

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
NOVEMBER 12, 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, 1:45 p.m., Thursday, November 12, 2009, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

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

Mr. Kevin Tanaka: I will now call the meeting of the Board of Variances and Appeals to order. We have a quorum. It is now 1:45. One thing I'd like to take out of order in Item no. 2, I have been informed that the request for variance has been withdrawn. Trisha, if you'd like to just state that for the record.

**B. PUBLIC HEARINGS**

2. **MAUI LAND & PINEAPPLE COMPANY, INC. requesting a variance from Maui County Code, §18.04.030 to allow a proposed nine (9) lot subdivision of a 1,635.91 acre lot that would not conform to or be consistent with the County general plan, community plans, land use ordinances and the provisions of the Maui County Code, as it relates to the community plan designation of open space, for the proposed Maui Preparatory Academy Subdivision (Subdivision File No. 4.895) located off of Honoapiilani Highway, Napili, Lahaina, Maui; TMK: (2) 4-3-001:001(por.) (BVAV 20090009)**

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

Ms. Kapua`ala: And for the record, we have Ms. Pam English representing Maui Land and Pine who's here on behalf of the applicant. And she has submitted a letter withdrawing the application for a variance. So we have a copy in our file. Would the Board like to address Ms. English? If not, we can move on to the second item. Okay.

1. **MAUI LAND & PINEAPPLE COMPANY, INC. requesting a variance from Maui County Code, §18.04.030 to allow a proposed two (2) lot subdivision of a 2.461 acre lot that would not conform to or be consistent with the County general plan, community plans, land use ordinances and the provisions of the Maui County Code, as it relates to the community plan designation of public/quasi-public and multi-family residential, for the proposed Kapalua Bay Park Subdivision (Subdivision File No. 4.906) located at One Bay Club Drive, Lahaina, Maui; TMK: (2) 4-2-004:025 (BVAV 20090008)**

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

Ms. Kapua`ala: I have a map here if the Board would like to see where the variance takes place. Also, representing Maui Land and Pine, we have Ms. Yarrow Flower, and her attorney, Mr. Paul Horikawa. Also, on behalf of the County, we have Ms. Jane Lovell, our Deputy Corporation

Counsel for Public Works and Planning, and Mr. Lance Collins who submitted a petition to intervene on behalf of the Maui – West Maui Preservation Academy – oh, I'm sorry – Association. Thank you, Paul. Would you like to see the map?

Mr. Tanaka: Well, do you have a presentation? I guess we've all seen the materials so–

Ms. Kapua`ala: Actually, I think we should take up the petition before we see the variance presentation. Or I believe there's a lot of members of the public here to testify as well.

Mr. James Giroux: Trisha, I was wondering if maybe like a mini presentation just for the public's benefit and maybe some of the Members just in order so that they get a scope of what we're dealing with today?

Ms. Kapua`ala: Okay. I can show you on this map. This is a Public Works' variance. Oh, sorry, excuse me, this is a Public Works' request so I'm not familiar with the scope of the variance. So any questions regarding that can be directed to Public Works or the applicant, but basically, the subdivision takes place in this area right here. This is Napili Bay and this is called Kapalua Bay Subdivision. And basically in Title 18, there's a code requiring consistency and conformity between community plan, County zoning, and State land use designation, and that's the nature of the variance request.

Ms. Yarrow Flower: (Inaudible)

Mr. Tanaka: Yes, we'd like to give the applicant a chance to present the original variance request so that all of us here are more familiar with your intentions.

Ms. Kapua`ala: Something short, yeah, because I don't think–

Ms. Flower: (Inaudible)

Ms. Kapua`ala: Oh, okay. Going through the merits of the variance might not be necessary at this point. Is that correct, James?

Mr. Giroux: Yeah, we want to try to avoid the merits because this is not the contested case, but we do need some background as to how it may shed some light on how we need to dispose of the petition to intervene. So I'd like the Board and the public to have at least a small opportunity to get a feel for what this variance is for.

Ms. Kapua`ala: You want to do your power point?

Ms. Flower: Well, I won't do the whole power point . . . (inaudible). . . . Okay, just really quickly, the project is Kapalua Bay Park Subdivision. It's a proposed subdivision. It would divide a 2.46-acre parcel into two lots. One parcel would contain existing public parking and access to Kapalua Bay, and the remaining parcel includes the existing restaurant. All improvements on this parcel were constructed in the 1970s. There's no construction or material improvements associated with the subdivision.

Mr. Tanaka: I'm sorry, before you continue, can you just identify yourself?

Ms. Flower: Oh, I'm so sorry. I'm Yarrow Flower with Maui Land and Pineapple Company.

Mr. Tanaka: Thank you.

Ms. Flower: This is the project site. Not as fancy as Trisha's, unfortunately. Lower Honoapiilani is here. This is the Ritz Carlton. Lower – I'm sorry. This is Honoapiilani Highway, Ritz Carlton, Lower Honoapiilani Road. The project site is right off of the Lower Road adjacent to Kapalua Bay. And this is the subdivision map.

Again, the purpose of the subdivision is to create a separate lot for public beach access, parking and amenities at Kapalua Bay, which is that Lot A-1, A-2, which is highlighted in yellow. The intent would be to transfer this parcel to the master resort association so it can be managed and maintained independently of Maui Land and Pineapple Company. The remaining parcel is Lot A-1, A-1. The existing restaurant is outlined in black. And that's the bulk of the project. It's just a paper subdivision. Any questions? Okay.

Mr. Tanaka: Do you have—? I know— I saw in our packets we had — you had maybe not an overlay but — of the zoning and community plan. Do you have a slide of that or—?

Ms. Flower: I do. So this is the community plan map. Occasionally, it can be difficult to determine exactly where the lines are. So what we did is work with the Planning Department who made a determination where the zoning areas are for our parcel. It's a little difficult to read, but this is what we agreed on, so that's why it's on the screen. I have handouts as well. Would that be helpful? They're not included in the application because this was done after the application was submitted.

Mr. Tanaka: Yeah, if we could have—

Ms. Flower: It's just of this slide.

Mr. Tanaka: Thank you. So with — in coordination with the Planning Department, you created this diagram?

Ms. Flower: Correct. So I've superimposed this square which represents the approximate location of the existing restaurant. In comparing the two, it's pretty easy to see that there's many inconsistent areas. Most notably for us is the public/quasi-public which is this blue stripe here. Instead of following— The assumption is that the intent for the public/quasi-public is to provide access to the shoreline which seems pretty reasonable. Instead of following the existing access that's been there since 1976, it instead traverses through the building, through the open space, and terminates on a rocky shore instead of at the beach. That's it.

Mr. Tanaka: Okay. Thank you very much. Now, there are some issues that arose very recently. At this time, I'd like to open up for public testimony. Anyone who would like to testify, please come forward. Sign in and identify yourself. You'll be limited to three minutes. Thank you.

Mr. Gregg Nelson: Aloha, Board Members and Vice-Chairman. My name is Greg Nelson. I'm

General Manager of Napili Kai Beach Resort. As such, I oversee and operate a condominium that sits right next to the deck area for Merriman's. And therefore, this particular subject is very, very important to us. I do not oppose what is being proposed. I think it's important as neighbors and as community members that we support Kapalua as they go through a very, very difficult time trying to deal with the economic challenges that they've been faced with. With that said, we are concerned at our resort having a condominium that sits very close to the deck area of this restaurant. At that restaurant, often there are banquet event functions that take place. We've been fairly successful with Kapalua as the landlord for the property in getting some cooperation from the operator of the restaurant. The restaurant operator is not as cooperative. And I would be very concerned if as a result of this subdivision, the Merriman's Restaurant and parking lot area was sold off somehow. In other words, I enjoy the relationship with Kapalua, and would be very concerned if it was out of the picture on that particular space because we have a continuing challenge with that restaurant. That's all I have. Thank you.

Mr. Tanaka: Thank you. The next person: Paul Horikawa.

Mr. Paul Horikawa: (Inaudible)

Mr. Tanaka: Okay, thank you very much. There's also Dick Meyer.

Mr. Dick Meyer: Thank you very much, Members. Way back— And I would like to add— I'd like to tell the Board — I'd like to let the Board know that back in the early 1970s, I was a member of the Maui Planning Commission when Kapalua first came up. It was the late 1970s. And early '80s, I was a member of this Board of Adjustment and Appeals. In the mid-'90s, I was Vice-Chair of one of the Citizen Advisory Committees which prepared our community plan. And presently, I'm the Vice-Chair of the Maui Island General Plan Advisory Committee better known as the GPAC. Although I'm a member of the GPAC, I'm today speaking as an individual and do not represent the GPAC. Because of my experiences, I am very aware of the care with which community plans have changed. It involves the public, the community, and the County Council. Changes are not made in a trivial manner and should not be sidestepped by a variance and the Board of Adjustment and Appeals.

