case with this. The parties worked to settle the matter from the very beginning. The hearings officer charged us \$200 an hour to take – to do procedural post hearing scheduling, and e-mails, and calls. So we paid the hearings officer and then they settled.

Chairman Endo: Okay, so it's settled, apparently.

Ms. Kapua`ala: Yeah, the issues were never – no issues were raised. I don't know what the meat of this appeal is.

Chairman Endo: Okay. All right. Okay, we can move to the next item unless there's any other comments. No?

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 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. **Stipulation to Dismiss Appeal**

3. **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, Hawaii; TMK: (2) 3-4-032:001 (BVAA 20080011)**

- a. **Stipulation to Dismiss Appeal**

Ms. Kapua`ala introduced the agenda items into the record.

Ms. Kapua`ala: Two separate appeals on two separate notices of violations on the same property.

Mr. Castro: This is the one with all the . . . (Inaudible) . . .

Chairman Endo: Yeah, that's the shacks on the property.

Mr. Ajmani: These are the junk piled up and all that, yeah.

Chairman Endo: Yeah. Okay, so I guess they settled that one too.

Ms. Kapua`ala: Working to.

Chairman Endo: Working to.

Ms. Kapua`ala: Yeah, not settled yet.

Chairman Endo: Oh, but they dismissed their appeal, though.

Ms. Kapua`ala: Yes.

Chairman Endo: Okay. All right. So noted. We don't need to take any action on that. Okay, at this point, I'd like to, if there's no objection from the Members, go back to Agenda Item C-1, Ms. Jennifer Oana on behalf of the Enriqueses.

Ms. Oana: Thank you for calling us again. Regarding the one million-dollar insurance policy, I would like to request for my clients a reduction in that amount.

Chairman Endo: Do you have a proposed amount?

Ms. Oana: No, I don't.

Dr. Enriques: (Inaudible) A million dollars forever is like . . . (inaudible) . . . Ten thousand dollars . . . (inaudible) . . .

Chairman Endo: Members?

Ms. Phillips: No objection.

Chairman Endo: I need a motion, a motion from somebody.

Mr. Tanaka: Motion to amend, to what number—?

Mr. Ajmani: Can I make a motion?

Chairman Endo: Sure.

Mr. Ajmani: Yeah, I think I will suggest – make a motion that we reduce the insurance to a quarter of a million dollars. I think that's the minimum we have done for these kinds of possible indemnity things and for the future for the County.

Chairman Endo: Okay. Is there a second? Hang on. Is there a second?

Mr. Castro: I'm just questioning: has that been the minimum?

Chairman Endo: Oh, well, he means in the recent past, when we have given reduced amounts, that's been a typical amount. That's not a statutory minimum or anything.

Mr. Ajmani: I think it's been found to be a pretty decent minimum because it leaves the owner a lot of – it does not put an undue burden on the owner, and yet protect the County if something were to come up because anything less than that is basically – it goes to the legal fees only, and there's hardly any money left for damages.

Chairman Endo: Okay, at this point, I'd like to let Dr. Enriquez or Jennifer – you wanted to say anything on that issue?

Ms. Oana: I would actually also like to ask to limit the number of years for this insurance policy, if possible, for example, ten years or whatever.

Chairman Endo: Okay, but you wanted to comment on the \$250,000 or not? I thought I heard the Doctor saying something or– Could you come up to the mic., and state your name just so that we have a clear record? Thank you.

Dr. Enriquez: I don't mind getting insurance but a quarter of a million is a lot of money for that building, yeah. It's not even– I don't think it's a hundred feet. I mean, it's a lot of money for that small building. And I'll leave that up to you, though. I mean, I have no, you know, say on that matter, I guess. You guys have the authority to grant me a reasonable amount, I'd say.

Chairman Endo: Okay.

Mr. Ajmani: I think this policy is really not for that building. It's just a liability policy that actually in some cases might be covered by a general umbrella liability policy. That policy can include this damage also.

