BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
OCTOBER 8, 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, 1:37 p.m., Thursday, October 8, 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.)

B. INTRODUCTION OF NEW MEMBER: RAY SHIMABUKU

Chairman Randall Endo: We want to say welcome to our newest Member: Ray Shimabuku. And at this point, I will ask Ms. Kapua`ala to introduce the first item.

C. EXPLANATION OF THE PLAN REVIEW WAIVER PROCESS BY THE DEPARTMENT OF PUBLIC WORKS, DEVELOPMENT SERVICES ADMINISTRATION

Ms. Trisha Kapua`ala: Hi. Thank you. For Item No. C, or Item C, we have Renee Segundo here. She's the Supervising Permit Clerk from DSA or Development Services Administration, and she's here to explain to you the plan review waiver process. Renee?

Ms. Renee Segundo: Thank you. Thank you for having me. Actually, I just wanted to find out from the Board, have any of you gone through the regular building permit process, first of all? You have. So you know the regular permit process. You come in with an application. You go through all the different agencies. And you can wait from like one week for a tent permit, or maybe a year and a half depending if you're in the SMA, or it goes to Water Department or Planning Department.

So the plan review was created to expedite the permitting process in 1992. And actually in your packets, after the checklist – after the fee schedule, actually, you'll have all the ordinances from 1992 till present, all the different changes. So you have a packet with – if you kinda skim through it after the fee schedule, it starts with the rules and regulations, and then I have the ordinances. I didn't do a power point presentation because I figured that you guys have all of this in front of you so it would be easier to look at.

But anyway, in 1992 it was created so that it would be a fast track. The applicant, owner, applicant, will hire an architect. The architect or structural engineer will take responsibility of the project, will do all the necessary checks with the agencies that they will comply to all the different codes with each agency. They will come in with the application and this agreement that's all in your packet. They sign it, notarize it. The Corporation Counsel signs it. Once it's approved, the permit gets issued. So it can be as fast as two weeks to a month depending on the agreement that they signed if the agreement is passed by Corporation Counsel. So if you flip through the packet, the agreement that I'm referring to is called, "Agreement for Approval of Residential and Commercial Building Permit and Non-Occupancy of Structures." Okay? Well, just a– I'm going backwards. So it was created in 1992, and then you have copies of all the ordinances.

So let's say that you were interested in applying for a plan review waiver. This checklist right here, the first page, gives you all the requirements you need to submit. And once you execute the agreement, you need to check with Wastewater Department and with Planning Department. So those are the two agencies we require you to get preapproval from prior to coming to our office. And the reason why is, if you're doing a tenant improvement like a commercial building, you have to get Sewer Department or sewer assessment fees. So they will calculate the assessment fees. They will give it to you on an approval paper, then you have to turn it in so we know that we need to charge them a sewer fee because you have to pay it up-front, not do the project, and then get payment for the sewer fees. Right? So you have to get sewer assessment fees first and Planning Department's approval if you're in an SMA area. Okay? But you cannot– If you look at no. 2, "The work described in an application for a permit waiver is not located on property which abuts the shoreline or beach reserve" on the checklist, no. 2, so if you re in an SMA area that does not abut a shoreline or a beach reserve area, you can apply. So it's mainly for single family residences, or accessory buildings, tenant improvements, and that's it, single family dwellings, accessory structures to single family like an ohana or even a barn, and then commercial interior and tenant improvements having a construction cost under $125,000. Before, in 1992, you could do commercial buildings, but not anymore. And that's in the ordinance, all the changes – what has – what had happened. Okay?

Also, back in 1992, they didn't have a limit. An architect didn't have a limit to how many plan review waivers they could have at a time. So some architects still have hundreds of permits issued under the plan review waiver and they cannot apply for any more until they bring it down to the limit of ten. So that's right under no. 4, the limitations of number of permits that – plan review waiver.

So in a nutshell is that you waive all the agencies' approvals, you get the permit, you start to build. At the tail end, you have to get released from the plan review waiver, and that's through a certificate of occupancy. And that's why I gave you the application and the checklist for certificate of occupancy. And if you were to occupy your single family dwelling prior to getting the release through the certificate of occupancy, there's a thousand-dollar fine. So even though you're getting it expedited through the plan review waiver, whomever we are supposed to send the permit – if you went through the regular process, we're gonna send those agencies the permit that we issued. And that time, once we issue the permit, each agency was supposed to be responsible to look at the permit right away because we stamp it in red saying, "Plan Review Waiver," and it's right on the permit. Each agency is responsible to review the plans right away. If there is job-stoppers like they're in the setback or they're not supposed to – I don't know, what about wastewater? Well, I know job-stoppers for plan review waiver – I mean, building plans is the setback. So if that's the case, we would contact the building inspectors, tell them to stop the job, and contact the architect. So at that point, it should never go to a point that they're already building and then they come to your – in front of you asking for a variance. So it's up to the agencies – after we issue, we disperse the permit to all the agencies that would require to review it and approve it if they went through the regular process. And if they have not reviewed it right away, and they built it not per code, then that's when a lot of people get into problems and have to face the Board.

Is there any questions? I mean, basically, if you went through our regular process, this is an expedited process. At the end you need a certificate of occupancy to release you from the agreement that you had executed and signed with the County. Yes?

Mr. Harjinder Ajmani: How many permits have been issued under this thing?

Ms. Segundo: I don't have a data of how much, but there are – back in 1992 when it first started, since it was a quicker way to issue the permits, they had thousands of permits issued this way. But once they built the structures, they never closed it out doing the certificate of occupancies. So today, if you went to plan review waiver and built your house, now you want to do additions, we'll look at your history of your building permit. If it was a plan review waiver, you'll have to close the plan review waiver doing the certificate of occupancy, and we'll charge you a thousand dollars, and then you can proceed with your new project or your addition to your structure. But if there was two – okay, so if there was two structures on the property, but the plan review waiver is your main house and you're building your new house, you'll still get hit because it's on the same property. So we'll ask you to close – basically, do the certificate of occupancy to close the plan review waiver out because that was the agreement when it was executed when you got the permit the first – you know, under the plan review waiver.

Mr. Ajmani: But isn't this the most – if I can remember anything, the most abused part of the permitting process?

Ms. Segundo: Yes.

Mr. Ajmani: This was the main reason for County paying millions of dollars to this developer on that – near Baldwin Beach in that house that was built that the County ended up buying and lost millions of dollars?

Ms. Segundo: I don't know if it was through a plan review waiver. I think it was through a regular process.

Mr. Ajmani: No, that was through a plan review waiver. Because just for the knowledge of the Board, when I was building my house, this thing was applicable. This was Linda Lingle's pet thing to cut down the County red tape, and my contractor wanted me to go through this process. And I happened to be in the construction where I have done – you know, I used to get permits and so on, so I told him, no way, this is nothing but a fraudulent thing. And this has created so many problems for the County where the architects who were unscrupulous, they gave away permits like you're saying somebody issued a thousand permits, and they had no responsibility, and the County never asked them to carry any extra liability. And the County has several of these buildings which are built, but they have no certificate of occupancy yet, and that's why you have this new procedure.

Ms. Segundo: Right. What we do is when they come in and apply for a new permit, we check the history. And if there is any certificate of occupancy – open plan review waivers, then we ask them to close it out, and charge them a thousand-dollar non occupancy – I mean, occupying without a certificate of occupancy.

Mr. Ajmani: But this is what causes when people come before us and say, well, we have been living in this house for ten years, and the County never said anything to us, and now we don't want to do it. I'm sure Board Members are very familiar with that logic. So this is really a – I think this is probably one of the biggest problems we face in our deliberations when things come up before us.

So I just wanted – I have a little exposure, my personal exposure to this so I thought I'd share it with you.

Ms. Segundo: And I do believe that that is the problem. It's because they're – the architect is waiving all the agencies' approvals. So the architect is taking responsibility saying that they are drawing the codes per code and they meet every agency's requirements. So that's why with all the different ordinances you have – in 1992, that started the process. And then in 19 – I'm sorry, in 2000, they took out commercial buildings 'cause now it's only tenant improvements. They had to add the shoreline. They added that it cannot abut the shoreline. Then in 2005, they added that it cannot be in a historic – within any historic districts. And then in 2008, we upped the fines from five hundred to a thousand.