I'm speaking today regarding the two applications for variances. And I wasn't aware when I gave this testimony that one would be withdrawn but the comments apply to both. Regarding the variances by Maui Land and Pine, I was very surprised to see these variance applications before you since BVA Member Mr. Endo is also vice-president of this company who's making this application and should've been able to make clear to the corporation that a variance is highly unlikely and an improper mechanism. There's a normal process to make community plan amendments and thereby to make the land available for a subdivision. Claiming that it is a hardship to get a community plan which is basically what this document application is saying that it's a hardship to get a community plan change is definitely not a basis for a variance. As a member of the GPAC, we met for the past three years on numerous land issues over — from all over the island. Maui Land and Pine came before the GPAC on several occasions with various land requests. Never did they come before us to make any request for an urban growth boundary around either of these parcels. They had ample opportunity to do so. The normal process by which a landowner makes a community plan amendment would be to go through the County Council and get its okay. That process would involve a more comprehensive look at the area being

re-designated in the community plan, public notices for the community involved, and a public hearing in the community. Coming before the Board of Variances and Appeals is merely a circumvention of the normal and legal process denying the community the opportunity to know about the change and to make community-based recommendations. It denies the County Council its proper authority to review community plans and thereby circumvent County Code 2.8B. I believe that the Director was a hundred percent correct in disallowing the subdivision request. And I urge you to support the legal planning process by denying these variances and maintaining the integrity of the community plan process.

Mr. Tanaka: Thank you. Okay, the issues that have arisen recently: the petition to intervene by the West Maui Preservation Association, as well as a motion in opposition to the intervention. Okay, we'll hear from the attorneys from both parties. Is the attorney from the petition to intervene here if you'd like to make a statement? Go ahead. Please identify yourself for the record.

Mr. Lance Collins: Thank you, Mr. Chairman. My name is Lance Collins. I'm an attorney that represents the West Maui Preservation Association. Before I make any comments, it was my understanding that the County was perhaps gonna be requesting more time to respond to this. So if that's gonna happen, I don't know if we should—

Mr. Tanaka: Okay. Let's jump forward. Do we have the representation from the County?

Ms. Jane Lovell: Thank you. Good afternoon, Vice-Chairman and Members of the Commission. My name is Jane Lovell. I'm the Deputy Corporation Counsel, and I'm here today representing both the County Department of Public Works and the County Planning Department. Our office received this petition to intervene late on Tuesday. And because yesterday was a holiday, we have simply not had an opportunity to have the two Departments meet and to discuss how they see this going forward. I have not had an opportunity to look at the legal issues that are raised in the petition. And therefore, it's possible that one or both of the County Departments may have the position to take with respect to this petition, but we are not in the position to do that at this time. And I think because the item – just because of the procedural way that it came up, and because it's not on the agenda, I think that's another reason perhaps for a short deferral, which would allow the County Department to figure out what their position is, and to brief it, and to present it to you in a more orderly fashion. It would also allow the Commission an opportunity to properly agendaize the issues. So that's all I have at this time.

Mr. Tanaka: Okay. I do have a question. As far as timing, how much time do you foresee needing?

Ms. Lovell: Not too long. I would say maybe two weeks, something like that. I certainly don't wanna hold up anything. It's just I understand that Mr. Collins acted as promptly as he could. So I'm not, you know, knocking his timing. It's just that when we received this, we just haven't had an opportunity to analyze it and to discuss with both Departments.

Mr. Tanaka: Thank you very much. Yeah, both—

Mr. Horikawa: Good afternoon, Mr. Chairman, and Members of the Board. My name is Paul Horikawa, and I'm representing Maui Land and Pine. For the limited purposes of addressing the

issues on the petition to intervene, as you know, Ms. Flower's gonna represent the applicant on the merits of the application.

The Board, I guess, back in 1999, which is quite a while ago, the Board adopted its rules. And there have been several amendments to the rules thereafter, but one of the provisions that has not been amended through time and which is applicable and has to control you – as the Board acts today is Section 12-801-27. And that particular provision describes certain requirements that people who want to participate in a proceeding must observe. And one of the things that has to be observed is if someone wants to intervene, they have to file an application to intervene. They have to file a petition to intervene. And the standard that you have is you have to file it within a reasonable time before the meeting on the subject matter upon which the application will be heard. Now, this application was heard – was filed months and months ago. It was published at least a month ago. I believe it was published 45 days ago. And so, the members of the public as well as the Departments that have made presentations before you today have had ample time to come before you, to prepare their petitions, and ask that they be allowed to participate as intervenors in this proceeding. Now, filing the application on Tuesday, and coming before you, and orally requesting an extension of time, in my client's position is not a reasonable time in filing the application that's before you today.

Now, what is your remedy? If you find that an unreasonable time – well, if you that a potential intervenor has not filed an application within a reasonable time, what is your remedy? You go on to the next sentence, "Untimely petitions will not be permitted except for good cause." Well, the petition itself, it was filed by the West Maui Preservation Association does not set forth good cause. And we haven't heard any good cause on why the Planning Department or the Department of Public Works has waited until today to ask permission to file a petition to intervene.

As far as – You know, I mean, to show you how – how untimely the petition to intervene was filed by the West Maui Preservation Association is, you know, the Sunshine Law sets requirements on which - upon which – you know, on matters that you can act upon. And the petition filed by West Maui is so untimely that you can't even take action on it today unless you violate the Sunshine Law. It's not posted. It hasn't been posted with the Clerk's Office. It's not outside on your wall. You're placed in an incredibly bad position where you just cannot take action on this.

And there's another rule I'd like to take – point your attention to. And this is a rule and an argument that we cited in the pleading that we filed which is today, and it's Rule 12-801-31, which imposes the requirement that the motion to oppose be filed five days after being served with the motion. Well, the motion was not properly served on Maui Pine, but nevertheless, we filed – you know, we had to work yesterday, and we had to work on it this morning, but we filed the motion to oppose the intervention today. But the point I'd like to make on this is that there is a five-day requirement. The rule – and this rule has been in place since, you know, 1999. It contemplates the petition, a timely petition to intervene, being filed at least five days before the hearing date. And in this particular case, it was filed two days before the hearing, actual hearing, on the – on Maui Land and Pine's application. And in reality, only one day because yesterday was a holiday. We would submit to the Board that we would oppose the written as well as the oral petition to intervene in this proceeding because it's just untimely at this point. Thank you, Mr. Chairman.

Mr. Tanaka: Thank you, Mr. Horikawa. Okay, we'll hear from –

Ms. Lovell: Thank you. This is Jane Lovell, for the record. I just wanted to clarify one thing, and that is that the two County Departments are not necessarily seeking to intervene. It's just a question of how whether if we will respond to the petition to intervene that was just filed on Tuesday. Possibly, depending on how we decide to respond to it, we might have to ourselves intervene, but it's not that the County Departments have waited all this time and now suddenly, we want to intervene. What triggered this was receiving the petition to intervene from the West Maui Association.

Mr. Tanaka: Thank you. Mr. Collins?

Mr. Collins: Yes, Mr. Chairman, I just wanted to be clear that WMPA is not asking for any kind of an extension of time. It was purely out of courtesy to the County that they be given whatever time is necessary to respond to it, but one point that I did wanna just address that Mr. Horikawa had said is that his argument starts with the assumption that the Board is gonna make a decision at the first meeting which it puts on the agenda this matter. And I believe in the similar types of cases where interventions – petitions to intervene has been considered untimely, for example, with the Maui Planning Commission where they actually set a specific deadline when petitions to intervene, they say it's ten days before a hearing, your rules don't, that courts have found as long as the Commission has not rendered a final decision that this very technical argument about what's reasonable time does not comport with our standards of due process. And so while I appreciate some of the comments that Mr. Horikawa's making, I don't believe that his interpretation of your rules and using the rules to foreclose a granting of a petition to intervene would be sufficient on due process grounds. And I think that – I think if you read all of the rules, including Subsection 32, it's clear that there is the assumption that at the very first public hearing, petitions to intervene have to be dealt with is not correct because Subsection 32 says that petitions to intervene have to be dealt with by the time a final decision, not the first time the Board ever looks at it. So while I appreciate his arguments, I think due process says something a little more broad. Thank you.

Mr. Tanaka: Thank you, Mr. Collins. Well, based on the petition to intervene and the motion in opposition of that petition and the timing of this as far as the Board is concerned, it would be – we would need to defer this item until we have Planning – the County's – as far as deferring this item by the Board.

Mr. William Kamai: I'd like to hear Corp. Counsel's feelings about both of these presentations just now regarding Section 12-801-31 as far as the timeliness of this intervention being filed.

Mr. Giroux: I think both attorneys made pretty good points. What concerns me is that we have something that we haven't dealt with before: a County agency coming before us asking for a deferral. Depending on how you dispose of that issue, it may render the other issues moot. So I'd kinda like to get a feeling from the Board on how it feels it wants to dispose of the idea that the County wants more time to either file formal pleadings in the case or – and such. And I guess depending on that point, the issue could still arise in the future of whether or not you want to take up the County's petition depending on the nature of those petitions and how they're filed.