Chairman Endo: Oh, yeah, just to clarify, that's correct. The insurance is not to protect the building, but to protect the County. So the insurance is liability insurance. In the event – it might be difficult to envision, but in the event that the County is sued over this matter because somebody is going to make some theory that they got injured or whatever, they got damaged because the County granted this variance, that insurance would help to pay for any damages the County would have to pay the claimant. So it's kind of an additional rider you would have to pick up onto your homeowner's policy, basically, but it's kind of an obscure kind of insurance.

Dr. Enriquez: Well, it's kind of rough on us because we're retired. To add another – to a million dollars or a quarter of a million like he said, that's a big amount for us.

Mr. Ajmani: I think typically, like I have a – for my own house, I have a million-dollar umbrella policy, and that typically – that cost me about \$300 a year. So unless this creates a big issue with you with your other policy that you might already have, it should not be a big – it should not be a very big item. You can confirm it and check it.

Dr. Enriquez: I don't know what I have. I don't know what I got on that house, but I'm insured on that house, but I don't know how much. But I'll leave that up to you, though, I mean.

Mr. Ajmani: I personally find that this is a very reasonable amount and it should not result into – if you really check into it, it should not result into much extra premium for you.

Dr. Enriquez: I gotta check my policy. Thank you.

Chairman Endo: I just had a very interesting thought that maybe you might be interested in. Since the motion actually didn't go forward yet, yeah, because nobody seconded it, it would be – well,

actually I don't think it would— I was going to say you could actually put a covenant on your property saying that in the event that — because you're already indemnifying the County over our decision. Part of the standard conditions is you are indemnifying us. So if that obscure situation occurs, the County's held liable for granting this variance, we would seek to recover that money from you because you asked for the variance. In the event that you don't have any money — well, I mean, that's where the insurance would come in. They would pay for that liability. But since you have property, we could actually encumber the property with that liability which would be more than sufficient, but then that would be an additional lien on your property that would run as long as you want the variance to exist. But you may or may not want that actually because that wouldn't cost you anything, but it would be an encumbrance on your property.

Dr. Enriquez: (Inaudible)

Mr. Ajmani: So should I restate the motion or is that—?

Chairman Endo: Sure, somebody should make a motion.

Mr. Ajmani: Yeah, I make the motion that we should reduce the insurance liability amount to be a quarter of a million dollars instead of one million as we had originally passed.

Mr. Tanaka: And the request was also made to restrict it — to limit it to a time limit.

Chairman Endo: Well, let's see if we have a second first, and then we'll talk about that, unless you want to add that to your motion.

Mr. Ajmani: I think the liability — the variance goes with the property, as I understand, so the liability should go with the property. It should be deeded with the property.

Chairman Endo: Well, just to be clear, the condition is as long as you want the variance. So as long as you want the variance, you — as it currently stands, you would be required to keep continuing that insurance. So there's been a motion made to reduce the currently imposed one million dollar insurance requirement down to \$250,000 and that's it. That's the motion.

Mr. Castro: Just a question to Hari: you said a million dollars is roughly like \$300 a year?

Mr. Ajmani: That's right.

Mr. Castro: So a quarter of a million?

Mr. Ajmani: Will be less than that. I'm assuming it will be substantially less than that.

Chairman Endo: Okay, it's better if we actually see if we have a second first, technically.

Mr. Castro: Second.

Chairman Endo: You can say second for discussion purposes only, if you want to. Okay. So it's been moved and seconded to reduce the million-dollar insurance requirement down to \$250,000.

Discussion?

Mr. Tanaka: Yeah – well, question: has there ever been where this stipulation has been waived for any reason?

Chairman Endo: Yes, we have waived the insurance requirement in particular cases in the past. The Board has the authority under the rules. We have the discretion on whether or not to impose these requirements on a particular applicant. It's not a mandatory condition.

Mr. Ajmani: I believe we have waived it for a very minor variation of a variance where we thought there will be no liability in those kinds of situations.

