

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
JUNE 10, 2009**

APPROVED

Maui County Board of Variances and Appeals
Meeting Date: JUNE 25, 2009

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Vice-Chairman Kevin Tanaka at approximately, 1:37 p.m., Thursday, June 10, 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.)

Vice-Chairman Kevin Tanaka: Good afternoon. Meeting of the Board of Variances and Appeals will now come to order and we have a quorum. The first item on the agenda, Trisha?

B. PUBLIC HEARING - VARIANCES

- 1. LAWRENCE ING of ING & JORGENSEN representing FRANKLYN L. SILVA and VALERIE E. SILVA TRUSTEES of THE FRANKLYN L. SILVA & VALERIE E. SILVA FAMILY TRUST requesting variances from Maui County Code, Chapter 18.20 and §16.26.3304 to defer the required road improvements such as street widening, construction of curbs, gutters, sidewalks and drainage improvements, relocation of utilities and the installation of underground utilities for a portion of Kealaloe Avenue for property located at 180 Kealaloe Avenue, Makawao, Maui, Hawaii; TMK: (2) 2-4-038:002. (BVAV 20090003)**

Ms. Trisha Kapua`ala read the agenda item into the record, and presented a video of the subject project and surrounding area.

Vice-Chairman Tanaka: Does the applicant have a presentation? Sorry, Larry, just before you start, just for the record, I need for the record to show that the civil engineer for the project is a family relation of mine. I've had discussions with Corp. Counsel and the Planning Department, and there should be no conflict. I just wanted to state that for the record. Okay, we're ready for the applicant.

Mr. Lawrence Ing: Thank you, Mr. Chairman. Members of the Board, I'm Lawrence Ing. With me today are the applicants: Franklyn and Valerie Silva. And sitting the second row behind them: their son, Gene, his wife, and the oldest son is sitting in the second- I'd like to thank Trisha Kapua`ala and Lance Nakamura for their help in getting us to the point of this application. I think they were invaluable in leading me out of the wilderness.

We have submitted additional information for your consideration. I believe we have a letter before you. In addition, we submitted six letters of support from the majority of the neighbors. We have not received any negative response from anyone.

The property has been in the Silva/Tavares Family for over 100 years. In 1901, Val's grandfather, Manuel P. Tavares, after coming to Hawaii was told that to make a better life for his family bought a 30-plus-acre parcel. And his objective was to provide land and home sites for his children. And with this objective in mind, his strategy, was to subdivide the subject property. So the subdivision that you saw on the same side of Kealaloe Avenue were by the descendants of Mr. Tavares,

relatives of Valerie.

So he subdivided the parcels and gave one each to his seven children. One of his children was Mrs. Silva's father, Nelson Tavares. And he received the parcel, 2.87 acres, which is the one involved today. After in 1937, Mr. Tavares and his wife, Mathilda, built their home, raised their family of five children there. After Val got married to Frank and they returned from military, Val's parents conveyed the subject property to them, and they raised their family of three sons there. This is the home—if you look at the project site plan—the home closest to the Avenue. In 1983, a second home was built, a two-bedroom dwelling, to provide a home for Val's brother, Anthony. And he and his family still live there. And this is the home furthest in from the Avenue. In 1983, they started construction of a small one-bedroom accessory dwelling, which is located between the two homes, and their son, Blaine, lives there.

Following the same strategy of Manuel P. Tavares, Mr. and Mrs. Silva proposed a nine-lot subdivision to provide a home site for themselves, their three sons, as well as the brother Anthony. Four of the lots were to be sold to pay for the cost of the road and other improvements such as drainage and utilities. Unfortunately, the long list of people waiting for their water meters has prevented this subdivision from obtaining final approval. When we checked in January, they were no. 851. This is the condition that if you make the subdivision, the – improbable in the near future.

So in 2007, they applied for a building permit for the fourth dwelling, which would be the home for their son, Gene, and his family. They didn't realize that by doing so, under the ordinance, they trigger in the subdivision requirements. And generally under the health, safety, and welfare, that was the reason for such a thing happening. Now, when they did apply for the building permit, and you'll see that in the Public Works' report, the last thing attached to it is the building permit that everybody signed off except Planning. You had water signing off. And the reason is they have a 3/4-inch meter on the property which is more than adequate to provide water service. I understand a 3/4-inch meter can provide like a 40-50 apartment unit, and here we had three homes. A recent review of the consumption shows the three homes were using less than normal. And the reason why is, when you look at the sizes of the homes, one is about 1,210 square feet, the other is about 1,500, and then the small one is only 500 square feet. So the consumption is less than normal, and the 3/4 meter is more than enough.

Then we have also the Fire Department signing off. Now, right across, you may have seen in the video, there is a water meter right across their driveway across the Avenue. On couple instances, the fire truck was required to enter their property. And it was able to maneuver, make a turnaround, and exit the property without any problem. So they signed off also.

So we're here before you asking for you to grant the variance. We feel that the health, and safety, welfare requirements have been fulfilled, and the granting of this variance will not violate those requirements. We believe we have met the criteria for the granting of the variance. And we're asking you to help approve this to enable Frank and Val to carry out their goal to provide for their family just like how their grandfather and their father did. We'll be happy to answer any questions.

Vice-Chairman Tanaka: Any questions from the Board?

Mr. William Kamai: Yeah, one question: so the applicant is no longer pursuing a nine-lot

subdivision?