Mr. Kamai: I think the attorney for the County's position was that if we were to grant this intervention that she would like to have ample time to take a look at its merits. What I'd like to know from Corp. Counsel is what are the merits of Mr. Collins and Mr. Horikawa, and who should

we listen to in terms of timeliness of this intervention.

Mr. Giroux: I think that, you know, looking at your rules, they are unique to this Board as far as they do raise the issue of reasonable time. And that's something for the Board to look at as what it feels is reasonable. And I think that parts of the code that have been pointed to are the fact is there is a good cause provision. If you feel that it's unreasonable, you're gonna have to go to the next analysis and say, well, if you feel that was unreasonable, then you have to look at whether there was good cause for that. And the third part of that is, looking at whether or not you've come to a final decision. So your rules do allow you to entertain petitions to intervene over a long span of time as long as you find that there's good cause. If we had already taken up evidence and somebody petitions to intervene, again, we would have to go back to that rule and say, well, we'll accept your petition, but upon the finding of good cause. So we'd have to hear why. Why is it that we're at a place where we're taking evidence now and you wanna intervene now? You would still be allowed to allow the petition to intervene but only upon the finding of good cause. And good cause is another nebulous – it would be up to you. So we're dealing with some really – You know, this Board, upon discussion, would actually be coming up with your definition of reasonable and good cause, and you'd have to formulate that through discussion. So if you feel a certain way, you can present those facts or those – you know, what you're relying on to the Board and see if other people agree with that position. And then you can vote to accept that position. Is it reasonable? If the answer is no, then is there good cause to entertain the petition.

And then the other rule that was pointed out to you is that petitions to intervene have to be disposed of prior to your final decision. So it is something that you do want to – you want to take it up, discuss it, and dispose of so that you can go on taking on evidence from the substantive part of the hearing. And right now, we haven't really accepted any evidence perse. We haven't started the contested case portion of this variance. We've taken public testimony and we've taken an overview presentation from the applicant. So we're – in contested case land, we're very early in the proceedings.

Mr. James Shefte: Mr. Chairman, I'd like to ask Lance Collins a question pertaining to this. Mr. Collins, in order for us to make any kinds of determination concerning what our Counsel just told us, I think one of the major points we need to understand is, why are you so late in doing this? What's the reason for it? Why not two weeks ago?

Mr. Collins: Right. Well, there's, I think, a number of reasons. I don't believe that it's very late. The agenda went out for this hearing. It was supposed to be six days before the hearing, so it was last Friday. That's – I received the agenda on Friday and the WMPA Board met. It's not an individual that's intervening, but a Board. And they had to meet, and say that yes, they wanted to petition to intervene, and they apparently did that over the weekend. And I started actually during the weekend before they had made a decision because I knew that I wouldn't have enough time if I wanted till Monday to do it. And I got it done. And my assistant, I believe, came here, if not first thing in the morning, one of the first things in the morning. And in fact, the reason why I e-mailed – I think it's on the certificate of service, the reason why I e-mailed – the petitions to intervene were mailed. They did comply with the regular service, but it was as a courtesy because of the timing issue that they were e-mailed both to the Planner and to Maui Land and Pine. And so, you know, in terms of whether or not it's late, I don't believe that this is late. And I believe that the court decisions where County agencies that have contested case processes where there are



interventions where the intervention is denied because of this question about time, even after evidence has already been taken, our courts here on Maui have decided that intervention should be freely granted unless there's a good reason not to allow it. And by using this technical argument about time, it's generally not sufficient. I can think of two cases off the top of my head with the Planning Commission in the last two years where they denied an intervention and – because – on the time issue. And they weren't people who intervened before the meeting. They were people who intervened after the meeting. And the courts still said no, you need to allow them to intervene. Whereas in this case, the intervention was granted what was – we did petition for it before the meeting and we tried to give as much notice as possible to Maui Land and Pine. And, I mean, I haven't spoken to the merits of the petition at all partly because of the Sunshine concerns that were raised because I guess from a Sunshine Law perspective, you folks can't actually consider certain documents. I think that it's something that should be addressed in your rules. I think the Planning Commission addressed it about ten years ago by making it ten days before a hearing, the petition to intervene has to be filed. But you folks haven't done that, and of course, the courts have still said that that rule is not valid as if you've deprived proper intervenors their right to participate in the proceeding. So it's a very nebulous area. And I – for whatever – all of the reasons that WMPA was only able to get this filed on Tuesday, I apologize for the board. I'm sure, as you know, when you're working with a group of people, sometimes it's hard to get action done very quickly. Thank you.

Mr. Tanaka: Any other--?

Mr. Aaron Shinmoto: Just for clarification, we did post the notice in the County Clerk's Office on Thursday at approximately 9:00 in the morning. We also published the notice in the paper on October 12<sup>th</sup>. The applicant published it three times in the paper: October 9<sup>th</sup>, 15<sup>th</sup>, and 23<sup>rd</sup>.

Mr. Tanaka: Just to let the Board know, my feeling anyway, because it's not clear cut, reasonable – arriving today and having these in front of us today is unreasonable as far as timing. That's– Good cause has to be heard. So I guess the Board needs to discuss that.

Mr. Kamai: I think, Mr. Horikawa, in responding to WMPA's reasons for the intervention, can I ask you a few questions, Mr. Horikawa?

Mr. Horikawa: Yes, you can, Mr. Kamai.

Mr. Kamai: Oh, never mind. Just kidding. Regarding our BVA rules, I think Mr. Collins' response regarding granting an intervention that he has this right, has a standing as a matter of right, yet in your response, 12-801-28B, it says, "Opponents do not meet the standard of intervention as a matter of right." Could you explain the difference to me?

Mr. Horikawa: Sure. Not a problem. Overriding all of this, okay, is you have to file a timely application otherwise the boat leaves at noon. You're left at the dock. But in my – and you can either verify, or confirm, or you can have Corp. Counsel issue a different opinion, but my understanding of the rules is that there are two types of intervention that are allowed. One, you have the intervention as a matter of right. And the other type of intervention that you have is intervention as a matter of discretion. Okay? Under the rules, and this is 12-801-28, all departments and agencies of the State and the County have the right to intervene if they file what's

called timely – if they file a timely application for an intervention. It has an example of a petition as a matter of right. And then in the next sentence, you have all persons who have a property interest in the land subject to the Board action. That's an example of someone who has a right to intervene as a matter of right. Or if you can demonstrate – oh, right there. Those are – I mean, A and B are examples of interventions as a matter of right. Okay? And then from C and D, that's what we call permissive intervention. And you – you know, you have to show– And it's discretionary. You don't have to do it, but you want to do it, you can. And those are the standards right there. I'm impressed with the technology. That's the – that's my belief of how the different types of interventions work as far as the BVA rules are concerned. Did I answer your question, Mr. Kamai?

Mr. Kamai: Yes.

Mr. Horikawa: Okay. Thank you.

Mr. Giroux: I think Paul was trying to get me to respond to that. This rule closely mirrors the Maui Planning Commission rule, and that is how I've explained it to them in the past that I do see it as two separate sections: one of being an intervention by right, and one being an intervention by discretion or by leave. So as far as that analysis, I have – I am on the record as far as explaining that bifurcation on to the Planning Commission.

Mr. Tanaka: Okay, now, going along – well, continuing on what I started to say was that the – this is in my opinion, it's not timely, but I do wish to hear all – any pertinent facts to the request. Now, as the Board right now, do we need – do we want to, do we need to act on this?

Mr. Kamai: Mr. Chair, can I hear from Mr. Collins?

Mr. Tanaka: You have a question for Mr. Collins?

Mr. Kamai: Yes.

Mr. Tanaka; Mr. Collins?

Mr. Collins: Yes?

Mr. Kamai: Yes, Mr. Collins, who is WMPA?

Mr. Collins: WMPA is a nonprofit Hawaii – it's a Hawaii nonprofit corporation that has a 501C3 – Section 501C3 exempt status with the IRS. And their primary purpose is – I believe I made some mention in the first paragraph of the petition to intervene. It's an organization dedicated to preserving and protecting and restoring the natural and cultural environment of West Maui. And that's I believe both in their charter and also in their bylaws.

Mr. Kamai: How big is this WMPA group?

Mr. Collins: It's a nonmember organization. So it's different than an organization like the Sierra Club that has, you know, a million hunters and fishermen and hikers. It has a board of directors of – I think at this moment it has four. There's one vacancy.

Mr. Kamai: And how many members?

Mr. Collins: As I just said, it's a nonmember organization. It's not like the Sierra Club.

Mr. Kamai: How many participants?

Mr. Collins: You know, I don't know that because I'm not on the board.

Mr. Kamai: So this intervention meeting you had was with the four board of directors?

Mr. Collins: I didn't have a meeting with the four people. They had it with themselves and indicated how they wanted to proceed.

Mr. Kamai: The four of them?

Mr. Collins: Yes, the whole board. Well, actually, I don't know that. It had to be at least three, but I don't know who was at the meeting because I wasn't a participant in it.