But the problem is the agencies that get it, I don't think they're reviewing – well, it's – they should be reviewing the plan review waiver permit, and put it on the top, and review it for their requirements. And if they have problems with the permit, they needed to contact the architect, but I'm not too sure of each department's procedures. That's something that you would have to find out. But I do know that the plan review waiver – I mean, sorry, the Building Plans Review Section, once we give them the permit, because they're right next door, once we give them the permit, they see it's a plan review waiver, they're looking for job-stoppers, and they're looking for setbacks. So if they don't meet the setbacks, right away, the job is stopped. But it's the architect's responsibility to again, check that all requirements have been met.

Mr. Ajmani: But has the County gone back to any architect that you know of to whom they said you stamped these drawings saying that they meet the codes and there are several violations, and barred that architect from issuing any more of these permits?

Ms. Segundo: I don't – I don't know. That would be for the building inspectors to answer your question.

Mr. Ajmani: But who issues the permits?

Ms. Segundo: We issue the permits, but they're the ones that communicate with the architect once the permit is issued, the building inspectors do.

Mr. Ajmani: Okay, so if the building inspector comes back to you and said, oh, they are building it not according to the codes, do you ever go back to the architect and say you are not allowed to issue any more permits?

Ms. Segundo: Then we would suspend that permit or expire that permit.

Mr. Ajmani: But not bar him from anything? So they have really – they really have no penalty clause or anything on them?

Ms. Segundo: Right, correct. We haven't gone and suspended their license.

Mr. Kevin Tanaka: When you say that you review the history of someone who has a number of plan

review waivers, if that's a red flag as part of their history, how do you act according to certain architects or engineers?

Ms. Segundo: So now the code had changed from buildings to tenant improvements. So say a unit in Kaahumanu Shopping Center, a retail unit, pulled a permit under the plan review waiver to do tenant improvements. They moved out, they vacated, and the new tenant comes in and applies for a permit. It'll be either their responsibility or Queen Kaahumanu to close out that permit. We try to go back to the architect – well, we let them know that this is what's happening. We cannot issue your permit until you close this – this is closed out. So it goes back to the architect after that, but we had to limit the architect because they were just rubber-stamping basically back in 1992. '94 and '95 were the most permits issued under plan review waiver because '92 it was just the beginning. But you have architects still with hundreds of permits still open and not closed. And when they come into our office, we have to tell them the bad news, and hopefully, that architect is still alive or still in business that they can help close out the process, but then they'll be fined a thousand dollars. Or if you were to buy a, of course, a property, you inherit the violation. So the new owner will then have to do the certificate of occupancy and get the permit closed out.

Mr. Ajmani: I think in all likelihood, it will end up here. If somebody buys that property and then they cannot do what they were expecting to do, they will come here and ask us to grant a variance and so on. So I think this whole thing was really when Lingle was on a privatization binge. And I built my house in '95, and '94 when I applied for the permit, the contractor told me and architect both, they told me, oh, you don't need to go there. You can do the plan review thing and get your house started right away. And I said, no, that's not my style. I will follow – I want to make sure that all the rules are followed before I start building and I got the regular permit. But I knew right then having been in this business myself, this is nothing but trouble. And I'm sure if you look in the County history on this, you will see how much trouble it has caused to a lot of people. And I'm surprised that you guys haven't made any report to the Board of – to the Council saying that this should be repealed or this should be modified to a point where it cannot be so generally applied – you totally depend on the honesty of the architect and structural engineers because I happen to know personally that they shouldn't be totally trusted.

Ms. Segundo: I mean, we actually, at the permit level, we let them know what they're getting into before they really apply for the permit because the certificate of occupancy, I don't know if anybody has gone through the certificate of occupancy.

Mr. Ajmani: I have gone through it very recently.

Ms. Segundo: Okay, so it's not an easy thing either. So that's normally – a certificate of occupancy is normally for commercial. And it exempts R-3s which is residential properties or U occupancies which is swimming pools, garages. But if you did a plan review waiver for your swimming pool, then you're gonna need a certificate of occupancy. And we don't issue a certificate. We just do a letter releasing them from the agreement of when they pulled the plan review waiver. Okay? So if it's a commercial business, then they have a certificate that they can post on the wall, but when it's residentials that were normally exempt or any U occupancy groups, then they just get a letter from us. Then we don't charge for the letter itself. We charge because they occupied prior to releasing themself of the process.

But in your packets, you will find the checklist; of course, the green application we're famous for, which is your building permit application, which is the same that you would use for a regular or a plan review waiver. There's the instructions on the plan review waiver agreement forms that was created by Corporation Counsel. There's a grading and grubbing permit check form that you would have to fill out for engineering. You have to do the typical special inspection form that is done from the architect, stamped and signed, and of course, there is the fee schedule. The only difference with the fees for a plan review waiver is the building plan review fee is 50% and not 25%. The regular process is 25% of the building permit fees. The plan review waiver is 50% of the building plan review fees. And then I gave you a copy of the rules and regulations on the plan review waiver. And then I made copies of all the ordinances again with the changes. There was Ordinance 2886 that was 150 pages long which I wanted to save paper, so I only copied the pertinent information regarding the plan review waiver. But if you need copies of the whole ordinance for that 2886, I can provide that to you.

But is there any questions regarding the plan review waiver that you've had? I can't speak for each department and what their job-stoppers are. I can only speak on the process that the applicant will need to go through. I just want to make that clear.

Mr. Tanaka: Renee, I have two questions. The certificate of occupancy, has that always been a requirement as part of the plan review waiver for single family residences as well as–?

Ms. Segundo: Yes. It's – in the rules and regulations or the agreement, it always just says a release letter from the plan review waiver, which it is the certificate of occupancy. That's the only way we can get the owner or applicant to go to the different agencies that should've reviewed the plans and released them or to make sure that they met their requirements like the Water Department or Fire Department.

Mr. Tanaka: Okay. My other question was, I wasn't aware of this, but single family residences, accessory structures, less than $125,000. So anything over $125,000 cannot go through this process?

Ms. Segundo: No. The $125,000 was for commercial interior and tenant improvements only. So that's why the original was $100,000, then they changed it to $125,000 for commercial. So there's no limit for valuation- wise for single family dwellings or accessory structures, only the tenant improvements. But sometimes we've gotten applications come in and it's questionable–a $125,000 for this big interior improvement. We can ask for three bid prices from a contractor and we've done that before. So they provide us with three bid prices, and hopefully, one of them meets the $125,000, and then we'll proceed with the project going through the plan review waiver.

Mr. Tanaka: Thank you.

Ms. Segundo: You're welcome.

Mr. Ajmani: Is this something new or in the past you were allowing more bigger development also to be allowed under this plan waiver scheme?

Ms. Segundo: They changed that in 2000 that it is only commercial interior and tenant improvements.

Mr. Ajmani: Before that it was for commercial also?

Ms. Segundo: Commercial buildings. In the 1992 ordinance, it says commercial building and renovations under $100,000. So, you know, commercial buildings mean buildings. Now it says commercial interior and/or tenant improvements having a construction cost under $125,000.

Mr. Ajmani: Because that's how this whole issue of having you come over here was resulted from one of the projects that came before us a couple of weeks or a month ago, and that was a much bigger building that had gone through this. So I was just wondering that it wouldn't have been built under the new regulations, but it was built under the old one.

Ms. Segundo: I think I know which project you're talking about, and he claims it was an ag building for residential use.

Mr. Ajmani: Accessory building?

Ms. Segundo: Accessory structure to a single family or ag-related zone.

Mr. Ajmani: Except it was bigger than maybe 20 houses put together.

Ms. Segundo: Yeah.

Mr. Ajmani: Okay.

Ms. Segundo: Any more questions?

Mr. William Kamai: Yeah, Renee, I think the reason why we asked for some clarification on this was that a couple of weeks ago, we had the Fire Department over here regarding an application for a certificate of occupancy over in Spencer's subdivision, yeah, where the plan went through this plan review waiver, and the developer didn't need to put in any fire hydrants by code. You see that happening that more often?

Ms. Segundo: See, it was the architect's responsibility to follow all the requirements – to make sure that he meets all requirements for the structure for the subdivision. So I believe that it falls back on the architect.

Mr. Kamai: Because I think almost every meeting we have, we have the department here regarding plans. Almost every variance or appeal is with the Fire Department and the architects not meeting their code for fire flow and stuff. So I just suspect that we'll be having more of these cases if we follow the same procedure, yeah?

Ms. Segundo: Well, like I said, it's up to every agency. When we issue the permit and it's a plan review waiver that each agency needs to look at the permit right away, and if they foresee any

problems, they need to contact the architect or the applicant and discuss the project whether it's through the DSA to stop the permit or suspend it, or they can proceed, and hopefully, come to a, you know, agreement and what is required of them to do like that fire hydrant. Because, you know, we're only issuing a building permit. We don't know what the requirements are for water lines, fire hydrants, sewer lines, etc. So that's why it's important that the agencies that are given these permits from our office make sure they read it. Open it up. Open the plans up.