Ms. Phillips: It seems to me like the risk to the County would be minimal in this matter. The pump house has been up for over 20 years? Thirty years. So it doesn't seem like all of a sudden there would be any– I mean, I don't know. I'm not an attorney, but it seems like there would be minimal risk so I would be comfortable with less than that. It's up to other Members as well.

Mr. Castro: Less than what?

Ms. Phillips: Less than the \$250,000. It seems like a lot of insurance, but–

Mr. Castro: Their request was for \$10,000?

Chairman Endo: Ms. Oana, what was the applicant's position?

Ms. Oana: Yeah, we . . . (inaudible) . . .

Mr. Castro: I think Dr. Enriques mentioned that looking at something like \$10,000.

Mr. Tanaka: Well, conceivably, they could be – that number may – the number we're discussing may be moot because his insurance policy may be – the umbrella coverage may be a lot greater than what we're discussing. So it may end up being that there is no additional cost, or if it is, you know, fifty bucks a year kind of thing. So that– And I'm not sure if they're aware of that fact. I guess the number sounds – a quarter of a million dollars sounds like a lot, but– Would it be appropriate or possible to go a lot less than that? I'm just – off the top of my head. Because the reason I asked the question about what is, you know, just waiving it. The understanding I have legally, the granting of the variance implies that the County is not responsible, but this insurance policy goes beyond. It's extra coverage for the County. But the first statement is, okay, we're giving you this variance, but the County is not liable. I mean–

Chairman Endo: That's correct, there's already an indemnification provision as one of the conditions. So to the extent that the applicant has adequate financial resources, if it ever happened that the County had to pay \$10,000 to somebody because we granted this variance, and they proved it, and we lost in court, then we would turn around and seek that \$10,000 from the Enriqueses. So that's already there by the indemnification provision. So now we're only talking about the additional that we require them to have insurance to cover that liability.

Ms. Kapua`ala: Mr. Chair?

Chairman Endo: Yes?

Ms. Kapua`ala: I have a question for Corp. Counsel. James, is that possible to add on the County as an additional named insured to the existing policy without designating an amount for naming the County an additional insured?

Mr. Giroux: I'm not sure about that. I think it would be easier – I mean, a lot of – we get a lot of post requests from applicants and stuff about – and it all comes down to what their insurance company is willing to do. So it depends on your carrier.

Mr. Ajmani: Okay, can I make a suggestion? Is it possible that we grant the variance with the \$250,000 insurance requirement, and if the applicant finds this to be prohibitively expensive, then they can make a further request at the next meeting or later on? Is something like that can be done?

Chairman Endo: I'm pretty sure that could be done.

Mr. Giroux: They can file a motion to reconsider or to amend.

Mr. Ajmani: Will that be okay? Okay, so can I amend my–?

Chairman Endo: You don't have to.

Mr. Ajmani: Or is it part of the discussion?

Chairman Endo: That operates already by default. So you don't need to amend your motion.

Mr. Tanaka: Myself, I'd be comfortable with that because it could be a fairly – a very small amount.

Chairman Endo: Okay, any further discussion? No? All those in favor of the motion to reduce the insurance requirement from one million dollars to \$250,000, please say aye. The Chair votes aye. All those opposed, please say no.

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

VOTED: To Reduce the Insurance Requirement from One Million Dollars to \$250,000.

(Assenting: H. Ajmani, S. Castro, K. Tanaka, R. Phillips, and R. Endo.)

(Excused: S. Duvauchelle, W. Kamai, and J. Shefte.)

Chairman Endo: **Okay, the motion is carried, and the insurance is reduced to \$250,000.**

Ms. Oana: Thank you very much.

Chairman Endo: Thank you. Okay, are we on meeting minutes now, Trisha?

E. APPROVAL OF THE MARCH 12, 2009 MEETING MINUTES

Ms. Kapua`ala: Approval of the March 12, 2009 meeting minutes.

Chairman Endo: Okay. Is there a motion to approve the minutes?

Mr. Castro: So moved.

Ms. Phillips: Second.