Mr. Kamai: With regards to Section 12-801-28, "All persons who have property interest in land subject to Board action who lawfully resides on said land or interest in proceeding is clearly distinguishable from that of the general public." What say you regarding WMPA and the general public?

Mr. Collins: Yeah, actually the parts that you had skipped over said, "Or who can demonstrate that they will be so directly and immediately affected by the matter before the Board but their interest in the proceeding is clearly distinguishable from that of the general public." And I think that if you look through the petition to intervene, it goes through some of the main issues of how they'll be directly impacted. I think – I haven't gotten to any of the substantive steps because I was under the impression that's not what was being considered, but it sounds like that is. And I think fundamentally, there is both case law and the County ordinance that's being asked to be varied from that requires consistency between the General Plan, community plan, and zoning, and the State land use. And what this variance attempts to do is to go around that. And so with respect to doing it for the County ordinance, that may or may not be legal. I don't think it is. But in terms of trying to get around case law, I think it's illegal. And I think that this Board would be wasting its time if it proceeded along this path at all. But the application is not being withdrawn as the other one was, and so this is a matter that I think would save everybody a lot of time if it had a full and meaningful record. And I think that that – if you look at all of 28, Subsection D, although Mr. Horikawa argues that there's this great burden on petitioners to show a number of things, your rules actually state it in the opposite way, "Leaves to intervene shall be freely granted." And then it gives you the specific findings that you have to make if you want to deny a petition to intervene. And so the burden is not on WMPA to prove those three things because we have established a prima facie case for intervention. It is upon either the opposing party or someone else to establish a record and those three points. And I don't think that that's been done at all. I think this is a very grave issue. It tremendously impacts WMPA and the people that WMPA is helping and supporting on the West side. I don't think that anybody's opposed to beach access. WMPA – most of its work has been about requiring land developers to have beach access. I think the concern is that there's another process for this. And a variance sort of sidesteps that entire process. And I think that if

the actual process goes through, I don't think there would be any opposition, and I don't think there'd be any interventions or anything. I think it would go through fairly quickly and maybe not as quickly as a variance, but if the normal process would – if it would be followed, I think there'd be no intervention because I think that everybody wants to try to make sure that people have jobs and people have beach access. But this sort of sidestepping of the community plan process and trying to sidestep case law which I don't think will be successful I think is detrimental and specifically to WMPA, an entity who has a long history in West Maui of beach access and the sort of proper progression of land use development on the West side.

Mr. Kamai: What's your response to Mr. Horikawa's argument about the timeliness?

Mr. Collins: Well, you know, I understand what he's saying, and I think the problem with the argument is that our Judges here on Maui have heard it and have disagreed with it. And, I mean, I, myself – the cases that went up from the Planning Commission, I mean, they did not follow the rule which said, "ten days." Your rules don't say that. It says "ten days before the first hearing." And these people didn't follow that, but the Judges said no, the requirement: leave shall be freely granted. And it's incumbent on the Board to come up with findings, and in your rules, you have three there, why it shouldn't be. And so I understand what Mr. Horikawa's saying, but it's actually the opposite. The Board is supposed to do the opposite, which is they shall freely grant intervention unless they can – unless you folks can come up with specific findings and there's some record or evidence, and there really isn't. And Mr. Horikawa's only presented argument. And so, I mean, in terms of just that rule, I think that it's fairly clear that this issue of whether it was timely or not is really a nonissue. And I do understand that the common sense idea that while this the hearing for it and we did a couple of days beforehand, but the Judges don't see it that way. It comes – the issue is really a final decision and if there's a full record because this is – when you're doing a contested case or a petition to intervene, you're not acting in a quasi legislative manner. You're acting in a quasi adjudicative manner. And because of that, you have to have a full record. And so sort of just basing a denial of intervention because there's this argument that it's untimely is – it may go against common sense, but it definitely stands against what the Judges here on Maui have been saying about that. And I do myself apologize. I can only do this as fast as I could so – And I was actually in Honolulu this weekend for the Nakem Ilocano Conference. And so I ended up – I apologize that I was not able to get this done any faster than I could but –

Mr. Tanaka: Any other questions by the Board?

Mr. Shefte: Comment. I appreciate all the comments from legal counsel, but we have a responsibility as a Board to act in the best way we see fit. And I don't think we should be thinking about what a Judge might say or what might not say in the future 'cause we don't know what that is. So I think that from my personal view of what I've seen, I think it's sad that this is so late in getting to us. People who are involved here are all volunteers, and come all the way down here for a meeting to try and do good work, and are presented with situations which I know are all . . . (inaudible) . . . and all that sort of stuff, but it should be able to move along a little faster, you would think. However, I think that in the interest of full disclosure concerning this, we probably need to seriously consider this intervention and at least perhaps delay action until we know more about it sometime in the future.

Mr. Tanaka: So as far as the variance, the request for variance, it is – that any action regarding the

variance will be deferred. Regarding the petition to intervene, I would think because we still have two Departments from the County as well as – well, the County's position to consider, so as our Board, defer the decision regarding the petition to intervene.

Mr. Kamai: I got a question for Corp. Counsel – two questions, actually. The first, if we deny this intervention, we move forward with the proceedings? What happens after say we do rule on the variance?

Mr. Giroux: Yeah, a ruling on the petition to intervene today would basically – it would trigger – the intervenor would have the opportunity to appeal in accordance with Rule 12-801-33, but it doesn't stay the proceedings. You could go forward unless there was a judicial order staying the process. So you would be running the risk of maybe having to either do it again or anything like that, but it's not – I'm not saying that you cannot do it. It's your discretion that if you did deny the petition, you could move forward. It's just that that decision would kind of be – it would go forward, but the petition to intervene would be heard by the Circuit Court. And depending on the outcome of that, then you might have to do a do over. But as far as – did I answer your question on that?

Mr. Kamai: Yes. The second question, we grant the intervention, does it stop right now, or do we still move forward with the variance?

Mr. Giroux: The procedure you would use is if you granted the intervention, you would have to decide on the process. Your rules allow you to either take on the petition to intervene as a Body, or to hire a hearings officer. If you hired a hearings officer, everything would stop because we've got to get a contract, then the hearings officer would have to get on board, and then the hearings officer would have to do pre-hearing scheduling and set up a schedule for that hearing.

Mr. Kamai: For the intervention alone?

Mr. Giroux: Yeah.

Mr. Kamai: But as far as the variance is concerned, would we still move forward with it?

Mr. Giroux: No, if you chose to go with the hearings officer, the whole case would be moved to the hearings officer, but then it would come back as a report to this Body, and a decision would be made based on the report after the intervention has created a record. And I think we've done it both ways. We have done – I believe we have done variances – well, we've done variances without intervenors, this Board has. And you've done – you've had variances where you've sent it off to hearings officers, and then you've made your decision based on the report. I don't think this Board has had the opportunity to do a variance with an intervenor on your own yet. We have done appeals where we've decided not to send it to a hearings officer.

Mr. Kamai: So the hearings officer would rule on the variance alone, the merits on the variance alone?

Mr. Giroux: It would give you a recommendation on the variance, and then you would do the final decision-making.

Mr. Kamai: And after we receive that back is when we listen to the variance?

Mr. Giroux: Right, you would make that final decision based on the recommendation of the hearings officer and the record.

Mr. Kamai: I'd like to hear comments from Mr. Horikawa.

Mr. Horikawa: Yeah, one of the options, as Corp. Counsel noted, is that you could retain jurisdiction of this matter. There's no requirement that you hire a hearings officer. And there's nothing in the rules, my review in the rules anyhow, that prevents you from saying, hey, if you grant the intervention, there's nothing from saying, okay, applicant, put on your case, intervenor, put on your case, and you can make your decision, and we can be out of here by four o'clock.

Mr. Collins: We are ready to proceed with the contested case today. I have the witnesses that I can call. So if you guys are ready to swear people in, I'm more than happy. Even though this did come in the way that it did, we're completely ready to go, so please don't think that we need more time. If you want to grant the intervention, have the contested case proceeding this afternoon, my witnesses are ready to go.

Ms. Kapua`ala: Mr. Chair or Vice-Chair? We'd just like to state a fact that the next available meeting date won't be until December 10<sup>th</sup>. November 25<sup>th</sup>, which is the day before Thanksgiving is a packed schedule, and we wouldn't want to ask the Board to stay past 4:00, 4:30 on that day. Of course, it is your schedule, so you let us know. It's either November 25<sup>th</sup> or December 10<sup>th</sup>, which is – the December 10<sup>th</sup> date is the open date.

Mr. Shefte: I have a question for Counsel. Because of this confusion thing exists – oh, I shouldn't say confusion, but the County has not yet been able to really apparently go over this and even decided how they should proceed, what is your recommendation? Do you have some advice as to whether it is prudent to go ahead or should we delay, perhaps delay decision on this intervention until we've heard a chance to hear from them as to what their position is?

Mr. Giroux: I mean, I would hate to go forward without hearing the position of the County, but you could get further clarification from exactly what the County's position is today regarding a deferral.