Mr. Kamai: That's it.

Ms. Segundo: Okay, but any questions on the certificate of occupancy process? Because–

Mr. Charles Villalon: Can I comment . . . (inaudible) . . . ?

Chairman Endo: Can you come up to the mic and identify yourself, please?

Mr. Villalon: Yeah, I'm Inspector Villalon with Zoning. The question was raised in regards to petitioners coming before the Board having purchased the property with deficiencies or plan review waiver pending disposition. At the point where they purchase the property, they should have been notified of the DROAs or disclosures on the property, but I don't believe it's your problem. You should be asking, did you know about it? Why did you sign? Or why isn't there a waiver signed on it? I don't even believe it should come before you. If they purchased the properties and they knew about it or didn't ask, that's not your problem because the problem existed before they purchased it. And I think a lot of that is going to come your way and you guys should, you know, just put up a screen right now and screen it because it's not for this – the real property agent. We try to get in. The Zoning inspectors tried to set up a meeting with the Maui Realty Association and it's very difficult. We wanted an insert in every property sold that there was a disclosure. And they haven't met. It's not a meeting of minds. They don't want to do it. We all know why. Just follow the money, yeah? Thank you.

Chairman Endo: Thank you.

Mr. Kamai: I got a question for the inspector. So your point would be that this Board to ask the applicants?

Mr. Villalon: Yeah. Did you purchase the property and signed the disclosures? And if they did, then why is it our problem? You knew it was a–

Mr. Kamai: That there's a deficiency in the application?

Mr. Villalon: Yeah.

Mr. Kamai: And that you're asking us for a variance from that because the property was sub par or didn't meet the specific–?

Mr. Villalon: Well, the petitioner or the applicant coming before you is the new buyer. They knew of the deficiency and now they want a waiver from you guys to supercede the negligence of the

seller. The seller knew. You know what? I cannot go back to the County. I'm gonna have to– You like buy'em? I sell'em to you.

Mr. Ajmani: No, I think what you're saying works theoretically, but it does not work when people come here and plead that, you know, we have been living in this house for so many years. We did not know there was any problem with it four years ago. And I can share my little story on the certificate of occupancy. I just started a new business and this has been a restaurant for the last 15 years. And I asked the landlord that has this restaurant a certificate of occupancy, and he said, I don't know. There's been restaurants for 10, 15 years. There were three restaurants that had come in-between. And I found out that this had no certificate of occupancy. So that's why I'm saying I went through this whole process just a couple of months ago because I told them I will not take it without a certificate of occupancy. But the thing is that, this is more of an exception rather than the rule, and a lot of cases come here before us, and they will say, well, if this had a deficiency or they had not followed the County's inspection to remove the deficiencies but it has been there for ten years, so now we should grandfather it in, or give us a variance because it's not our fault, and you know, that kind of thing.

Mr. Villalon: Well, I need to correct you on that because there's a – you pay taxes, improvement taxes, and improvement taxes will reflect on exactly what you're allowed to do. If you went in for a permit, and you didn't complete the permit, and you're running an illegal business, and you didn't pay the final taxes on it, you should know when your taxes come. You know what? I didn't get my C.O. on my restaurant. In fact, the insurance would not even bond your restaurant. And that's the reason why the businesses call zoning to verify that they have the final C.O. checked off because they can't get their bonding to open their restaurant. So the theoretical thing is that if you're occupying or certain to occupy or own and you don't have a C.O., it's because you're not doing due diligence. You're not paying your taxes. If you're paying the taxes, the correct taxes, that are assessed by the Property Tax Department, then you can operate. Your bonding will cover. But if you're not for ten years, I don't know how you're doing that. I don't know how you're occupying your home paying taxes on the property without completing the process. Something's– You know what I mean? Something's off.

Mr. Ajmani: I think if the County was working perfectly, we wouldn't even need this Board. So I think that's where my problem comes in that because the County's not perfect.

Mr. Villalon: And that's why I try to back up DSA because a lot of the problems that are going to come before you is not only the County. It's the Maui Realty Association. It's insurance. Yeah? Those are the kind of things that they're gonna come through you so they can usurp that and get their variance, and they don't have to go back to the real property agent and said, look, we signed off the DROA. You didn't say anything about this outstanding C.O. I can come back to the owner and you and get recompense, but I got it through you guys.

Mr. Ajmani: I have never seen a certificate of occupancy in any DROA. Most of the time, the Realtors don't even know what they're talking about.

Mr. Villalon: That's right. That's not your fault, though.

Mr. Ajmani: So I think, no, the thing is that we are here to get a process which has the least chance of getting messed up by either the lack of County action, or irresponsibility of people, or things like that. If we can minimize– We can never eliminate it. We can minimize it.

Mr. Villalon: Ignorance should not be an excuse. Ignorance should not be an excuse. If they were ignorant not to ask, it's not your problem. That's all I'm saying. You guys gotta ask that.

Mr. Ajmani: But then once you guys accept the fee for getting the variance application, it becomes our problem.

Mr. Villalon: You gotta give everybody their checks.

Mr. Ajmani: Okay, thank you. I understand where you're coming from, though.

Chairman Endo: Okay, any other questions for Renee?

Mr. Edward Kushi: Mr. Chair, my name's Ed Kushi. I work with James Giroux. I'm not here to monitor him at all, but I did note his absence. But again, if I may? And I agree with Charlie, if everybody went by Charlie's rules, you don't need this Board. But again, I do work in my capacity as representing the Water Department. And the Water Department, their staff and engineers, have had numerous historical problems with this process. And I'm not here to say it's a bad ordinance, but I think maybe before Francis and Aaron go off into the sunset, maybe the ordinance can be changed because right now, as I understand it, once DSA issues this permit, it doesn't go to Water. It comes to Water after the project is in the stage of C.O. compliance. Offhand, I can see a problem if the property is in Upcountry because for all building permits or structures, you need a water meter, and as you know, we have a moratorium up there. So you may have a completed structure with no C.O. for years. In Central area so far, maybe they can get service, but again, from the engineer's standpoint on the Water Department side, they don't see these things until after-the-fact. So just as a comment, general comment.

Chairman Endo: Thank you.

Ms. Segundo: I'd like to respond to that. If you build a single family dwelling, you're exempt from Water Department, the first structure. So he is correct, the Water Department does not get the plan review waiver for the first dwelling on the property. So if it's a vacant lot, the normal procedure is exempt from Water Department's review and approval.

Mr. Kushi: That's for fire protection.

Ms. Segundo: Well, it's exempt from their review and approval regular process and plan review waiver.

Mr. Kushi: But you need a water meter.

Ms. Segundo: Right, but they don't review the permit. First structure, as long as it's a single family dwelling, they don't review it. It could be ag structures. It could be – I mean, ag zoned or regular

residential. They're exempt from reviewing the application, and that's per Water Department. So I can – whether it's fire protection or not, still, they don't get the permit to review whether it's a regular process or a plan review waiver. So, yes, there is a problem with this process. I think, in my opinion, off the record, Water Department should review all permits. They should review all the permits. They should let us know whether it's not applicable or applicable because we, as clerks, are not familiar with their requirements. So why should it be put on the Building Permit Section to say when it goes to them and when it doesn't? But they've given us a list of criterias that if it's the first dwelling on a property, it does not go to Water Department for review and approval whether it's fire protection or not because – I mean, County water. But if it's private water, it does not go to them at all. It goes to the Fire Department. So that's the only difference that if it's a private water, it goes to Fire. If it's County water, it goes to Water Department, but it's exempt from the first structure, or first single family dwelling, or first farm dwelling.

Chairman Endo: Okay. We should wrap this up so that we can move on. Any final questions? I guess I had one comment. If there are hundreds of old plan review waiver approvals given ten years ago or whatever, wouldn't you want to like send them all a mass letter saying, hey, by the way, if you're living in your building, we have you on record that you don't have a C.O. You're actually in violation. You're going to have all these fines. And then get them to come forward and get their C.O., and then you folks would have a lot of work to do.

Ms. Segundo: The County doesn't have the staff, the inspectors, to go out and send violations.

Chairman Endo: I know, but if you have them all on computer who pulled the plan review approvals, right?