Mr. Ing: That is correct. Well, it got preliminary approval, but it's just sitting there, yeah? And until they get approval of eight more additional meters, it will not go forward.

Mr. Stephen Castro, Sr.: But the current meter is sufficient for all the dwellings?

Mr. Ing: Yes, the current meter is 3/4-inch which is a very large meter. Most properties just have 5/8, and that's just adequate for maybe a house and one accessory dwelling, but here we have much more.

Vice-Chairman Tanaka: Larry, is that your presentation? Do you have any--? Okay. At this point, is there any public testimony? Please come forward. State your name. Speak into the mic., please.

Mr. Morris Haole: Good afternoon, Members of the Board. My name is Morris Haole. And I'm speaking on behalf of my parents who own the property right next to the Silvas. And they would just like to express their strong support for the application, the variance application. And I'm here to answer any questions.

Vice-Chairman Tanaka: Any from the Board? Thank you.

Mr. Haole: Thank you so much.

Vice-Chairman Tanaka: Is there anyone else that would like to testify? Okay, I guess we'll close public testimony for this part. Trisha, is there – I guess your Planning Staff recommendation?

Ms. Kapua`ala: I'd like to defer the recommendation to Department of Public Works. This is Lance Nakamura. He's a civil engineer with the Department's Development Services Administration, Engineering Division.

Mr. Lance Nakamura: Our response is to the specific criteria that was required to issue the variance. It's in the staff report. They did provide supplemental information in the letter dated June 9. This is the first time I'm seeing that letter, but in quickly reading the letter, you know, I don't have any objection to the responses provided. And I believe that the responses, the supplemental responses, could be taken to satisfy the conditions that are required. Public Works, in general, does not provide a specific recommendation of approve or deny, but our specific responses is to the individual requirements, I guess, are stated in our staff report. And again, I don't object to what was stated in the supplemental letter.

Vice-Chairman Tanaka: Okay, thank you. Any discussion by the Board?

Mr. James Shefte: Yes, Mr. Chairman. In that there doesn't seem to be any disagreement with the applicant in that what they're requesting that the Planning Department or Public Works doesn't seem to have any particular problem with it, I think we should consider approval.

Vice-Chairman Tanaka: Any other discussion? Then I'd ask for a motion.

Mr. Shefte: I would move for approval based on the fact that there is no resistance to their application.

Mr. Kamai: I'll second.

Vice-Chairman Tanaka: Okay, it has been moved and seconded. Can I get a vote for approval of the variance? Any against?

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

VOTED: To Approve the Subject Variance.

(Assenting: J. Shefte, W. Kamai, S. Castro, S. Duvauchelle, and K. Tanaka)

(Excused: R. Endo, R. Phillips, and H. Ajmani.)

Vice-Chairman Tanaka: **Okay, it's all approved.** Thank you very much. The next item on the agenda is the appeals. Trisha?

C. APPEALS

- 1. MAUI LAND & PINEAPPLE COMPANY, INC. appealing the Director of Water Supply's requirement to provide information on the proposed water source since the exemptions of Maui County Code Section 14.12.030 are not applicable to the Mahinahina Large Lot Subdivision, DSA No. 4.955, formerly known as Pulelehua Large Lot Subdivision, located off of Honoapiilani Highway, Mahinahina, Lahaina, Maui, Hawaii; TMK: (2) 4-3-001:031. (BVAA 20080001)**

- a. Hearing Officer Judge E. John McConnell's Report**

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

Ms. Kapua`ala: Mr. Chair, we do have Judge McConnell, as well as the parties' attorney here representing Public Works – well, Public Works and the Water Director is Deputy Corporation Counsel, Jane Lovell; and Mr. Greg Garneau, representing Maui Land and Pine.

Vice-Chairman Tanaka: Go ahead.

Ms. Jane Lovell: Good afternoon, Vice-Chair and Members, as well as Staff. My name is Jane Lovell. I'm the Deputy Corporation Counsel. And in this appeal, I represented the Department of Public Works, but probably more specifically, the Director of the Department of Water Supply.

In the previous matter that you've just heard, Mr. Ing spoke of having assistance to be led out of the wilderness. And I fear in this matter before you, I will be leading you back into the wilderness. And that is because this particular case is really the first opportunity that the Department of Water Supply, the Department of Public Works, and this Body has been called upon to interpret certain

provisions of the so-called Show Me the Water Bill or Show Me the Water Ordinance. And very briefly, that ordinance requires that when you go in for subdivision approval, that you either show that you have a reservation for a certain amount of water, or you have to show that you have a source of water for your subdivision, and that has to be proven by certificates from engineers and so forth.

In this particular case, it's our understanding that Maui Land and Pine wants to do what's known as a large lot subdivision where they are not actually building yet their Pulelehua Subdivision. But what they are doing is taking – or proposing is taking a large piece of land and they want to divide into three quite large lots. And then later on, they will further re-subdivide.

Now in this particular case, there was a previous agreement by Maui Land and Pine to comply with the requirements of the Department of Water Supply when one of these lots was re-subdivided. So in this particular case, the Department of Water Supply took the position that because there was a previous subdivision, and because there was an agreement that on the next subdivision, we will comply with the Department's requirements that this was the time to comply.