Ms. Lovell: Thank you. If I could just maybe add a little bit more to my presentation from this morning or from earlier this afternoon? Mr. Kamai is right, it's the County's position, I think, that if you deny the intervention, then the County doesn't need any more time. It's just that if you're thinking of granting it, then the County would want to weigh in. And although we haven't had time to actually, you know, draft a brief and take a formal position, I do note that the petition itself, in my view, is legally deficient because it makes various allegations about who WMPA is, what they stand for, and so forth. So it makes these allegations of why they have standing and why they should be allowed to intervene, but there's no proof. There's no affidavits. There's no facts that are somehow proved through documents, or photographs, or something of that nature. So all you really have is the arguments of an attorney. And Judges are fond of telling juries that arguments of lawyers is just that—it's just argument. It's not evidence. I hate to quote that against myself since I'm one of those folks, but that is the case. So those are some of the concerns that we have about the petition. We also think that the petition is perhaps – the petitioners are incorrect in what they

think the effect of a variance will be, but that's something that we needed a little more time on. However, if you're inclined to deny the petition, then I don't think we need any more time. I don't know if that helps or hurts but–

Mr. Tanaka: No, that helped. Thank you. My feeling would be that as much as I hate to say sorry, but let's push this off to another date, I would be very hesitant either direction as far as the petition to intervene. It's – the discussion and testimonies have been – we've heard from lawyers, and that's, to me, that's kind of intimidating. So I would be hesitant to ask for – to make a decision, and let's move forward, and as much as I hate to say, we gotta come back and do this again. Any feelings by the Board?

Ms. Rachel Ball Phillips: I think based on what I've heard today, I would like to defer as well until we can hear the County's position on it, and then I think we might be in a better position to decide whether or not to grant or deny the intervention at that time.

Mr. Kamai: I think I concur with County Attorney Lovell's position about it just being an attorney's argument. And I'd like to make a motion to deny this intervention and move forward that way, personally. It's not a motion. It's just my opinion.

Mr. Tanaka: Any other?

Mr. Shefte: I think I agree with Mr. Kamai. Number one, there's a lot of questions out there. Who are these folks: WMPA? I don't know. I don't know who they are. And it sounds like there's four of them, not the whole community, and who knows what their interest really is. So I would – I think that we should move forward, and I think we should deny it, and let's see where things go from there.

Mr. Ray Shimabuku: I would say the same thing too.

Mr. Tanaka: So hearing that, I'd ask for a motion from the Board.

Mr. Kamai: I'd like to make a motion to deny the petition to intervene.

Mr. Shimabuku: Second.

Mr. Tanaka: It's been moved and seconded. I'll call for a vote. Those in favor? Oh, sorry. Any other discussion by the Board? Okay, then I'd ask for a vote. In favor of denying the petition to intervene, please say aye. Aye. Because I make the quorum, I would need to vote. Is that–? Any in opposition?

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

**VOTED: To Deny the Petition to Intervene.**

**(Assenting: W. Kamai, R. Shimabuku, R. Phillips, J. Shefte, and K. Tanaka)**

**(Excused: S. Castro, S. Duvachelle, H. Ajmani, and R. Endo)**

Mr. Tanaka: **Okay, so the ayes have it. The petition has been denied.**

Mr. Giroux: Just based on the conversation for the production of the order because I think the person or the party who prevails on this issue needs to produce an order, can we just for discussion sake make it clear on what basis it – was it on the timeliness issue, the lack of good cause, or the lack of standing that were briefed? I think it would help the produce – or the producer of the order to have that clarified. Or is it on all points?

Mr. Tanaka: Yeah, I believe that what has been said by the Board: one being timeliness, another being not being able to illustrate good cause, and standing – how it – justification from an organization that is up until this point was unrecognized by this Board. Those would be the comments that would be attached today's denial of the petition to intervene. So as part – along with that would be the agreement with the motion in opposition to the petition to intervene. I hope that was clear enough for the record. I apologize. Is that agreed upon by the Board?

Mr. Kamai: Yes, Mr. Chair.

Mr. Tanaka: Thank you very much. So the petition to intervene has been denied.

Ms. Kapua`ala: Mr. Chair, James, should the prevailing party produce the D&O, the decision and order?

Mr. Giroux: Yes.

Ms. Kapua`ala: Paul, thank you.

Mr. Collins: Thank you.

Mr. Tanaka: You want to keep going? Let's keep going. Well, and then we're also on a time thing so, Trisha, shall we proceed with the–? Do you have a presentation that goes along – or–?

Ms. Kapua`ala: Staff does not have a presentation. On behalf of the Department of Public Works, we have Lesli Otani, the Civil Engineer for the Development Services Administration, Engineering Section, and she's here to answer any technical questions regarding the County Code. And, Yarrow, would you like to proceed to elaborate on your presentation?

Mr. Tanaka: Yeah, if you'd like to go ahead and–

Ms. Flower: I think I showed you all the good parts already. Okay, so once again, my name is Yarrow Flower. I'm with Maui Land and Pineapple Company Incorporated presenting this application for a variance for the Kapalua Bay Park Subdivision.

We already saw this slide. The reason for the subdivision is to subdivide TMK into – it's a 2.46-acre parcel. We would like to subdivide it into two lots. The first will be the existing public parking



and access to Kapalua Bay, and the remaining parcel will be an existing restaurant. Once again, there is no construction associated with the subdivision.

Project site, we already went over. This is the subdivision map, once again. The purpose is to separate the parking stalls which are located here which are public parking, the restroom facilities, the improved access to Kapalua Bay Beach and the shower facilities all into one parcel. The intent once this is completed will be to transfer this parcel to our master resort association which is Kapalua Resort Association. The reason for this is that Kapalua Resort Association is in a position to manage and maintain the parcel independently of Maui Land and Pineapple Company. There is an agreement also in place, an agreement and declaration in place, and it preserves public access rights for the parcel. So that goes with the land. The remaining portion is Lot A-1, A-1, over here, and that contains the Merriman's Restaurant, Bay Club Restaurant. It's been there since the '70s.

So the reason we're here today is to request this variance from Chapter 18.040.030, which states in part that, "The Director shall not approve any subdivision that does not conform to or is inconsistent with the County General Plan, community plan," etc. Due to an inconsistency between County zoning and community plan designation, Maui Land and Pineapple is currently unable to subdivide this land.

The history of the land shows how incorrect land use designations led to the current mismatch of designations versus existing structures. Land Zoning Map 944 was adopted in 1974. This map shows the location of what was then the future beach access in the same location as it is today. That is in the application as Exhibit C. The Step 3 approval for the public beach access parking and facilities was approved in 1975 by Maui Planning Commission. As part of the process, an easement was drawn up in cooperation between Maui Land and Pine and the County of Maui. The easement map also clearly showed this alignment and the easement was the same as what exists today. And that document is in the application under Exhibit B along with applicable communication between the County and Maui Land and Pine.

So in 1976, we constructed the public access improvements and the restaurant was constructed in 1977. In the absence of the signed easement agreement, Maui Land and Pine executed and recorded the unilateral agreement and declaration of park and beach access parking in 2000, and that's located in Exhibit E.

So the Lahaina Community Plan was adopted in 1983. And the West Maui Community Plan was adopted in 1996 both well after the improvements in this area were completed including that public access which was constructed in '76. And again, because it's difficult to determine where these lines are, we did do the math with the Planning Department which we looked at previously.

So the top map is the community plan. The zoning that's located there includes this blue stripe which is the public/quasi-public. We have business and commercial which is here. We have open space which is the green along the shoreline, and we also have a little wedge of multi family here. Down below is the County zoning and that has a swath of resort commercial here. We have a little tiny strip of A-1 apartment here, and then again, the green open space or golf course here. And there is the approximate location of the existing restaurant.

So when you compare these two, you can see multiple inconsistencies. Most notable is that the community plan's public/quasi-public area traverses over the existing building, and it also extends into the County resort commercial area here. Also, the community plan's multi family residential designation extends into the County open space which is here. And while there are inconsistencies between the community plan zoning, and the County zoning, it is clear that the community plan map intended to provide for public access. However, the public/quasi-public zoned area was simply drawn in the wrong place. Instead of along the existing access, which is located here and has been since 1976, it was drawn through the Bay Club Restaurant and terminates on this rocky shore instead of at the beach.

So in summary, Maui Land and Pine is requesting a variance for Maui County Code, Chapter 18.040.030, specifically in regard to an inconsistency between the community plan and Maui County zoning. It is clear that providing the public access at Kapalua Bay has been the common goal of MLP and the County since 1974 and prior. The existing improvements on the parcel were constructed in 1976 and in 1977 prior to the adoption of the community plan 20 years later in 1996. While the community plan shows the intent to provide public access to Kapalua Beach, the public/quasi-public corridor was inadvertently drawn to intercept the building instead of follow the existing beach access. Granting the variance will allow Maui Land and Pine to establish a separate lot for the 39 public parking stalls, restroom, and shower facilities, and access to Kapalua Beach which will then be transferred to Kapalua Resort Association. That Association currently maintains the area and will continue to do so independently of Maui Land and Pine. Thank you so much for your time today and I welcome any questions.