Ms. Segundo: Correct. And some architects do come because they want that business. So they want to close out their plan review waivers. We provide them with a list of open plan review waivers that they have, and they look at it, and they say, forget it. You know, they don't want to do it. So it comes back to the homeowner, or the property owner, or the tenant that's going to lease that space. It becomes their responsibility if they want to move into that space.

Chairman Endo: Okay, thank you.

Ms. Segundo: If you have any questions, our number's on the application or on the forms. Thank you.

Chairman Endo: Thanks.

Mr. Villalon: Can I make a comment on that?

Chairman Endo: Sure.

Mr. Villalon: . . . (inaudible) . . . We just had a process change in our Division is you cannot issue via certified mail. There's a posting and a notification by the paper, in the newspaper. So if you're a violator and I'm notifying you about a discrepancy on your property, I can post the notice on your fence, the front gate, or door, take a photo of it, and that's service instead of denying the certified

mail and the County pays for it. There's also an allowance for the newspaper notices. You are in notice. You own this property, hereby, you are notified like a real property transaction. That's real important on what you're saying. I'm wondering if Corp. Counsel can allow for one mass notice, those of you who have outstanding waivers, this is the drop dead deadline, and you'll be subject to penalties, blah, blah, blah, and then you can proceed from there. But we just went into that . . . (inaudible) . . .

Chairman Endo: Okay, thank you. Okay, Trisha?

D. ORIENTATION WORKSHOP

1. **Sunshine Law**
2. **Ethics**
3. **Discussion of Boards and Commissions Booklet distributed by the Department of the Corporation Counsel**
4. **Sexual Harassment Policy and Training**
5. **Rules of Practice and Procedure for the Board of Variances and Appeals**
6. **Area Variances**
7. **Use Variances**
8. **Appeals**
9. **Opinions**
10. **Chapter 91, Hawaii Revised Statutes (HRS)**
11. **Chapter 92, HRS**
12. **Title 12 - Streets, Sidewalks and Public Places, Maui County Code (MCC)**
13. **Title 16 - Buildings and Construction, MCC**
14. **Title 18 - Subdivisions, MCC**
15. **Title 19 - Zoning, MCC**

Ms. Kapua`ala: Thank you. Our next item, D, the actual orientation workshop, I think we're going to go out of order a little. And what we can do is have James do his presentation first? And – oh, do you want me to go first? Okay. We can begin with Section 4, which is the sexual harassment policy and training.

Okay, definition, sexual harassment means unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct or visual display of a sexual nature directed by an officer or employee to another officer, employee, or private individual. So you are covered under this as a public servant to the County. All personnel must refrain from the following conduct: making unwelcomed sexual advances or request for sexual favors, making remarks of a sexual nature, using gender-based or sexually abusive language and sexual innuendos, visually displaying materials of a sexual nature, physical contact of a sexual nature, and any other similar actions. The County of Maui has a zero tolerance policy against sexual harassment and will not condone or tolerate sexual harassment in the workplace. This policy is applicable to Board and Commission Members.

Filing a complaint, an individual who feels subject to sexual harassment should immediately make

a complaint to his or her supervisor. Board and Commission Members who feel subjected to sexual harassment should make a complaint to his or her Chairperson. If the Chairperson is the alleged offender, the report should be made to the County's Equal Employment Opportunity Officer, or the County's EEO Officer, Director of Personnel Services.

So here are your options: Planning Director, Planning Deputy Director, the Commission's Chairperson, Director of Personnel Services or County EEO Officer, Hawaii Civil Rights Commission, Federal Equal Employment Opportunity Commission. You're encouraged to first seek internal remedies before going outside to other agencies.

A complaint may be informal which is verbal or written and unsigned, or a formal–written and signed. Investigation will be conducted in an unbiased, fair, and discrete manner. There will be all the appropriate safeguards to maintain confidentiality and protection from embarrassment to the extent of the law. An individual who is found after investigation to be an offender shall receive the appropriate warning or discipline. Any disciplinary action prior to implementation will be reviewed by the Director of Personnel Services and approved by the County's EEO Officer. There shall be no retaliation or discrimination against the individual who has made the complaint, conducted the investigation, or acted as a witness. Retaliatory conduct is illegal and constitutes a separate violation. Thank you. Any questions?

All right, I will move forward with the orientation workshop regarding two – area variances, use variances, appeals, and the Titles of the Maui County Code, which you have the authority to take action on. So that's Titles 12, 16, 18, and 19. The Maui County Charter gives you the authority.

So use variances versus area variances, area variances are generally considered to be a less serious deviation from zoning requirements. Area variances are based on practical difficulty and – leave it at that. Use variances are based on unnecessary hardship. Use variances are generally subjected to a higher level of scrutiny.

We'll go into detail about area variances. You have received a Department of Corporation Counsel memorandum of 1997. And this opinion is what we use to scrutinize area variances as well as use variances. It outlines five criteria to consider which balances the need, the harm, and the alternative solutions.

Here's the five criteria: how substantial is the variance in relation to the requirements, and this is where we talk about percentages in staff reports–how far of a deviation is it from the requirements? If the variance is allowed, the effect of the increased population density thus produced on available governmental facilities. We analyze this as a strict compliance standard. How will it affect neighboring properties and future subdivisions, you'll see that language in the next staff report. Whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created. That kind of goes hand-in-hand with the above criteria. Whether the difficulty can be obviated by some method feasible for the applicant to pursue other than a variance. Whether in view of the manner in which the difficulty arose and consideration of all the above factors, the interest of justice shall be served by allowing the variance.

So area variances are usually structural, structural variances. And you see most – most of the

variances you see are area variances: height, setback. That's the main ones you guys see, yeah, height and setback? This is a setback variance that was granted where the structure was allowed inches away from the property line. Same property. This is actual encroachments so it actually goes onto State property, and this whole restaurant was allowed to be within the setback area. So again, less scrutiny for area variances versus use variances. The greater the deviation, the more scrutiny should be given. The considerations above do not substitute the criteria for variances as mandated by County Code. So the three criteria, or four, or five criteria required to be analyzed by Titles 12, 16, 18, and 19, the applicants are still required to meet all of those standards. And you can use this Corporation Counsel opinion to help you determine practical difficulty.

So now use variances, again, another Corporation Counsel opinion from 1997, which you have in your packets. It outlines variances – guidance for variances from the Interim Zoning Ordinance. However, the Planning Department applies it to all zoning districts. Okay, so now, area variances, we analyze it under practical difficulty. Use variances, we determine if it would result in unnecessary hardship to the property owners so which is a different analysis. It's generally viewed as a higher standard than practical difficulty. There's three elements of unnecessary hardship that Corp. Counsel opines in 1997. The land cannot yield a reasonable return if used only for purposes allowed in that zone. The plight of the owner is due to the unique circumstances and not to general conditions of the neighborhood which may reflect unreasonableness of the Zoning Ordinance itself. So this is where unique characteristic of the land really weighs heavy. The use to be authorized will not alter the essential character of the locality.

So we'll look at reasonable return. Look at the permitted uses as determined by the Zoning Ordinance. And this criteria is met if none of the uses would allow the landowner to get a reasonable return. A reasonable return does not mean maximum return. And the Zoning Ordinance prevents reasonable use of the land which would – the use variance thus used to prevent what would amount to confiscation of property or regulatory taking due to the application of the Zoning Ordinance, so meaning the Zoning Ordinance itself is unreasonable.

It's the applicant's or landowner's burden to prove that he has unreasonable return. And here are five types of evidence to be considered: initial purchase of the property, market value of the property, expenses from maintenance, amount of mortgage, annual income. Failure to sell the property for a permitted use after vigorous efforts to sell is also evidence that the land will not bring reasonable return due to unique circumstances. So the focus must be on the features of the land rather than circumstances of the property owner. And the reasons are because variances run with the land, not with individuals. So personal circumstances or situations of the applicant should not be a consideration of why you would grant a variance. It shouldn't be considered an unnecessary hardship based on the applicant. It always must be pointed back to the land. Will not alter the character. It's important to prevent a use variance which results in intrusive, incompatible uses; considers the applicant's interest, but also protects the interest of the community.

This is the only use variance I've seen is Pacific Biodiesel to operate within the interim district. And in the interim district, you become a recommending agency for Council action. So this was approved by the Board, which became a recommendation for approval for County Council action, and Council approved it. So this is located at the Central Maui – what is it called? Baseyard.