Now, the Show Me the Water Bill has to be read together with Maui County Code Section 18.16.270C.1. And that requirement calls for installation of water improvements based on the minimum requirement of one dwelling per lot. Now, the Hearing Officer, Judge McConnell, did his usual excellent job of reading all of the different statutes and regulations, and trying to thread his way through this wilderness of ordinances, and requirements, and so forth. And the County really agrees with very much of his proposal, but not all of it. And that's why we've taken exception.

As we understand Judge McConnell's recommended decision, he found that the proposed subdivision is exempt from the requirement of putting in these water improvements based on the minimum requirement of one dwelling per lot not because, as Maui Land and Pine argued, this is a large lot subdivision. Judge McConnell agreed with the County's position that large lot subdivisions, per se, are not exempt from the Show Me the Water Ordinance. However, Judge McConnell's recommended decision found that the listing of exemptions from the ordinance has the words, "such as," and then it gives a bunch of examples. And Judge McConnell found that under the factual circumstances of Maui Land and Pine's proposal that their proposed subdivision comes within the exemptions even though it's not enumerated because as the Judge found, the words "such as" is not exclusive to those particular exempts, and that is really the point on which this turns.

It is the Department of Water Supply's position that the Director, in trying his best in this first instance to interpret this new legislation, did not act arbitrarily or capriciously. In fact, Maui Land and Pine will eventually have to decide what kind of water system to put in. If subdivision is allowed right now of this big lot into three separate lots, they would be entitled to "at least one dwelling on each lot." Whether or not they propose to actually do that, they would be entitled to do that. And therefore, the Department of Water Supply takes the position that they need to install the improvements now based upon that requirement of – minimum requirement of one dwelling per lot.

So that is basically our presentation. And we thank you for your attention. We also thank Maui Land and Pine and its counsel, and Judge McConnell for their cooperation and patience as we try to work through this new ordinance and its requirements.

Vice-Chairman Tanaka: Thank you.

Mr. Greg Garneau: Good afternoon, Vice-Chair and Members of the Board. My name is Greg Garneau. And I represent Maui Land and Pine in this appeal. And I just wanted to maybe get you back out of the woods and try to simplify as much as I can.

Maui Land and Pine does support the recommendations of Judge McConnell, your Hearing Officer, because I think that what Judge McConnell did best is he took a whole lot of complicated legal issues and facts—we had quite a lot of information before him—and he boiled it down to what its essence was.

And this particular appeal involves a subdivision, which is a large lot subdivision known as the Mahinahina Large Lot Subdivision. It is three large lots carved out of 1,739 acres. So there's one that's 159 acres, another one that's 151 acres, and a third remainder that's 1,429 acres. So these are very large parcels that's – that's usually why you use a large lot is that you defer improvements, and you break them up, and then for later, figure out what you wanna do.

Essentially under the Show Me the Water Bill, there are exemptions. And one of the exemptions is for subdivisions that do not require water service. And the Department of Water Supply has recognized that, and they also said that to my client in a letter, but still they found that they didn't think it was exempt, which is what we're arguing over here.

The subdivision itself does not require water service because it's already – it's essentially, in agriculture. It's already being serviced by private water, non potable water. And there's no intent, at least as part of this subdivision, for the water that's there to change. I might also point out that that water is actually outside of the jurisdiction of the County. The County, through the Show Me the Water Bill and its authority that it has over water is concerned with domestic water. Once there – the domestic water is within the County water supply, they definitely have a jurisdiction over it. And the full point, maybe some of you have thought of this, some of you haven't, first, we have an issue on the island where there's a lot of building that's happened over the last few years. Infrastructure just hasn't come up to support the water infrastructure. And so the Council in order to get the effort rather to deal with that, passed the Show Me the Water Bill. And the idea behind it is if you're a subdivision, or you're building additional houses, the County has a right to say to you, well, how are you gonna provide water to these residences, you know, domestic water, so we can be sure that when people go to live in them, they have water to drink? And that all makes total sense, but that's not what we have here.

Here we have a large lot subdivision, and at least at this time, there's no intent to build anything on it—certainly, no dwellings. And so when the County talks about the right of Maui Land and Pine to build one dwelling on each of these lots, you think about, yes, in a completely technical sense, you could put one dwelling on each lot. Well, let's think about what that water system would look like. You've got, you know, literally, hundreds of acres. You'd have to find some way to put water on each one to three. No one's gonna build a water system like that. And MLP has expressed all the way along that that's not what they're going to do. And we also have this deferral agreement in place. Now, there's been some disagreement about what the deferral means. And I think Judge McConnell's recommendation is that we don't need a new deferral agreement, that the existing deferral agreement will require when we build, if we build, residences that you come up how you're

providing that water. And so – and that's the position of MLP.

Essentially, there's a recorded agreement that's called a Large Lot Subdivision Agreement. Are we all–? Or it's a deferral. It gets recorded against the property. In this case, it's recorded against the large parcel so that 1,739-acre has this agreement recorded with – against it, but it's at – with the Bureau of Conveyances. So anybody that were to buy any piece of it if it were to be sold is obligated to comply with those. So I mean, obviously, MLP is its owner, but anybody else would too. And so that's a real restriction. And what that means is that at the time putting in infrastructure, whether it's water infrastructure or else, you have to have – to work with the County in order to figure out what they're gonna do.