Mr. Tanaka: Go ahead, questions.

Mr. Shefte: Yes, I have question or clarification. The public parking lot is actually there's two parking lots.

Ms. Flower: There are.

Mr. Shefte: There's the Bay Club or the Merriman's parking lot and the public. So as a result of this change, will that parking change at all, or will it be exactly the same?

Ms. Flower: It remains exactly the same. If you look on this map here, the public parking lot is here and Merriman's parking lot is actually on a separate lot over here. And they drive across to Merriman's there. So Merriman's parking isn't affected by this at all, and the public parking remains the same. And again, there is an agreement and declaration over the entire area, the parking and the path to the beach that will insure that it's open to public access.

Mr. Shefte: So what you're saying is—and I agree—you have provided a very – a great public access to the beach back in the '70s. But that will not change, but the responsibility for who's going to maintain that is going to change?

Ms. Flower: This is true. The Kapalua Resort Association is funded by all of the owners and businesses within Kapalua Resort, and they have much better resources than Maui Land and Pine currently has right now or may have in the future. So what we're doing is we're transferring all of our public beach access areas to that resort association to insure their preservation.

Mr. Shefte: Thank you.

Ms. Flower: You're welcome.

Mr. Tanaka: I have a question. Now, you said that there is an agreement. Is that the January 2000 agreement?

Ms. Flower: That's correct.

Mr. Tanaka: Now, without reading it, if you can give me an overview of what that agreement says that it's the responsibility of Kapalua rather than Maui Land and Pine to maintain the park and beach access?

Ms. Flower: Currently, it's Maui Land and Pine's responsibility to maintain it. The agreement that you're referring to basically opens that area up to the public, and that's what goes with the land. So even when we transfer the land to Kapalua Resort Association, they cannot deny public access, and that will go with the land.

Mr. Tanaka: Okay. Yeah, that was my concern that if by making this change, would it be possible that that parcel may be used for something else or closed to the public.

Ms. Flower: The only way this unilateral agreement and declaration can be reversed is by the County, actually.

Mr. Tanaka: Okay. Thank you very much. Any other questions?

Ms. Phillips: Why doesn't Maui Land and Pine try to apply for community plan amendment instead of a variance?

Ms. Flower: We haven't applied for a community plan amendment for this particular project because we don't have any anticipated land use changes. It's all existing. So because it's just a paper subdivision, and we're not planning on doing any additional development or anything like that, we thought that a variance was more appropriate. And everything was in existence prior to the existence prior to the community plan, so we felt like it had already been granted.

Mr. Tanaka: Any other questions?

Mr. Kamai: That would be the same answer for the change in zoning?

Ms. Flower: That would be the same answer for the change in zoning, yes. And that everything was already existing. Everything that's built there was built legally and allowable in '76 and '77 when it was built with that County zoning, and then with this additional layer of the community plan which obviously has good intentions. I honestly feel it's just a mapping error.

Mr. Kamai: Any other questions by the Board for anyone?

Mr. Shimabuku: I have a question. I have a comment, actually. So there's no future plans as far

as developing or putting something on this parcel?

Ms. Flower: Absolutely not.

Mr. Shimabuku: Thank you.

Mr. Tanaka: Is that in print, in writing, anywhere? It's not part of that unilateral agreement, but is that--?

Ms. Flower: In writing, I think that we are limited by the zoning as far as putting any additional buildings in the A-1. And I am not sure if the unilateral agreement -- I don't believe it has a no-build clause, so I don't think that it's in writing. However, it is a requirement by the County of Maui Planning Commission to have that parking area and beach access available. So I'm pretty sure that that would be flagged if any kind of like -- well, just as a . . . (inaudible) . . . for the subdivision would come up.

Mr. Tanaka: Yeah, it would have to go through the process.

Ms. Flower: Yeah.

Mr. Tanaka: Is there--? Trish, would you know, is there anything that states if there are 40 stalls now it has to remain 40? I'm just curious. It may be that--

Ms. Flower: The number of stalls is detailed in the unilateral agreement. It's 27 plus 12.

Mr. Horikawa: The number is based upon-- Hi. My name is-- Sorry. Hi. My name is Paul Horikawa. And it's set forth in the agreement. It was pursuant to an order of the Planning Commission back in '75 that they had to provide the 40 stalls. And it also-- You know, even the reserve, the ocean reserve, along the ocean, that's about 24,000, half an acre, and, you know, the shower, the restroom, that's all required. And the maps are pretty clear on where those areas are.

I just wanted to make one other comment that this idea of turning over maintenance facilities to a community association is not unusual. I think Mr. Matsui who was here earlier today from the Parks Department will tell you that the Wailea Community Association entered into a management agreement with the County to maintain the median for Wailea Alanui as well as, you know, Olua, and all of those beach accesses. They just really didn't want -- nothing against the County, but they didn't want the County to maintain it. They felt that they could do a better job. The same is done at Makena. They preferred to have the Makena Association maintain the access just to -- just because they felt they would do a better job. In speaking with Mr. Matsui this afternoon, he preferred that KRA do it rather than the County. As you know from the newspaper articles, Maui Pine is kind of shaky right now. So they would prefer to turn it over to an entity that will, you know, maintain it in a good fashion where the public will be able to use it down the road.

Mr. Tanaka: Thank you very much. You have a question?

Mr. Giroux: Paul or Yarrow, I'm looking at the subdivision. You're asking a variance from the subdivision requirement, but in doing the subdivision, are you not also not having to do an SMA

assessment in order to get the subdivision? Can you explain that process and how this affects the SMA determination?

Ms. Flower: We do have an SMA permit submitted and our Planner is here today. However, it's a requirement of Planning for the SMA, and this subdivision requirement is – and this variance is for the subdivision requirement. So it's dealt with DSA separate.

Mr. Giroux: But are you going to run into a similar issue of consistency?

Ms. Flower: I'm not intending to, no.

Mr. Tanaka: Okay, any other questions by the Board?

Mr. Shefte: I just have one more for Maui Pine. One of the concerns or big questions is I think that most of the Board Members feel, maybe not, but certainly I do that you've waited all this time really, before making this application for this change. And I know it's probably lots of reasons why, but one of my concerns will be you would be in a much better position to sell this property if you had this cleared up. Is that not true because it'll cloudy otherwise?

Ms. Flower: I wouldn't say that it was cloudy, no. I mean, it's a sellable parcel as it is, 2.46 acres.

Mr. Shefte: So I don't want to put you on the spot. I'm just wondering if that's part of the motivation so that if down the road somewhere, you know, it makes sense for Maui Pine to unload this property to someone. Is that part of your motivation?

Ms. Flower: It's not, no. We would be deeding the Lot A-1, A-2, to the Kapalua Resort Association. There'd be no money changing hands, so it would be like a gift. And we have no plans to sell the remaining parcel either.

Mr. Shefte: Okay. Thank you.

Mr. Tanaka: Because even if that were the case, if that were sold, that public access would always exist.

Ms. Flower: That's correct. It could be sold as-is.

Mr. Tanaka: Any other questions?

Mr. Kamai: So say we were to grant this variance, so would it change these maps that we're looking at?

Ms. Flower: It would not change the maps.

Mr. Kamai: As far as the Parcel A-1, A-2. But the color, the designation?

Ms. Flower: No, the zoning would remain exactly the same. And my understanding is that we would receive an exemption from that code so that we could receive the subdivision approval.

Mr. Kamai: Okay.

Ms. Flower: It's not a change in zoning.

Mr. Tanaka; We have a comment from Public Works?

Ms. Lesli Otani: I just wanted to explain what we look for in Public Works. I'm Lesli Otani. I'm the engineer that processes subdivisions through Public Works, Development Services Administration. What we look for, for compliance with that section of the code is that the three levels of zoning sort of align between the community plan, and the County zoning, and the State land use. So let's say if you were ag, it would be community plan ag, County ag, State land use ag, or maybe community plan single family, R-3 State land use urban. So in this case, if she goes back to the other map, maybe somewhere like out on the point where it's open space, open space, urban, for us that would be fine. But in this case where you have public/quasi-public, for us we look for community plan public/quasi-public, County zoning public/quasi-public, State land use urban. So that is what we're looking for that each level matches, and that's what the variance is from. So even if this variance is granted, the designations are still the same. They're being exempted from the code requirement where we say that it has to match up precisely.

Mr. Kamai: Thank you.

Mr. Tanaka: Any other discussion by the Board? If not, I'll ask for a motion.