Okay, so again, these are the ordinances that you have jurisdiction over: Titles 12, 16, 18, and 19. These are just the list of the subsections, the chapters: Streets, Driveways, Public Places. We don't see too many of these–Title 12. There's four conditions in Title 12. So applicants must meet all of these conditions. You'll see here a little bit of uniqueness, but mostly safety and welfare kind of criteria in Title 12. And this is all Public Works.

Title 16, also Public Works: Fire Code, Housing Code. Commercial signs, you don't see. That goes to Urban Design Review Board. Energy, electrical, plumbing, building. Again, four conditions. You see the language here: practical difficulty, unnecessary hardship, but again, mostly public safety and welfare.

Title 18, which is another Public Works' function, which is subdivisions. This is how you see Fire a lot of times is through the subdivision's process. So they have five conditions. It's basically the same thing, which is uniqueness, health, safety and welfare. And the fifth condition is the property has obtained an appropriate zoning and it cannot be interim. So you cannot subdivide interim properties. That's why you cannot even apply for a variance.

And then Title 19, which has two articles, so two different applications: one for zoning and one for interim. This is by far the largest ordinance because every single zoning district is in Title 19, Article 2: business, industrial, airport, rural, ag, public/quasi-public, all of the project districts which is Maui Lani and Kehalani. These are all the project districts. Timeshares, timeshares are in here. There you go.

The Board of Variances and Appeals shall comply with the General Plan and community plan provisions of the County. The Board shall not grant an application for a variance which does not conform to the community plan. And for the interim districts, any action shall be forwarded to Council for final approval, and the Council may override any action of the Board which may either grant or deny as the case may be by an affirmative vote of at least five of its Members. There's only two conditions required to grant a variance from the interim zoning provision: strict enforcement of any provision of this article would involve practical difficulty or unnecessary hardship; desirable relief may be granted without being detriment to the public interest, convenience, and welfare.

And this is only for the comprehensive zoning provisions. Due to the particular physical surrounding, shape, or topographical condition of the subject property, compliance to the provisions of this chapter would result in hardship to the owner which is not a mere inconvenience or economic hardship to the applicant. So in other words, we can't grant variances because the applicant says it's too expensive for me to remove it, or move it, or I can't keep my property unless I use it for a TVR. And you're very familiar with these three criteria: exceptional, unique or unusual physical geographical condition existing on the property which is not prevalent in the surrounding area; will not alter the character of the neighborhood; strict compliance would prevent reasonable use of the subject property; and the conditions creating the hardship were not a result of previous actions by the applicant.

Mr. James Giroux: Trish, can I just comment? This is a good time for Corp. Counsel maybe to just highlight some legal parts about the zoning variances.

Ms. Kapua`ala: Okay.

Mr. Giroux: If I could just have about five minutes? One of the things that legal counsel and the staff have to do as part of processing the variances is, we have to develop a finding of facts, conclusions of law, decision and order. And so what's been happening quite a few times is that the staff will do a report, and the report is actually for a denial. And the decision of the Board is to grant the variance. And what's necessary is on the record that it's very clear as to what you disagree with from the report as far as there may be one where it says hardship was not due to the applicant's conduct. And the report will say, well, the applicant was – knew of the condition and was responsible, but the Board finds different. They say, well, how were they supposed to know that, or how would the average person know that the place was subdivided and the engineer didn't have the right amount of area, or something like that. And it's very important that if there's that type of fact-finding that the discussion is made very clear that that's what you're disagreeing with. It's okay to disagree with staff. We're not going to say you can't disagree with staff. But all we're asking is that when it comes to that point that it's very clear that you're disagreeing with their analysis and it's based on fact. You know, the applicant makes representations, you know, oh yeah, you know, this family – this property's been with the family about – you know, we never – we weren't involved in the subdivision process but– So to really point to those facts that you're disagreeing with so that it's clear that the applicant has met the criteria. And so when Trish goes back to draft the order, it's very easy for her to just change that section of her report, and then she can get the order done.

There's two reasons I'm bringing this up because the order, if somebody were to appeal it, it has to be clear within the order that the applicant met the criteria, and also, just as a timing issue is that Trish needs to be able to produce these orders in a timely fashion because there may arise in the future whether or not these orders are produced within the 60 or the 120-day deadlines that the applicant would come back and say, well, you granted it, you put all these conditions, but you never got the order out to me. So on the legal side, we really want to avoid any problems with the order. And because I think – I don't know statistically, but it's pretty high. The Department comes back with analysis that says we recommend denial, but through the hearing, which is a contested case and additional information is given, then the Board comes with a decision to allow the variance. So all we're asking is that you go – when you make a motion to approve or grant the variance, get a second, and during discussion, make it really crystal clear. The report says that this property is not exceptional, unique, or unusual, or physical geographical condition; however, we note that this property is within the Makawao area, and historically, the properties were subdivided prior to the creation of the car. We find that to be unique. Okay, as legal counsel, I can live with that. You guys have clearly stated why. And there was facts introduced into record that in this area, these properties were subdivided in said date, and of course, they weren't – you know, they're zero lot line. And so it helps in developing the order so we can get that order out and then– And what we're trying to do is preserve your decision because what we don't want is to have an order that has a big hole in it because we can't just say it's unique. We have to say it's unique because– And so if we can put that stuff into the order, if it's ever challenged or people come in the future and say, oh, but you've granted ten of these variances, why are you denying mine, we can go back and say, well, it says unique, and the fact that we looked at unique was, you know, where it was located, the size of the property, the topographical. So we can point at these things in the future and say, well, this is why the Board decided this way. And people can't say, well, it's precedence, it's precedence. No. Every variance has to be decided on the criteria of that unique property.

And that goes to another caveat that I just want to kind of bring to the forefront is that a variance is not to take the place of zoning. You really want to be careful when ten properties all have the same problem, because if it's a general problem, that usually means it's just that the ordinance is kind of off, and that's a legislative solution. To go and solve that legislative solution by granting serial variances, you're basically rezoning the area. And the courts are going to look unfavorably on us if we go down that path. But do look at the individual property. Do look at the criteria. And if you disagree with the analysis of the Planning Department or the Subdivision Department, just really zero into the criteria that you're disagreeing with and the facts that you're relying on. And then that way that document becomes very defensible in court because they're going to – the courts, once you make that decision and they know why you made that decision, they're going to lean heavily to your expertise. And so that's kind of where we want to put you on the legal field is we want to put you guys on the winning side, and we want to make sure that on the drafting side and on the reporting side that we can help you with that. So if you see us interrupting you like near the end of the meeting, and we're going, what was the unique character of the property, what was said that makes you think it's unique, we're just trying to make sure that the record is sufficient and that we can put it into that document. So we will be trying to ask you to – you know, if there's anything different that came out from the report, we're going to try to get that information solidified before the end of the meeting so there's no confusion. And if there is any attempt to overturn your decision that you'll have something solid to stand on because it would be an agency appeal. And the only thing that the courts would look at is basically that document and the transcript, and that's it, and legal argument after that. So that's all I want to say at that point, Trish.

Chairman Endo: I had a comment on that because I know that it's a lot of work for you, Trisha, to put together the decision and order after-the-fact combing through the minutes and everything. Why don't we put the burden on the applicant to draft up a one-page proposed findings and conclusions? I mean, it's already in their application, sort of, but they could reformat it so that it's in bullet point form and say they find that Criteria 1 was met because of these reasons, and they could list them all out in bullet points. Then we can take it up when we want to make our motion, if we want to agree with them, and we can just read it into the record, and we could scratch off the ones that we don't agree with. But it would be like an easy form, template, that we could then read right into the record at that point when we make the motion, and that way it could be much easier for you to do your findings later on.

Mr. Giroux: Yeah, I think in the past when we've gotten into that situation, we've told you, well, just look at the applicant's application because that's where they've tried to justify the criteria. So there is the application, but sometimes, you know, their justification is so thin that it's like, well, even if we use their analysis, we'd still be on thin ice. So, yeah, it gets dicey, but–

Ms. Kapua`ala: Well, I think if the Board would do what James asked on a more consistent basis, it would help me a lot as the producer of the final decision and order, because then I can just go verbatim off of what you stated during deliberation versus, like you said, combing through the minutes and trying to discern which fact matches why you decided to grant the variance. And we only do that to protect you so that if it is appealed to Second Circuit Court, there is evidence, and they can find it in the record. It would help tremendously. That's what I've been doing all this time.

Mr. Tanaka: But, Trisha, you know – well, as for Randall's part, from – I think Randall's been doing

a pretty damn good job by making sure that a motion is made, and the point is clear on what–

Ms. Kapua`ala: Yeah, I agree. I really appreciate that Randy has law experience. He's trained in law. It helps, as the Chair, tremendously.