Now, I do know– So this is just from a practical matter. And I think Ms. Lovell talked about this is a new process. This is the first one. I think that's all true. And so what we're trying to figure out, okay, well, where in the process do you actually have to say what the source, and quantity, and quality of the water is, and how much you're gonna have, and so forth? And it's our position it's not now, not at the time of a large lot, because you really don't know. I mean, again, in a theoretical sense, you might put three residences on. But in the real sense, if – until you know what you're going to develop on the land, if anything, you don't even know what kind of system to design. And there's a lot of different things that go into that. Here, it's true what Ms. Lovell said, a portion of this property, there is an application pending before the County for the Pulelehua Project. And that is – it includes residences. And as part of that project, of course, MLP has to work with the Department of Water Supply to figure out how to meet the water needs for those residences that may possibly need water. And there, at that point in the process, sure, you need to know, well, are you gonna provide private water? Are you gonna drill a well, or bring water from, you know, MLP system? Are you gonna contribute to the County system? Maybe it's money in lieu of building, you know, to improve the system. You know, there's a lot of different things that could happen, but it's not – until you know what you're likely to build, then it doesn't make sense to even look at the water systems for properties this large because you might end up – you would end up just ripping it out. I mean, even if you had to put in the infrastructure as the County wants for these three, . . . (inaudible) . . . it's not gonna be – be adequate later on if you actually build. And the other side of the coin is if you never do build, then you're being asked to put in really expensive infrastructure for agricultural property when there's already agricultural water there.

So anyway, we do absolutely support Judge McConnell's report and recommendation. The way the Show Me the Water Bill was written on its face, as Ms. Lovell said, it said "such as," you know, exemptions. It's not – it doesn't have a list of these things are only exempt. It asks the Director determine, okay, if – there maybe other situations. And so in this situation where the Director has already said that the subdivision does not require water service, and that is the exemption, and in our position, and we agree with Judge McConnell as a matter of law, that's an error. Not that they were bring arbitrary or capricious, but it's a matter of clear error of law. And the same with the deferral agreement, our position is that it is in place. It will remain in place. It protects the County and the public that housing won't be developed without water for domestic purposes. And so for these reasons, we really do support and thank very much Judge McConnell for all the time he put in, in coming to that decision. I'll be happy to answer any questions, if you have.

Vice-Chairman Tanaka: Any questions from the Board?

Mr. Shefte: I have one: could you explain the deferral agreement just in one respect? Defer it to what? Deferral to the new owner that – people who might buy? Or defer it to a—?

Mr. Garneau: We call it a “deferral” because it means deferral of the improvements you normally would put in for the subdivision. So what it is, it’s a large lot subdivision agreement. And within that, the landowner agrees that upon subdivision when they put in the infrastructure, they have to do these things. And maybe it’s water, but it also – the other kinds of improvements like curbs, gutters, sidewalks, sewer lines, if it’s connected to the sewer system, you know, lighting, outdoor lighting, all of those things. So essentially, until— The same thing. It’s kinda coming full circle. Once you know what you’re planning on doing, you know what type of infrastructure you need. You know where, you know, where the internal roads of the subdivision are gonna connect to whatever the local government road is, the public road, and you know how big the aprons are, and how big the sidewalk should be. You know whether – like for example, in an agricultural subdivision, you don’t need sidewalks, but you do need swales depending on what you’re applying for. So there’s a lot things that could change. So the point of the deferral agreement is to say, oh, yes, we’re gonna do these things, but we’re gonna do them at the appropriate time. And so that agreement will stay in place.

Mr. Shefte: Thank you.

Mr. Garneau: Okay, thanks. Any other questions?

Vice-Chairman Tanaka: Any other questions?

Mr. Garneau: Thank you very much.

Judge John McConnell: Mr. Vice-Chairman, Members of the Board, I’m John McConnell, the Hearing Officer on this. It is kind of an interesting situation. It is a first interpretation of this ordinance. And I wanted to thank both Greg and Jane for their help because really, if I’ve learned one thing is let the attorneys do the work, and they did. They did the work here, and I made the call, but—

You know, in looking in this ordinance, there’s situations where you have a subdivision where you know it’s never gonna use water like a – I don’t know, a driveway, or some kind of situation where water is not a question. And I don’t know if the Council was intending that. Probably was. But there are also the situations like this one where the applicant is saying, well, we’re not gonna do it. And as I understand it, the County’s argument is they say, well, theoretically, you could put one lot on each of these very large – one dwelling, I’m sorry, on each of these lots. So therefore, you can show the water, so to speak, but – for the one dwelling. I disagreed with the argument because I’m a practical person. It seemed totally impractical. But I think you have to look at whether you’re really gonna take their word for it that they’re not gonna put any dwellings or not. And it occurred to me that the Board could just condition its approval saying, okay, we’ll take you at your word: no dwellings, period; no water usage, whatsoever. It’s really just a question of when you’re gonna require them to comply with the Show Me the Water Ordinance. Thank you.

Vice-Chairman Tanaka: Thank you. Questions from the Board? Trisha, is there a – does Planning Department have an analysis or recommendation as far as—?

Ms. Kapua`ala: No, sir. The recommendation is from the Hearing Officer.

Vice-Chairman Tanaka: Judge, I did have a question. The deferral agreement which you spoke about, when you say the Board could add a condition onto it taking Maui Land and Pine at their word saying that they won't do anything, is that language not in that part of the deferral agreement?