Chairman Endo: Okay, it's been moved and seconded to approve the March 12, 2009 meeting minutes. Any discussion? Seeing none, all those in favor of the motion, please say aye. Opposed, please say no. The Chair votes aye.

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

VOTED: To Approve the March 12, 2009 Meeting Minutes.

**(Assenting: S. Castro, R. Phillips, K. Tanaka, H. Ajmani, and
R. Endo.)**

(Excused: S. Duvauchelle, W. Kamai, and J. Shefte.)

Chairman Endo: **The motion passes.** Director's Report?

F. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: Well, the only update I have to report is Item No. 1, which is the first item, BVA 20050013, which is the Maui's Best Gift and Craft Fair, LLC. The appellant actually proposed to the Economic Development Office to use the property that's being used for the Taste of Lahaina. Are you familiar with that property right next to the Lahaina swimming pool? If they could use that for their swap meet. It's a basin. And so Economic Development's response was that they would have to follow the procurement process meaning, publish in the newspaper and receive bids. So Jo Anne Johnson, knowing of her lawsuit with the County, because she's also suing the County naming Mike Foley, our previous Planning Director, in relation to this appeal said that perhaps we can offer this property as a settlement of the entire matter where she withdraws her BVA appeal, withdraws her civil suit in court. So they are working with Deputy Corporation Counsel, Madelyn D'Enbeau, right now and trying to see if they can make that happen, some type of settlement to make everything go away. And the Planning Department is working with Corp. Counsel as well as the appellant to assist her in whatever land use permits she might need, not that we're going to approve it. She still goes through the process, but at least advise her and process for her. So this is still an ongoing case.

Okay, so the only other development is the Mahinahina – I'm sorry Makila Nui and Ranches

Subdivision Appeals, which is on page 2, no. 4. The contested case was held on May 14th and 15th at Corporation Counsel's conference room. And the Judge will be – has scheduled a second hearing to hear closing arguments in July. Hopefully, soon after he'll issue his recommended decision and order for you, for the Board, and we can close this case. And everything else has remained the same.

Chairman Endo: Thank you, Trisha. I guess that's it. Our next meeting is June 10, 2009, unless there's any further business.

Mr. Tanaka: So the Mahinahina—?

Ms. Kapua`ala: Excuse me, I'm sorry. For the contested case? Go ahead.

Mr. Tanaka: Well, I was just reading here, it's scheduled for June 10.

Ms. Kapua`ala: Here, right here. Yeah, he submitted his recommendation to the Board what he thinks after hearing the case, what he thinks what his decision is for your review and action. And he – unfortunately, he'll be in the Mainland, so we heard Corp. Counsel has this mega speaker phone deal. Deputy Corp. Counsel calls it – Jane Lovell calls it a bat phone. So we're gonna borrow their bat phone and have Judge McConnell appear via teleconference for the first time. See how that works out.

Chairman Endo: Okay, any other questions? No? Oh, is there any update on the new Member? Is there a new nominated Member?

2. Status on New Board Member

Ms. Kapua`ala: No, there's a letter that I don't think was included in your packets from– There was a Member appointed and because of his work schedule, he had to decline his appointment, and there is no reappointment yet from the Mayor's Office.

Ms. Tremaine Balberdi: They're actually looking for a Kihei Member. It has to be someone from Kihei. So the Mayor's Office is actually asking if anybody from the Board who knows anybody to please let them know.


Chairman Endo: Okay. Thank you. Okay. Meeting adjourned.

G. NEXT MEETING DATE: Wednesday, June 10, 2009

H. ADJOURNMENT

There being no further business to come before the Board, the meeting was adjourned at 2:59 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Kevin Tanaka, Vice-Chairman
Harjinder Ajmani
Rachel Ball Phillips
Stephen Castro, Sr.

Members Excused:

James Shefte
Sandra Duvauchelle
William Kamai

Others:

Trisha Kapua`ala, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of Corporation Counsel
Jarvis Chun, Supervising Land Use and Building Plans Examiner, Development Services
Administration, Department of Public Works