Mr. Tanaka: So we have to make sure Randall is always here then.

Ms. Kapua`ala: Okay. So that goes right into appeals. Appeals, in appeals, this is a mini court. You have the authority by Maui County Charter to hear and determine appeals alleging error from any person aggrieved by a decision and order by any department charged with enforcement of zoning, subdivisions, and building ordinances. And this also includes the Department of Water Supply when it pertains to a subdivision. So you will not hear water appeals that goes to the Water Board. You'll hear water appeals when it pertains to subdividing land.

So there are two deadlines for appeals: 15 days for subdivisions. So when the Deputy – I'm sorry, the Director or Public Works makes a subdivision determination by letter, applicants have 15 days to appeal. Every other ordinance, there's a 30-day deadline.

And the Board shall conduct a contested case pursuant to Subchapters 3, 4, 5, and 10 of your rules of practice and procedure for the Board. The Board may act as the hearing officer or appoint a hearing officer to conduct the contested case. Typically, we forward all contested cases to a hearings officer. We have a list of hearings officers that are contracted by the County, and they all are attorneys. Some of them are actually judges or retired judges that will hear all the evidence and provide you with their expertise after hearing the case.

The rules of practice and procedure for the Board provide the framework for appeal procedures which includes – and these are all the legal requirements of pre-hearing documents, hearing documents, post hearing documents: notice of hearing, transcripts, testimony, removal from proceedings, the order of the procedure, counsel cross examination, subpoenas, oath, substitution of parties, motions, discovery, settlement emulation, evidence, corrections of transcripts, briefs.

These are all post hearing procedures, which you're familiar with. By the time you see the case, this is what you see: the recommendations to the hearings officer. The hearings officer will then make his report and provide you with a recommendation for approval, denial, partial approval, partial denial. And then each party can submit what they think is correct or wrong about the hearings officer's report. You'll see everyone's document, and then make your own final order, decision and order, which we will produce our own final decision and order for, and of course, it's appealable to Second Circuit Court. Any decision you make is appealable to Second Circuit Court except for Subchapter 10 of the BVA rules as far as a hearings officer is concerned. Subchapter 10 does not allow it. This is a truncated contested case procedure to allow for a more efficient process, a more efficient appeal process. And this is because this subchapter is for appeals of notices of violation. So whenever a department issues a notice of violation on a property owner, they can appeal to you, and you are the judge and jury.

And here are the three standards to qualify – here are the three standards for an appeal. An applicant or appellant must only meet one of these criteria for an appeal to be granted. So unlike

variances where they must qualify for all three of the criteria, appeals, you only must meet one: that the subject decision and order was based on an erroneous finding of fact, material fact, or erroneously applied to the law; that the subject decision and order was arbitrary or capricious in its application; or that the decision or order was a manifested abuse of discretion.

So basically this is the process where the Board grants or denies the appeal. The party may appeal to Second Circuit Court. The court may affirm, remand, or reverse the decision of the Board. And any aggrieved party after that may appeal to the Hawaii State Supreme Court. Yeah, so again, you are the administrative level of judge and jury before it reaches the court system. Any questions?

Mr. Tanaka: Yeah, Trisha, one question. Real simple. We have a list of hearing officers. How is the specific hearing officer chosen?

Ms. Kapua`ala: Well, we actually put out an ad in the paper and people apply. So that list we have, which we haven't updated in a while actually, because we haven't put an ad out in a while is–

Mr. Tanaka: Well, actually, the list that we have, but out of those, I think that list contains maybe 12 names. How is it that one out of this 12, this person on this list was chosen?

Ms. Kapua`ala: Oh, I see. Usually the parties meaning the County's counsel and the applicant, appellant's counsel, will come to an agreement and request from you to appoint that hearing officer. So you don't have to listen to them. You can, of course, take their recommendation because they agree on it.

Mr. Tanaka: No, I was just curious how it was chosen.

Ms. Kapua`ala: You can appoint whoever you want from that list.

Mr. Kamai: I think one time we acted as hearing officer.

Ms. Kapua`ala: What case what that? I forget.

Mr. Giroux: That TVR case.

Ms. Kapua`ala: Rager.

Mr. Giroux: Rager.

Ms. Kapua`ala: Okay, James, I turn it over to you.

Mr. Giroux: I just want to touch real briefly. I've got a couple of handouts: one is the Open Meeting handout. And I think most of you have gone through this already, but for the benefit of everybody, we'll review. This is a really good handout. It's put out by the Office of Information Practices. And they're the agency that basically administrates what's called Hawaii Revised Chapter – Hawaii Rules – Revised – what is HRS? It's been a long day. Chapter 92, we call it, and we call it the Sunshine Law. And basically what it does is it makes sure that the workings of the government are

transparent and that the people are allowed to see how the government deliberates in order to get to the decisions that it makes. This Board is unique in the aspect that it's a quasi-judicatory board. So pretty much 99% of the things that you take up are actually contested cases which is under another chapter, Chapter 91. And what happens is that once you get into an adjudicatory mode, you're basically exempt from Chapter 92. However, because of the County Charter, variances have to have a public hearing. So once you have a public hearing, it bounces back into Chapter 92. We do the agenda. We have to have quorum. We have to have a recording of the meeting and such. A lot of this is semantics, in a way, but it is important if the attorney start freaking out and saying, hey, I think we're gonna violate Sunshine Law because that means that we've gone off track, or we haven't followed a procedure that's necessary to make sure that at the end of the day, your decision doesn't end up in Circuit Court. So it's good for the Members to read through this. It's a really good packet, and it really lays out a lot of questions that come up a lot.

One of the things I want to touch on is that the fact that you don't want to be doing serial communications, meaning that you don't want to be talking to one person about a case that's pending, and then go talk to another person and find out what he talked to somebody else about, and then came back and talked to somebody else about especially, in the context of – if you're trying to deliberate or get to a decision type of making process. You don't want to be doing that off the record. Once you're in a contested case, everything has to be on the record for the applicant's benefit and for the government's benefit. Everything needs to be on the record. And you cannot be making decisions based on evidence you went and collected yourself. Everything has to be based on what was presented at the hearing. That's not to say that you can't – if this has something to do with something in Kihei and you drove by it, but it's got to be significant that everybody at the meeting has the same information, and you're making this decision based on that information that was presented at the hearing. Other than that, I think we've done a really good job at following Chapter 92. I don't think you guys heard too much from me on that issue during your guys' deliberations and meetings.

The other thing I have to talk to you about is ethics. We have the New Board and Commission Member Orientation, and this has a really good summary of what's expected as far as ethics. This Board is governed by the County Charter, Chapter 10, which talks about what's expected of a Board Member that's on this type of board.

There's two points I want to touch on: one is gifts. If somebody gives you a gift that is suspected by you to be meant to influence your decision-making, either don't accept the gift, or bring it to the attention of Corp. Counsel so we can talk about it. And if we can't come up with a solution, then we can ask the Board of Ethics if they could comment on it. And I guess in Hawaii, we are used to gifts of aloha. I think the Planning Commission right now is really used to getting snacks from unknown sources. So I guess, minimo, de minimis. As long as it's not seen to influence your decision-making.

The other thing is conflicts. You don't want to have – you don't want to be perceived as gaining monetarily from decisions that you're making. If you're in a profession where a client is actually – you actually helped them on a project, or if it gets through the variance process, you would be the architect who would be finishing up the project, things like that. You have to – according to your rules, you have to disclose any type of conflict that may be arising. And if that conflict is such that

it would – that you would have to recuse yourself, all you have to do is let the Board know of the conflict, and then you can either let them know that you're deciding to recuse yourself based on that, or you can try to get a feel for if the Board thinks that that conflict is such that you would need to have to recuse yourself. Once you do make the decision to recuse yourself, your rules are specific that you can't participate in the discussion. Some Boards, their rules are a little more slack that you can actually recuse yourself, but participate in the discussion. The Board of Variances is a little bit more strict. So if you have a question about whether or not something's a conflict, you can talk to me. And again, if we can't come to some sort of conclusion, we can have you get an opinion from the Board of Ethics so that at least you don't have to worry about it. And try to look at the agendas ahead of time. And sometimes if something's really large, you'll actually kind of have a hint of it before it even hits the Board's agenda and that you might want to run it past me or run it past the Board of Ethics.

Mr. Tanaka: Does it happen a lot where a Board Member actually sits on the other side and–?