Judge McConnell: You know, it's been so long. I've forgotten exactly— Maybe—? As I understand it, this is not the first time this land was subdivided. And the first time they entered into this agreement, they said, okay, we're gonna comply—this is before the Show Me the Water Bill—and they said, we're gonna comply if we – with the subdivision ordinance if we subdivide again. I read that really as just saying we're gonna comply with the law, you know. And if there was an exemption, I didn't see that that was fatal that the exemption applies. So I thought it did apply, but I also appreciate Jane's argument that, well, they could possibly put one on there, so if you wanted to be doubly sure— Anybody got that exact language?

Ms. Lovell: The . . . (inaudible) . . . , the deferral?

Judge McConnell: The deferral agreement.

Ms. Lovell: (Inaudible)

Judge McConnell: Basically, if I can recall, it's been a long time, it just said, they next time we subdivide, we're gonna comply. Of course, that was way back.

Vice-Chairman Tanaka: Okay. Thank you. And then my question would be to Staff: you know, but the letter of the law, I guess the intent is you're dividing into three large lots, so technically, you could have three dwellings. Now, Maui Land and Pine could not go ahead and build three houses on these three subdivided lots without going through the process anyway so—

Ms. Kapua`ala: Well, a building permit would be required, and all applicable provisions of Maui County Code would then have to be complied with in order to approve the building permit.

Vice-Chairman Tanaka: Okay, so that condition would be moot, then. Thank you very much.

Judge McConnell: As a practical matter, I'm not sure it's essential to have that.

Vice-Chairman Tanaka: Yeah, to have that, yeah. Okay. Questions or discussion by the Board? Okay, I believe that the Board's action would be to vote on to accept, deny, or defer the Hearing Officer's recommendation.

Mr. Edward Kushi, Jr.: Mr. Chair, as far as I understand it, because this is a Hearing Officer involved, you have the report, his recommendation before you. You have the exemptions filed by the County. You have the support memo filed by the applicant. So it's before this Board. You can either vote on the recommendations of the Hearing Officer. You could allow further oral argument. You could possibly reopen the docket, take new evidence. Or you can do anything else that you feel was lack – was not performed by the Hearing Officer. Those are your alternatives. If none of the above is chosen by the Board, then it stands for your consideration right now.

Vice-Chairman Tanaka: With that being said, I'll look for a motion from the Board.

Mr. Kamai: I'd like to make a motion to accept the Hearing Officer's findings. And if I may? That the Department of Water Supply Director's decision on February 13, 2008, requiring Maui Land and Pine to provide written verification of a long term reliable supply of water for subdivision is reversed pursuant to the Board's authority under BVA rules. Two, that the Board grant an exemption of the subdivision from Maui County Code Chapter 14.12, Water Availability, pursuant to the exemptions set forth in MCC 14.12.030(B). And Maui Land and Pine's Subdivision application is referred to the Director of Public Works, County of Maui, for further processing in consistent with the Board's order.

Vice-Chairman Tanaka: Do I have a second?

Mr. Shefte: I would second it.

Vice-Chairman Tanaka: It's been moved and seconded.

Mr. Kushi: Mr. Chair, if I may? Can I ask Judge McConnell questions? Judge, just for future clarification, did you consider your decision – I mean, did you base your decision on the facts of this case alone?

Judge McConnell: Yes.

Mr. Kushi: It's a three-lot or large lot subdivision?

Judge McConnell: Right – well, the letter from the Director said, well, there's no exemptions for large lots. I thought that was – I agreed completely.

Mr. Kushi: Was it one of the facts that the applicant–?

Mr. Garneau: Mr. Vice-Chair, I'd really like to object at this point because Mr. Kushi's here to advise the Board. If there are questions in regards to what the Hearing Officer did or didn't do really should come from Ms. Lovell or . . . (inaudible) . . .

Mr. Kushi: Well, I'm just trying to clarify his decision.

Ms. Lovell: Well, I think I'd be happy to ask the same question.

Mr. Kushi: Yeah, my intent is to see how this decision will affect future applications.

Vice-Chairman Tanaka: Well, let me throw this in here: Judge – well, let me ask you the same question coming from the Board in that the decision that you made is specific to these three lots and not, you know, any large lot subdivision. So your decision was based on the facts presented to you for these three lots?

Judge McConnell: Yes, and on this specific – well, on this specific commitment of Maui Land and Pine that they're not gonna build a single dwelling thing. That was part of my decision. If they were gonna do that, or take a position even that legally they can do that, then I think they probably should

comply, but they've said they're not. And what I was trying to say earlier was if you really feel it necessary, you could condition the approval on their not doing that. Does that answer your question?

Mr. Kushi: Yes, it does.

Vice-Chairman Tanaka: Thank you very much. Well, okay, so a motion has been made to accept and has been seconded. So I'll call for a vote. All those in favor, say aye. Any opposed?

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

VOTED: To Accept the Hearing Officer's Recommendation.

(Assenting: W. Kamai, J. Shefte, S. Castro, S. Duvauchelle, and K. Tanaka.)

(Excused: R. Endo, R. Phillips, and H. Ajmani.)

Vice-Chairman Tanaka: **Motion is carried.** Thank you very much. Next item on the agenda, approval of May 28, 2009 meeting minutes.

D. APPROVAL OF THE MAY 28, 2009 MEETING MINUTES

Vice-Chairman Tanaka: Has the Board Members gone over the minutes?

Mr. Castro: Move to accept.

Vice-Chairman Tanaka: Second?

Mr. Kamai: Second.

Vice-Chairman Tanaka: It's been moved and seconded. Approval?

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

VOTED: To Accept the May 28, 2009 Meeting Minutes.

(Assenting: S. Castro, W. Kamai, J. Shefte, S. Duvauchelle, and K. Tanaka.)

(Excused: R. Endo, R. Phillips, and H. Ajmani.)

Vice-Chairman Tanaka: **The meeting minutes have been approved.** Next item, Director's report, status update on BVA's contested cases. Trisha?

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: Thank you. The only change, besides today's action, was for page 3, Item 6, the Kaanapali Royal Condominiums. A hearing date has been scheduled for July 8 and 9 at the Department of Corporation Counsel's conference room. So that's moving along. And other than that, we received the Iwado Court Reporter's official transcripts of the Makila Nui and Ranch's Subdivision Appeals, which is Item no. 4 on page 2. So Judge McConnell will be expecting closing arguments, memos, final pleadings this month with a final hearing in July before he makes his written recommendation and – just like he did today. And that is it. Oh, also, just for your reference, the Pre-hearing Order No. 1 it's called has been distributed for your reference. Thank you.

And, excuse me, Mr. Chair, for Public Hearing Item B-1, Staff recognizes that no conditions of approval were adopted, and would like to raise the issue now if you think that the subdivision – or, I'm sorry, the building permit approval without required road improvements would be okay to – you know, for the Board to approve without mainly the hold harmless agreement and the insurance policy attached to it.

Vice-Chairman Tanaka: How does it work being that it's already gone through, and approved, and everything? Can we backtrack on–?

Ms. Kapua`ala: I would have to defer to Counsel on that, on the procedure. I think we might have to reopen the public hearing.

Mr. Kushi: Is this the first variance, the civil variance?

Ms. Kapua`ala: Yes, sir.

Mr. Kushi: Isn't that a standard condition?

Ms. Kapua`ala: It is a standard condition.

Mr. Kushi: For all variances?

Ms. Kapua`ala: Well, the Board does have the authority to adopt whatever condition. I don't think – if it's not stated, I don't think it's been automatically adopted.

Mr. Kamai: And I think at the last meeting, there was a reduction in the actual dollar amount, yeah, from a million to \$250,000?

Ms. Kapua`ala: For the record, Section 12-801-76.1 of your rules says, "In approving an application for a variance, the Board may impose conditions necessary to prevent any detriment to the public interest, health, safety, convenience or welfare, and to insure substantial compliance with the representations made by the applicant. Conditions imposed may include, but shall not be limited to the following," and the standard conditions 1, 2, and 3.

Mr. Kushi: Knowing the nature of this nature, I would advise and suggest that you put this – the two requirements in, the standard conditions, because what you did today was approve a variance, and not require them to go through subdivision improvements. So let's say it's a – it's four units on one

lot, and there's an accident, or there's a fire, had you forced them to go through the nine yards, they would've put in the whole nine yards of improvements. So that being the risk, I would suggest and advise at least the hold harmless provisions and insurance. I'm sure they can afford the insurance policy.

Mr. Kamai: How do we go about letting them know that?

Vice-Chairman Tanaka: Well, as part of today's record—

Mr. Kushi: They'll get a decision and order, right, on this variance?

Ms. Kapua`ala: Yes, sir.

Mr. Kushi: Put it in and see what happens.

Vice-Chairman Tanaka: Well, basically that's what would have to be done.

Mr. Kushi: And if they have a problem, I'm sure Mr. Ing will call Francis or you.

Vice-Chairman Tanaka: And may have to appear again.

Ms. Kapua`ala: So put the standard conditions in with the million-dollar insurance policy?

Mr. Kushi: Or whatever amount that you guys have decided. Was it \$250,000 now?

Mr. Castro: For that particular case, the last one was reduced to \$250,000.

Mr. Shefte: The standard has always been – since I've been around has been a million unless we decide to make it less.

Mr. Kushi: Oh, okay. Go with the standard?

Mr. Shefte: In this case, thinking about the possibilities, the potential for damages, etc., yeah, I think a million dollars is appropriate. I'm sorry I didn't put that in the first place.

Mr. Kushi: I would say put it in. And if they have a problem with it, they can come back.

Vice-Chairman Tanaka: Yeah, I guess, procedurally, that's what we would have to do because it is a standard from – by this Board.

Mr. Castro: Just an oversight. Thinking about the safety and welfare of the surrounding public interest.

Vice-Chairman Tanaka: You know, and I brought – actually, I brought this question up again, but however, a different mind to pick now. But the agreement with the County, the Board is – the County is giving – granting a variance with – and it's being stated that, okay, with this variance comes – the County is not – will not be responsible for the granting of this variance. I mean—

Mr. Kushi: No, no, no, you're authorized to grant the variance, but by granting this variance, things involving third parties may happen. With this indemnity and backing up with insurance says that if something happens, because you granted a variance, I wanna be covered. The County wants to be covered because you granted the variance. You don't have to grant the variance, but now you really – you're authorized to do it. If you don't grant the variance, then of course, there's no–

Vice-Chairman Tanaka: Yeah, there's no – yeah.

Mr. Kushi: So that's the historical perspective that I understand, right, Francis?

Mr. Francis Cerizo: Yeah, typically, yeah, on any variance, we have three conditions. And it's noted in the rules and the first one is that – the first variance is it's applicable to the request. They can't change for another variance. So that's the first one. The second one is an indemnity with insurance. And the third one is that they record an agreement, a hold harmless agreement that becomes part of the property. It's like an encumbrance to the property.

Vice-Chairman Tanaka: For as long as the condition–

Mr. Cerizo: Yeah, as long as that they have that condition outstanding. So that's typical of all variances. And that's – we're recommending that somehow the record shows that – and if it has to be – your – you maybe have to go through a motion, if it's necessary, to consider the conditions, and let the Board approve the conditions with the granting of the variance.

Mr. Kushi: Again, I suggest that you leave it in. If you're not sure, I'm sure we can call Mr. Ing back, and tell him we want to put this condition on, our standard condition, if he has any objections to it.

Vice-Chairman Tanaka: Well, yeah, that's what we will – well–

Mr. Cerizo: So you wanna get a recess and just have him – call–?

Mr. Kushi: We could.

Mr. Cerizo: Sure.

Ms. Kapua`ala: He's five minutes away.

Vice-Chairman Tanaka: So we'll take a recess in the attempt to contact Mr. Ing regarding this item.

Mr. Cerizo: Yeah, and we'll get Public Works here also.

(A recess was then taken at 2:31 p.m., and the meeting reconvened at 2:37 p.m.)

Vice-Chairman Tanaka: Back in session. Thank you, Mr. Ing, for returning. We are backtracking to Item B-1, the variance that has been granted for the Silva Family.

B. PUBLIC HEARING - VARIANCES

1. **LAWRENCE ING of ING & JORGENSEN representing FRANKLYN L. SILVA and VALERIE E. SILVA TRUSTEES of THE FRANKLYN L. SILVA & VALERIE E. SILVA FAMILY TRUST requesting variances from Maui County Code, Chapter 18.20 and §16.26.3304 to defer the required road improvements such as street widening, construction of curbs, gutters, sidewalks and drainage improvements, relocation of utilities and the installation of underground utilities for a portion of Kealaloe Avenue for property located at 180 Kealaloe Avenue, Makawao, Maui, Hawaii; TMK: (2) 2-4-038:002. (BVAV 20090003)**

Vice-Chairman Tanaka: Mr. Ing, the standard condition with the granting of the variance, would—Ed, can you – I guess—?

Mr. Kushi: Yeah, I guess, Francis, correct me if I'm wrong, but the standard conditions, as I understand it, for all variances is that the applicant, if the Board grants the variance, signs an indemnity agreement, hold harmless, records that against the property, and then also there's some insurance provisions. I think the code provides for a standard policy coverage of a million dollars. So I think the Board – the oversight, we didn't – put that – those conditions on to the granting of the variance. But now, being brought to our attention by Staff, the Board is reconsidering imposing those two conditions which are standard conditions.

Mr. Ing: I was thinking the statute of limitations was one minute.

Mr. Kushi: Yeah, I know, it's usually about 30 days.

Mr. Ing: Well, the indemnification I think covers quite a lot. Now, the insurance, my recollection, and I haven't done this for a while is that it's a permissive thing. You may. It's not, I think, you shall. So then an indemnification provision would cover any possible claim or lawsuit against the County. In regards to the insurance portion, it is an expensive item. I had a client on Moloka'i that called to say they were gonna do a parade and they wanted to use the County grounds. And they were required a million-dollar coverage. And it's gonna cost her \$800. Now, imagine this condition if it's a million dollars. It's in perpetuity. So it could cost her \$800 forever. So if it's ten years, it's \$8,000. If it's a hundred years, it's what—\$80,000? So it can be an expensive thing. In the alternative, however, just to give you as many options, some people have homeowners' insurance, and it might be \$250,000, generally, in that range. I think even in my automobile is about that—\$250,000, \$300,000. I don't know how much it would cost for that amount if you add the County as an additional insured. I'm not—

Mr. Kushi: Trisha, what section was that under?

Ms. Kapua`ala: 12-801-76.1.

Mr. Kushi: 76?

Ms. Kapua`ala: We'd like to reiterate the fact that there is three standard conditions. One being that the variance shall be applicable only to the request as approved by and reflected in the record. The second, again, is the hold harmless agreement indemnifying the County in any loss, liability, claim, or demand arising out the variance and which includes maintaining during the entire period of the

variance, a policy of comprehensive – I'm sorry, a policy or policies of comprehensive liability insurance naming the County as additional insured. And the standard is in the amount of one million dollars. And then third, that the hold harmless agreement with that insurance policy attached shall be recorded with the Bureau of Conveyances within 90 days from the decision and order.

Mr. Ing: Former Councilman John Enriques was before you a couple of weeks ago. And I asked him during his term as Councilman, were there any lawsuits brought against the County because of any of these variances that were granted? And his answer was no.

Mr. Kushi: Mr. Chair, I'm not an insurance expert, but I would imagine that if the County was named as an additional insured to the homeowners' policy, I guess that would suffice. And unless I get back to you, that's my advice. Now again, Mr. Ing is correct in that the conditions imposed may, may include but shall not be limited to. So again–

Ms. Kapua`ala: Excuse me, Mr. Chair, James Giroux approves all insurance policies that's approved as a part of variances, and typically, homeowner insurances are submitted with additional coverage to the County. So as Mr. Ing and Mr. Kushi said that it is possible.

Vice-Chairman Tanaka: Yeah, to add the County under your liability – umbrella policy.