Mr. Paul Engler: (Inaudible)

Mr. Tanaka: Please step forward to the mic. Identify yourself for—

Mr. Engler: My name is Paul Engler and I own the property located at 12 Kapalua Place, Maui, about ten feet away from Merriman's Restaurant, which would be one of the parcels if you granted this variance. My main question is why? Why does Maui Land and Pineapple really want to do this? Now, the word in the pineapple express for five years has been Maui Land and Pineapple loses money on that property which is now occupied by Merriman's and wants to sell it. Well, historically, it's been occupied by Merriman's for about the past two years. Before that, it was vacant for probably three or four years. Now, the young lady here says the real reason is because they want to preserve public access and they wanna have it maintained. And Maui Land and Pineapple who was a mega million-dollar company doesn't have the money to do that, so they're gonna turn it over to Kapalua Resort Association. Who's that? These are homeowners who pay association dues. And so they're gonna maintain it? We have not heard anything from them that they're gonna maintain anything. And then you say, well, how much money does it cost Maui Land and Pineapple to maintain a parking lot and to maintain the other things that this young lady's talked about? I can tell you they don't maintain the bathrooms very well, and they don't maintain the— You know, they have an area where you wash your feet off as you come off of the beach at the end of this access trail. It hasn't worked for, I don't know, two years. Barely works at all. People use the one – use a different one to clean off their feet. Not that one. So I'm thinking as I'm sitting here listening, how much money is it really gonna cost to maintain that? And is that really the real reason they wanna do this to have some unknown entity that we don't know financially anything about maintain it? To me, that doesn't make any sense. But what does make

sense to me is they wanna sell that piece of property that Merriman's is located on.

I can tell you about Merriman's because they're only ten feet away. There's no aloha at Merriman's. They wake us up at midnight, 1:00 in the morning, 2:00 in the morning shampooing their tile floor, employees talking, music playing. They violate noise ordinances constantly, which has a decibel reading maximum of 60 decibels up to 10 o'clock and 50 after 10 o'clock. No way. Commonly, 65, 70, no matter what time it is. Talk to the managers all the time there so I know them. There's five managers and four. It's like dealing with an octopus. You talk to one, the other one doesn't know you talked to this one. They all tell you different things and react differently.

So I had really— They— Their liquor license—this is just an example—their liquor license that their working under was going to be applied for at a public hearing, but people like me could come and talk and give their input. But that idea was stuttled and they ended up getting their liquor license somehow under Maui Land and Pineapple's liquor license since they had it initially when it was Kapalua Bay Club Restaurant. So there's no public hearing. Well, that's important because when it was initially granted, there were restrictions put on the restaurant which then was Kapalua Bay Club Restaurant because of people like me who live so close to it and other people at Puna Point, Napili Kai Beach Resort. It's because of the noise. The trade, it blows the noise to us. So instead of noise restrictions of you can't have music on the deck outside, you have to be quiet after a certain hour, they ended up getting approved. An open walled restaurant. No walls. Just restaurant. You have a roof. You have a floor. We look right out of our roof where we live. We see all the people sitting there at their tables. We hear all the noise. So there are no restrictions. So — which would've been avoided had the liquor license been applied for with a public hearing.

I know I've taken up some time, but I just had to say this to give you more information because I know you're looking for information to make an intelligent decision. Seriously question the doubt — the reason for this. Does that make any sense? Thank you.

Mr. Tanaka: Thank you very much. Is there anyone else who wishes to speak?

Mr. Collins: Thank you and good afternoon. My name's Lance Collins. And I'm sure you know I represent West Maui Preservation Association. Earlier in the proceeding WMPA was not allowed to intervene and so offers public testimony at this time.

This variance seeks to ambrocate the West Maui Community Plan and the County Code of Maui 18-04-030. The normal procedure for a landowner to make a community plan amendment consistent with zoning or to make a change in zoning is to seek that through a community plan amendment, or through a change in zoning ordinance, and not through a variance. Community plans are "Designed to provide plans that clearly identify provisions that are meant to be policy guidelines and provisions that are intended to have the force and effect of law to implement and enforce plans through prioritization and accountability, to empower advisory committees, to place more emphasis on island-wide and interregional issues, and to encourage more frequent update of plans, and to establish deadlines for completion, and to increase public and community participation in the planning process."

I think the problem that this Board is facing and fundamentally may end up being decided by somebody else is that although this was built in 1976, there have been two community plan

processes in which Maui Land and Pine asked for all sorts of things to be changed in the community plan map matrix. This was not one of them in either of those things. You heard from a GPAC, the GPAC Vice-Chair earlier. They didn't – they offered all sorts of things for the Maui Island Plan. This was not one of them. Council Members have routinely said if you need change in zonings, community plan amendments, ask us. If it has to do with beach access, we will always do it. The Council has an open door policy on that. And if this is about beach access or trying to conform things, it would be getting done, and it wouldn't cost the Maui Land and Pine anything, and there'd be no objections by anybody. But the normal process is not being followed. And so you have people that are now testifying asking, well, what's the real agenda here because frankly, I don't think this is legal. And so I don't really what the agenda is either that what we now have discovered is they're not asking for anything. In fact, once you give them the variance, everything will still not be in conformity, and that's the whole point of the variance is to release somebody of the hardships by strict interpretation of the law or strict application of the law, but that's not what they're asking for. They're not even asking really for a variance. They're just asking to allow the Public Works Department to break the rules temporarily so they can split these things up and still not have everything not be– They're not asking for a total variance. They're not asking to actually vary from this or anything along those lines. They're just asking for you to allow them to bend the rules slightly so that they can ignore this entire process and free up that parcel for whatever they're gonna do with it. It has nothing to do with beach access. It has nothing to do with the public and community participation process, or the community plan process, or change in zoning process, or the General Plan process. And I think the Hawaii Supreme Court has clearly spoken on this issue. And even if this variance is granted, I don't know if the subdivision itself would be legal. Something for Corp. Counsel to talk about. But WMPA and its supporters are totally against this. They think that beach access is very important and this should be addressed, but it should be addressed in the proper forum, not before the Board of Variances for a variance that doesn't really vary anything. Thank you.

Mr. Tanaka: Thank you very much.

Mr. Giroux: Question, Lance? Just real quick. Lance, if the Board were to grant this variance, do you see any shoreline access being diminished by the granting of the variance?

Mr. Collins: It's not an issue – this isn't an issue about beach access. It's about the community plan process.

Mr. Giroux: So the answer is no? Is the answer no, that you don't see any beach access being diminished by this?

Mr. Collins: Well, as I said, I don't know because that's not part of their application.

Mr. Giroux: But that was part of your petition to intervene.

Mr. Collins: Excuse me?

Mr. Giroux: That was part of your petition to intervene. You're saying that you're concerned about preserving beach access.



Mr. Collins: That's one of the purposes of WMPA, but that was not one of the reasons for the intervention.

Mr. Giroux: Okay. Thank you for clarifying.

Mr. Collins: Sure.

Mr. Tanaka: If there's no other public testimony, we'll close that portion of the meeting. After that, any other questions by the Board for anyone?

Mr. Giroux: Mr. Horikawa, as far as the people who testified, our understanding is that they're a part of public testimony. However, do you have any concern about your right to cross examine those witnesses? Or do you have any other witnesses do you have to present? It looks like we're coming to the near end of this meeting so—

Mr. Horikawa: I don't necessarily want to cross examine them. I mean, it's part of public testimony. And it's not a tradition that I've observed or seen observed where parties get to cross examine individuals who testify during the public testimony portion of the – of a proceeding.

I would like to add a comment. I really didn't come here – I really didn't come here prepared to address some of those concerns, but I would like to pass along these comments. One, you know, what we have here— I would like to comment on the process portion of the discussion. And I use to represent almost – a little over 20 years ago. And so, I'm – you know, I've looked at the Charter provision that, one, creates the Board of Variances and Appeals. And I've also reviewed, you know, on many occasions thereafter, the powers of the Board of Variances and Appeals. And the Board has a lot of power that's mandated by the Charter. And one of the powers that it does have is to grant variances not only from the community plans, but also from the Subdivision Ordinance. So this is not really an ordinance – I mean, a request for – an application for a variance from the community plan, but a variance from the Subdivision Ordinance requiring the consistency issue. But even if it was, you still have that authority. There is, you know, a process that is traditionally observed, but nothing prevents the Board from acting on the application that's before you today.

On a more basic level, you know, we have various levels of documents that have priority over other documents. On top of everything, you have the Charter and then you have the ordinances. If there's a conflict between an ordinance and the Charter, the Charter as the organic law of the County of Maui prevails over the ordinances. And in this case, the Charter clearly contemplates the Board to grant the request today. So I don't have any problem. In my opinion, it's fully defensible for the Board to take action that it's taking today.

The other portion of today's hearing that bothers me a little is that I remember the old – it was under a different slide that we had there before, but I remember we would go out to – what was this called before? Yeah, it used to be called Fleming's Beach. And I remember going there—I hate to show my age—40 years ago. And the parking lot was there. Maybe it's not in as good a shape that it is now, but I remember going there. And I remember the parking lot being there. I remember the bathroom being there. I remember the access being there. And this action to require Maui Land and Pine to create this beach access came in 1975. I was in college when that occurred but, you know, it's been there since 1976. So we're talking about something that's been there for over 30 years. And it's a beach access that's, you know, predates all of the community

plans. And I'm kinda wondering. I mean, usually the beach access, you know, this is supposed to be something that we're supposed to preserve. And I don't know who is responsible for what is an obvious error, but it would be a shame that – I mean, it's a shame that it wasn't corrected a long time ago. I mean, this is not the type of– And so– This is not the type of use that a mistake should occur on. I mean, Mr. Collins had mentioned that the politicians would've granted– You know, this is not the type of a use that should have to go through this process. It's been there for time of memorial. It should've been memorialized a long time ago. That's my only comment that I have on that issue.

Mr. Tanaka: Thank you. Again, discussion by the Board? I realize that the process is – of going through a variance – requesting a variance rather than a community plan amendment or a change in zoning was the chosen route by Maui Land and Pine, which is the issue here, which has been brought up multiple times for whatever reason, but it is – it has taken this path and it is before us now. For myself, there is a public beach access, and parking, and amenities, which from what I understand from what we've heard that will remain, that will never change. By looking at the community plan map and County zoning that all these overlapping colors that, I guess, eventually will be corrected. I guess my feeling is just the issue of the process that they took versus what should have been done on the assumption that – well, there is a restaurant there that's part open space, part public/quasi-public, part business is there concerns by the Board?

Mr. Shefte: I'd like to voice one concern that leads me to wonder about the whole process. Because Kapalua has taken them so long to come to this decision to apply – to make this application, that makes no sense to me. Why not do it long ago? Kapalua, these days, is in bad – people all know that they're in financial straits. So I would think that they'd certainly be motivated to produce cash in any way possible. And they own this beautiful piece of property. Further, I'm really not clear from listening to all of the various attorneys talk about what is the proper process to be followed. Should this be going through this amendment process or should it be a variance through us? And because I'm not clear on that, I think that currently I would be thinking that the variance should not be granted.

Ms. Flower: (Inaudible)

Mr. Tanaka: Actually, hang on. You wanted to address that statement?

Ms. Flower: Just to respond to your statement, the reason – the question as I understand it is why would Maui Land and Pine wait so long to come for a variance and do this subdivision and what our motives are, again, in the past, it's never been – we've never applied for any kind of community plan amendment or changes in zoning. And we are still not doing that for the simple reason that there is no change in land use. There's no planned construction. There's nothing like that happening. If we were truly looking at cleaning up the parcel to make it more saleable, we would probably go through a change in zoning process. Does that make sense? Because as it is, the land use isn't changing. The restaurant's not changing. The beach access isn't changing. Therefore, it's just a paper subdivision. It's not an action, or a construction project, or a change in land use.

Mr. Shefte: What makes sense to me is that you would take the most expedient way to, you know, accomplish your goal, and appears that perhaps this is it. Also, it's probably a lot less expensive

than going through the amendment process.

Ms. Flower: I wouldn't argue with you that the amendment process is cumbersome, and it takes a lot of time, and it is expensive. But having a consistent zoning on a parcel I think adds quite a bit a value to a parcel. So if we were looking for – to add value to that parcel, that's the route that we would take. That's not what we're currently trying to do. We're really just trying, regardless of what you hear from other people, we are trying to get all of our beach accesses, not just this one, transferred to Kapalua Resort Association, which was – has been in effect since the '70s when, you know, Colin Cameron dreamed up the resort. And it is very stable, and it is supported by all of the homeowners and the businesses within the resort, and has been since the early '70s.

Mr. Kamai: Yeah, for myself, I would be supporting this variance, and it's based on several issues regarding there's no changes in land use, one. The response from the Department regarding the five criteria is no comment, no comment, no comment, no comment. And what I suspect is there'll be more cases like this coming before us regarding the process for community plan amendments and change in zoning requests. We, too, are part of that process in ruling on variances like this until – and again, weigh heavily that there is no change for the use of the land as my decision, being a part of my decision. But I would consider making a motion to grant this variance for those reasons.

Mr. Tanaka: Any other discussion by the Board? Any other comments or questions? Well, my understanding, Paul and – say this parcel becomes two and you sold the parcel with the restaurant, the restaurant could not change, could not be added to – because of the issue of the community plan and the zoning. So they couldn't take the restaurant and build a single family house or anything else.

Ms. Flower: Not only that, but the shoreline setback on this parcel makes development prohibitive. It was built a long time ago and we have much different rules now.

Mr. Tanaka: So just to reiterate my feeling is that even if it were sold, there's nothing that could be done. They can't expand on what's there. My concern is the preservation of beach access as well as parking, which apparently that is the case. So I would tend to lean towards Bill's statement. Although the process, there is some argument of the process that it's going through, the end result is fine with me. So with that said, if there's anybody on the Board who would like to make a motion?

Mr. Kamai: Yes, I would like to make a motion that we grant this variance based on the fact that in my opinion, the applicant has met the five different criteria for granting this variance and to include his responses on this application as part of the motion.

Mr. Tanaka: There's a motion to approve. Any second?

Mr. Shimabuku: Second.

Mr. Tanaka: It's been moved and seconded. Any discussion?

Mr. Shinmoto: I have a comment.

Mr. Tanaka: Go ahead.

Mr. Shinmoto: Should the Board choose to approve this, the Board might want to entertain the typical hold harmless and insurance requirement.

Mr. Kamai: Yes, I'd like to amend my motion to include the million-dollar hold harmless agreement that's standard with our granting of variances.

Mr. Tanaka: Trisha, you had another—?

Ms. Kapua`ala: No, Mr. Shinmoto . . . (inaudible) . . .

Mr. Tanaka: It has been moved and seconded to approve with the standard condition of insurance, million-dollar insurance, and County's indemnity. With that, I'll call for a vote. All in favor, please say aye. Any opposed?

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

**VOTED: To approve with the variance as discussed.**

**(Assenting: W. Kamai, R. Shimabuku, and R. Phillips)**

**(Dissenting: J. Shefte)**

**(Excused: S. Castro, S. Duvachelle, H. Ajmani, and R. Endo)**

Mr. Tanaka: **Well, with three in favor and one opposed, we do not have the necessary vote for – even if my vote were included, we would still not have the vote required for the granting of this variance.** If there would be any other motion, otherwise we would need to defer this item for a full quorum.

Mr. Kamai: Mr. Chair, I'd like to make a motion to defer this item until there is such quorum to make an adequate vote.

Mr. Tanaka: We have a motion to defer. Do I have a second?

Mr. Shimabuku: I second.

Mr. Tanaka: It has been moved and seconded. **The application for the variance has been deferred.**

Mr. Giroux: Can we have a date for that?

Mr. Shinmoto: You have to act by December 10<sup>th</sup> because of the 60-day requirement to take action from the close of public hearing, which is today.

Ms. Kapua`ala: Could we leave the hearing open, or is it going to be closed because testimony has already been taken?

Mr. Tanaka: Yeah, it has been closed. So the item will be deferred to—?

Mr. Shinmoto: It will be scheduled on December 10<sup>th</sup>.

Mr. Tanaka: December 10<sup>th</sup>. Okay, back to our agenda. Here we go.

**C. APPROVAL OF THE OCTOBER 8, 2009 MEETING MINUTES**

Mr. Tanaka: The next item would be approval of the October 8, 2009 meeting minutes.

Mr. Kamai: Move to approve.

Mr. Tanaka: It's been so moved. Do I have a second? We need a second.

Mr. Shimabuku: I second.

Mr. Tanaka: Second. Okay. **Meeting minutes have been approved.**

**D. DIRECTOR'S REPORT**

**1. Status Update on BVA's Contested Cases**

Mr. Tanaka: Director's Report. Trisha, do you have a status on the update?

Ms. Kapua`ala: There really is no status update, sir. There's been no change since – for about a month since I came back from maternity leave. There were status conferences set up; however, all have been deferred.

Mr. Tanaka: Okay, but yet we have a full agenda for our next meeting? Is that what you said?

Ms. Kapua`ala: We have a full agenda for next meeting: one variance, two appeals. One of the appeals is a deferral. You might be familiar with that case.

Mr. Shinmoto: The Jim Whitehead Wall.

Mr. Giroux: Is Randy the hearing officer on that one?

Mr. Shinmoto: It just got deferred because the applicant wanted to pursue getting administrative approval from the Director of Public Works, and we don't know if he was successful or not, but it's scheduled for the November the 25<sup>th</sup> meeting.

**E. NEXT MEETING DATE: Wednesday, November 25, 2009**

Mr. Tanaka: Okay, so our next meeting is Wednesday because of the Thanksgiving holiday, November 25<sup>th</sup>. And we'll as usual be notified in advance. Thank you very much, everyone. Meeting adjourned.

**F. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at 3:52 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Kevin Tanaka, Vice-Chairman  
William Kamai  
James Shefte  
Ray Shimabuku  
Rachel Ball Phillips

**Members Excused:**

Randall Endo, Chairman  
Stephen Castro, Sr.  
Sandra Duvauchelle  
Harjinder Ajmani

**Others:**

Aaron Shinmoto, Planning Program Administrator, Planning Department  
Trisha Kapua`ala, Staff Planner, Planning Department  
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel  
Lesli Otani, Civil Engineer, Department of Public Works, Development Services Administration