Mr. Giroux: What's happening or what's happened in the past is that somebody – I think the last brouhaha that happened was at Planning Commission where we had three Members who kind of disclosed that, oh, my husband works at this hotel and they're coming for an SMA permit. And the other one disclosed, oh, I went to that hotel and they comped me a room. I didn't think it was part of this, but just in case it was, I just wanted to let you know it doesn't influence my decision-making. And then another one was, oh, my wife has a flower contracting business and she delivers flowers to the hotel. So, I mean, as far as my analysis went, I looked at it and I was like – I wouldn't recuse myself. It doesn't amount to you getting a direct or indirect benefit in that your spouse is employed. Now, if the spouse were the president of the corporation, I'd be like, okay, now there's a higher chance that that's going to influence somebody. Or if they're – if they don't get the permit, they've already let you know that you're going to lose your contract. I would say, okay, now that's – yeah, that's going to rise to a conflict. And that's happened on – you know, we've had these allegations on Lanai where the community's so small, everybody works for Castle & Cooke. And people come in and go, Castle & Cooke told me if this doesn't go well, I'm out. And you're like, didn't hear it, didn't hear it, didn't hear it, no, but you know, I mean, a lot of that stuff, you've got to weigh it. You've got to decide whether or not if it's going to influence you. If it doesn't– A lot of times you've just got to check your conscience. If it's really wearing on you, just get a decision from the Board of Ethics. And a lot of times their decisions will come back, and say, well, based on the facts, we really can't say you can't vote on any of these. We have to look at the specific facts of what's going on with that permit or things like that. So that's a – it's always good to try to catch those as early as possible because they are very fact-specific. And is there any questions? Anybody? Any kind of question about ethics or even the Sunshine Law? All right, it's over to Randy.

Chairman Endo: All right. We're done with our orientation workshop. We'll now move onto Item E, approval of our September 10 minutes.

E. APPROVAL OF THE SEPTEMBER 10, 2009 MEETING MINUTES

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

VOTED: To approve the September 10, 2009 meeting minutes as presented.

(Assenting: W. Kamai, H. Ajmani, R. Shimabuku, K. Tanaka, and R. Endo.)
(Excused: S. Castro, S. Duvauchelle, J. Shefte, and R. Phillips.)

Chairman Endo: **The minutes of September 10, 2009 are approved.** We have another item: discussion of indemnification insurance condition.

F. DISCUSSION

1. Standard Indemnification Insurance Condition

Mr. Cerizo: One of the Members asked for clarification on the insurance requirement. And in your rules, Section 12-801-76-1, there's conditions of a variance. And in that section, it indicates that the Board may impose conditions for your variance. And it may include, but shall not be limited to – and one of them is the insurance requirement. The other two is that the variance shall be applicable only to the request as approved. The second one is the indemnity agreement of insurance. And the third one is that they have a hold harmless agreement and the policy naming the County as additional insured.

On the second one, there's an insurance policy. It says here, "The insurance policy shall provide coverage in the minimum amount of one million dollars provided that the Board may reduce the required coverage amount for good cause shown." So it starts at a million dollars, and that's just a recommendation. But if you feel, if the Board feels that for a good cause– And sometimes I've heard in the past that there's minimum risk that this variance granted for – to go from 700 square feet to 705 square feet. I mean, you know, they're making the house a little bigger, what kind of risk is there to anyone? Use variances can be a little more intrusive or more dicey where they may have impacts. You know, you're granting for a restaurant in an area where it's not required, or it's not a required – not allowed. I'm sorry. Then you may have a – there may be impacts and somebody might sue. So as far as a million dollars, that's pretty much as you wish or for good cause, you can reduce it. If there's any other questions, maybe Counsel can provide more enlightenment.

Chairman Endo: I think I had a comment on that one. What you read, Francis, was correct that it says insurance shall be a million, but the Board can reduce it for good cause. But if you go further back to the beginning of that Section 76.1, it says that we may impose these conditions. So we're starting out with the overarching "may," so that's at our discretion. And if we decided, well, I guess we'll do insurance, then it has to be the million, and then for good cause, we can reduce it. But you know, it's not like it starts off with a "shall." It's not like we start off with an absolute million and then only for good cause, we can reduce it. It's kind of a tricky back and forth kind of language.

Mr. Cerizo: That's correct. There's times when there was no insurance requirement. I think we did that for – I think MCC was one of them, the latest one we just issued for the building height. There was no insurance requirement. In fact, I believe there was no – not even a hold harmless requirement. So in that case there, the variance was granted with no conditions.

Chairman Endo: I had a general question, too, but, Hari, go ahead.

Mr. Ajmani: Yes. When we look at any variance, the County people have already done the staff analysis and have come up with why it should be denied or granted and so on. At that point, can they make – include some comment about what they think is the proper insurance for this critical issue or the issue that we are reviewing?

Chairman Endo: Francis?

Mr. Cerizo: Well, our Counsel has always said start with a million dollars.

Mr. Giroux: That's their – that's not me. No, but I think it's an important discussion because we have gotten projects where it just didn't make sense to put insurance. And you – I think one thing you should look at is that to look at what's the variant. If you can see a clear purpose in health, safety, or welfare for let's say, a zoning law, and you're going to variant from that, what's the possible exposure to the County would that create? You know, a lot of times, the Departments will come up and we've had the Fire Department say, you know, this is for – houses are going to burn down, you know, if you guys don't do this. So that should be like a red flag. Okay, if we're going to let somebody have a smaller roadway but Fire is saying the fire engines aren't going to be going up there, yeah, we're going to need some insurance on that. But where we had a case where the person only needed a couple of inches just to be in compliance with their height, and you're going, okay, what's the liability of having two inches more on your house, or nobody's complaining about the view, and they're really – everything else is structurally viable to the house, you know, where's the County going to get sued on that? So if you do that, that would go toward the showing of good cause, or even whether or not you want to put insurance. And a lot of the government projects, the Fire Department itself came in to ask for a height variance, and they don't need insurance. We're self -insured. We know people are going to be climbing down those things with the ropes and everything, so that's a risk the County's willing to take.

Mr. Ajmani: But I think the County really needs protection against these kinds of things. So if the staff can give us that analysis at the same time, then our action will become more consistent, because what I have seen the past four years is that we issue a variance, and sometimes even a half a million, sometimes a quarter million, sometimes hundred thousand. It's just a spur of the moment last thing added into our proceeding, and there is a lack of consistency in it. So they do put together a very good statement of facts and why we should allow it or not allow the variance, so if they could just do this additional thing, that would make it I think more appropriate for all the actions taken.

Mr. Giroux: Francis, maybe – because I think why that's happening is you guys are writing your report as a denial, and then we actually do grant it. So as a contingency factor maybe, I mean, even if it's not in the report, you think the Department could an analysis to say if the variance were granted, what would be, you know, as far as the Department could see an appropriate insurance and all?

Mr. Tanaka: Or a potential for a lawsuit. I mean, the reason why I brought this up, and I just wanted to – because the wording says this Board "may" or "shall." That's very different. And when it came down to it, it's like, okay, well, we'll grant this variance with these conditions and with the standard a million dollars of additional insurance. And it's just – and some of them are very justifiable to say

a million dollars. Some of them are, and it's just my opinion again, but some of them are, wow, if it's part of their agreement that the County is – there is an agreement that the County is held harmless, then the additional insurance is, and I mean just in my opinion, it's just you're giving an insurance company money. You're just giving them money. There was one– I mean, in some cases, a million dollars may be insignificant. In some cases, a million-dollar additional coverage may be very significant. And even $800 a year for additional insurance to a billion-dollar corporation is nothing. Eight hundred dollars a year to myself, that's very different. So I think that's the reason I wanted to bring this up and have this discussion so that at the end of any granting of a variance you say, well, these conditions with the County's hold harmless, and a minimal insurance amount or – and we'll just say at – I don't know, I mean, four stages: a quarter million, half million, three-quarters, and one. And maybe the County says, well, risk of four meaning a full million, or a risk of one where– I don't know. This is just off the top of my head. But just that it can – it's out there to discuss and out there for all the Board Members. That's my feeling.

Mr. Kamai: I'd like to know what the premium is on a million dollars.

Mr. Tanaka: Yeah, from my limited fact-finding mission, there was one that I had asked an insurance guy that– That's why I used the number, $800. So I said if I did this and I needed to get this insurance to cover it for myself, it would've been $800 a year. So in ten years, that's $8,000. That's $8,000 I just gave to an insurance company that has one in a billion chances that there would ever be any kind of legal action on it. But if we grant a variance for a use, and you bring in extra traffic into something, and there's an accident then, yeah, the possibility is a lot greater than four inches in a height variance and no one will ever even know that a variance was actually granted. So I just wanted to say that.