Ms. Kapua`ala: Yes, and they just up that amount to a million total or whatever the Board requires.

Vice-Chairman Tanaka: Yeah, so in – or at our last meeting, we reduced the number from a million to \$250,000, which in that case may have and probably was already typically you'd insure your home for more than \$250,000 anyway. So unless there's a similar request–

Mr. Ing: If this Board should see fit to impose an insurance coverage, then we would ask that it would be whatever the amount the homeowners' insurance policy is presently in effect, and generally it's about \$250,000 to \$300,000. Because I'm fearful that to increase it would cost the homeowner or whoever is the owner at that time, funds.

Mr. Kushi: One question, Mr. Chair. Larry, is the Silvas planning to do four separate homeowner policies or one knowing that they'll have four units on there?

Mr. Ing: I think because there's only one owner, it'll be one policy, yeah, but they could have – if they had let's say a long term lease with anyone, that person could be asked to carry that insurance policy too. Not being an insurance man myself, but–

Vice-Chairman Tanaka: Comments from the Board? Procedurally, is it possible to – do we set – would we need to set a number now? Or is that just that one item possible to be deferred?

Ms. Kapua`ala: That's definitely possible. We would definitely need Mr. Ing to come back, and the Board to move on and approve a certain condition, a specific condition, before we issue the decision and order. And for the record, you have approved variances with hold harmless agreements with no insurance requirements.

Vice-Chairman Tanaka: Yeah, I know we have been before.

Mr. Shefte: Well, you know, personally speaking, I have an insurance policy on my house, and then I have an umbrella policy on top of that. The umbrella policy is really cheap. I mean, it's like a hundred and fifty bucks a year or something like that. It's not very expensive. And I don't know if that type of policy would cover this, but if it did, then I almost think it's a moot point. We should go for it. And my question is to the other Board Members, are you comfortable with the \$250,000 coverage? I'm not particularly comfortable with that because it doesn't go very far.

Mr. Castro: I think we brought up the \$250,000 as an example from the last case that we did.

Vice-Chairman Tanaka: It may be that in this particular case, the Silvas have two million dollars of coverage any way. So if we impose an amount that's already umbrella'd, it would be no additional cost, but I do not know that.

Mr. Shefte: Well, could we impose it subject to it to a certain ceiling of \$500,000, or \$250,000, whatever we agree to, but it would have to be at least that minimum? Otherwise, we don't where we stand.

Vice-Chairman Tanaka: Yeah, but we could impose a number and say at a later time the Silvas make a request for a reduction, if— Is that possible?

Ms. Kapua`ala: Yes. When we issue the decision and order, Mr. Ing could always come back and make a motion to the Board to request a reduction in the insurance policy amount.

Mr. Kushi: The other concern I had was Mr. Ing mentioned that this coverage would be – and hold harmless agreement would be in perpetuity, but my understanding, Francis, is that once this variance is moot, moot meaning that they – say they go through subdivision, the variance—

Ms. Kapua`ala: Yes, that's correct. In essence, it's a temporary variance approval until the subdivision improvements—

Mr. Kushi: If and when they go through subdivision.

Ms. Kapua`ala: If and when, yes it's granted, yeah? So once the subdivision is granted, the variance goes away? Oh, I'm sorry, once the improvements are actually physically completed.

Vice-Chairman Tanaka: Okay, so can we have a motion for this addition to that variance approval?

Mr. Shefte: Since I made the original one and didn't do it right, I move that we impose the three conditions which will include insurance, the minimum of \$500,000 worth of coverage.

Vice-Chairman Tanaka: It's been moved. Do we have a second?

Ms. Sandra Duvauchelle: I'll second.

Vice-Chairman Tanaka: Okay, moved and second. So we are adding this to the – these conditions to the approval of the variance for the Silva Family Trust. And sorry— All in favor, say aye. Any opposed?

It was moved by Mr. Shefte, seconded by Ms. Duvauchelle, then

VOTED: To Add Three Conditions to the Approval of the Variance for the Silva Family Trust as Discussed.

(Assenting: J. Shefte, S. Duvauchelle, W. Kamai, S. Castro, and K. Tanaka.)

(Excused: R. Endo, R. Phillips, and H. Ajmani.)

Vice-Chairman Tanaka: **So added.** Thank you very much, Mr. Ing, for returning.

Mr. Ing: Thank you. I'll inform the applicants.

F. NEXT MEETING DATE: Thursday, June 25, 2009 - Moloka`i

Vice-Chairman Tanaka: Okay, next item – next meeting date is Thursday, June 25th on Moloka`i. Tremaine, you've coordinated all of the arrangements for that meeting and Randy's gonna be here or there?

Ms. Tremaine Balberdi: Right.

Vice-Chairman Tanaka: Okay, if there's nothing else, meeting adjourned.

G. ADJOURNMENT

There being no further business to come before the Board, the meeting was adjourned at 2:50 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Vice-Chairman
James Shefte
Sandra Duvauchelle
William Kamai
Stephen Castro, Sr.

Members Excused:

Randall Endo, Chairman

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Harjinder Ajmani
Rachel Ball Phillips

Others:

Francis Cerizo, Staff Planner, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
Edward Kushi, Jr., Deputy Corporation Counsel, Department of Corporation Counsel
Lance Nakamura, Civil Engineer, Development Services Administration, Department of Public Works