Mr. Ajmani: I just wanted to comment on what Bill said. I have a million-dollar umbrella policy. It started at a hundred dollars a year and now it's about $200. After about 15 years, now it's about $210 a year. So this is the kind of policy I believe that the County asks for and not specific– This is just to make sure that even though the variance say that the applicant will hold the County harmless, if the applicant doesn't have money, the County ends up paying some damages of something because of a variance, then they can go back to the insurance company and collect at least some of it. So that's really– So I understand the reasoning why they have it. And the County, if it comes to a point where the County has to sue somebody, then $100,000 is just going to Jim's fee or his salary. So I think when it comes to really a legal – if it gets to be that kind of legal issue, then $100,000 will cover almost nothing in today's–

Mr. Tanaka: Yeah, that's true, but on the same note, a million dollars potentially could be nothing if a case goes for ten years, that kind of thing. Where if you had a 25 million-dollar coverage and it goes for ten years– It's just, I guess, kind of a degree. Rather than just saying, stamp, a million-dollar coverage, I just–

Mr. Giroux: Another factor I want to throw in there while you guys are chewing on this is that variances run with the land. And so you're putting on a condition that may last a very, very long time. If somebody's roof is going to stay four inches high for that generation, they might hand it down to their sons, daughters. So that's something to think about when you're thinking about insurance.

And the other thing is that variances are not supposed to be handed out like candy. They're anomalies of either zoning or subdivisions where there's really something wrong with the property, or you know, I mean, it just doesn't make sense not to give the guy a variance because of something that's not his fault, the property just doesn't fit in the box, or that type of thing. So it goes to both sides of the argument. Variances aren't supposed to be easy to get. Not everybody gets a variance. But if you do, they run with the land. They go forever. The next ten owners, they're going to have a variance. So when you put on a condition of insurance, that goes from that person to that person. When they buy that property, they're going to be stuck with either the structure or the variance. And I think as an administrative standpoint, that gets kind of dicey because the person sells the property. You know, like we had that thing about, oh, it's under the DROA? Who knows what those Realtors are doing out there? They're selling stuff out there that says as-is now with a big "AS-IS." So your due diligence to catch as a buyer to know that your house actually got a variance of four inches, and now you've got a million-dollar insurance policy, I think it's a viable discussion we're having.

Mr. Kamai: I'm just curious as to why the large disparity between $210 and $800.

Chairman Endo: Oh, I can speak to that a little bit, if you want. An umbrella policy generally is what's called excess coverage. It's an add-on protection above and beyond your current homeowners' and auto policies. So say normally you'd be required to cover say, $300,000 in liability for your auto, plus whatever $100,000 or $500,000 for your home, so all the risk covered by your home policy and your auto policy, they pay it first. You have your regular insurance. Your umbrella only kicks in if all of those amounts are exhausted. So, for example, you run over somebody, you kill them bad, and they sue you for five million bucks. First, your auto policy would kick in the first $300,000. And then the injured person would then seek money from your umbrella insurer who would then kick in the additional million or two million that you had purchased. So it's not a specific rider which is probably what Kevin asked for. You go to your insurance company and say, oh, I want this weird rider to cover this bizarre variance that I got from the County for this weird situation. And they'll say, oh, well, that's a special need risk. That's not even part of your homeowners. That's not part of anything else. To get this extra rider, you've got to pay "X" amount of dollars based on whatever the situation is for your particular case. So that's probably that's why there's a difference in the cost, because Hari's correct–the umbrella is really cheap. It's something everybody should get, actually.

Mr. Kamai: So what you described as far as the bodily injury covering $300,000, the house covering $500,000, the million would be on top of that. So it would be 1.8 million dollars in coverage?

Chairman Endo: For somebody getting an umbrella insurance policy? Yeah, but that wouldn't necessarily cover this situation that we're asking for. That's the one where the – it's a new rider. It's special coverage to cover the County. It's a special coverage to cover the County if the County gets sued because the BVA granted this variance. So we granted the variance, we let them build a wall five feet extra high, fell down, hurt somebody, that person sues the County saying, hey, you guys never should've given that variance, then the insurance coverage, the special kind of insurance, would come in and help pay the County's bills or liability. So it's obscure stuff.

Mr. Ajmani: Yeah, but I think but in general, cases that come before us, most people have their

basic coverages on the house or property and so on, so again, I'm not a lawyer or something, but I think an umbrella policy taken by them should not become prohibitively expensive. That's my understanding, because an umbrella policy is pretty much for all perils. They're really – depend on the fact that other – like Randy was saying, your other insurance covers first. And only when that is exhausted then this comes into play so they know the risks are very small. But I think that's the kind of policy, from what I understand is what we generally seek that they should be covered with some kind of– I mean, generally, people have it. And again, a house with a four-inch extra height or something, I mean, chances are he has a fire insurance policy, other liability policies, related to that house. So if he's now asked to do a little extra, take an umbrella to cover this thing, in my opinion, it should not be really an expensive policy.

Chairman Endo: Yeah, but what I was trying to say is that the umbrella just increases the policy limits. It doesn't change the scope of the insurance coverage. So if the insurance – your homeowners' insurance doesn't cover this kind of unusual question, the umbrella won't cover it either. The umbrella doesn't sweep out to cover you for any kind of liability at all. That's not the meaning of umbrella. Umbrella just means excess coverage of what you already have in your policy. So if your homeowners' policy doesn't cover this, and most likely it won't, because your homeowners' policy wouldn't normally protect the County. You gotta add that on. That's extra.

Mr. Ajmani: That's additionally insured.

Mr. Tanaka; Yeah, you're actually naming the County of Maui as an insured.

Mr. Kamai: That's why that premium is a little more steep.

Chairman Endo: Possibly.

Mr. Tanaka: Yeah, you're buying extra insurance. So even if you have ten million dollars of insurance, this requirement, this add-on, is still in addition to what you already have. So, I mean, that's why it's so – to some, it's–

Mr. Kamai: Good to know. Makes a lot of difference for some of the–

Chairman Endo: It would be good for us to have like a survey of people who have actually had to buy that coverage. So if we could call like about two or three people who had got a variance from us and had to get a million dollars of insurance, and then find out how much they paid.

Mr. Ajmani: Yeah, I think that'll be good to know.

Mr. Giroux: The Department has contacted me because some of the variances that we've granted, the people have never gone out and gotten insurance. So technically, they're kind of – they don't have a variance, or they're either in violation. So you might be seeing in the next year or two proposed rules about doing special hearings, orders to show cause for actually revoking variances. So that's something to look forward to.

Mr. Ajmani: So I think in the order that we issue for a variance, then they should make it a thing that

they should have evidence of insurance within 30 days of the variance, or something like that.

Mr. Giroux: Don't we have that? Isn't it like 90 days or something of receiving the order, Francis? How do you guys process that?

Mr. Cerizo: When they come in with the hold harmless agreement, before they record it, we need the evidence of the insurance. And we don't finalize the process until that comes in. And like James said, we have had a few that they just couldn't get it or it was too expensive. And I believe one of them even came back and asked for a reduction of their insurance requirement. So – but there's a few that actually just – when they cancel the insurance, we have notice. They give us a notice saying this owner is now – this policyholder is canceling the insurance. So we get notice, and we send them a letter saying, you know, provide us with insurance, additional insurance coverage. Now the homeowner might have sold the property. I'm not sure. But in some cases, that's what happens. The owner sells the property, cancels the insurance, and we can't get in touch with him.

Mr. Kamai: But maybe something like that, Francis, you have a copy of the insurance, maybe what their premiums were just to give us an idea.

Mr. Cerizo: Yeah, we probably could get from the– We'll check. We'll call a company up that has – because all the variances that we've approved have evidence of insurance. We'll just call the insurance companies and ask them how much it costs. I don't know if they'll give that to me, but I can ask.

Chairman Endo: Okay. Anything else on that topic? No? Otherwise, our next meeting date is October 22nd.

G. NEXT MEETING DATE: October 22, 2009

Chairman Endo: Is there any further business of the Board? Hearing none, meeting is adjourned.

H. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:35 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Kevin Tanaka, Vice-Chairman
William Kamai
Harjinder Ajmani
Ray Shimabuku

Members Excused:

Stephen Castro, Sr.
James Shefte
Rachel Ball Phillips
Sandra Duvauchelle

Others:

Francis Cerizo, Staff Planner, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel