

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
JANUARY 28, 2010**

(APPROVED: 2/11/2010)

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, 1:35 p.m., Thursday, January 28, 2010, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

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

Chairman Randall Endo: The meeting of the Board of Variances and Appeals will now come to order. It is January 28, 1:35 p.m. Let the record reflect that we have a quorum of five Board Members present. I would like to make a few initial remarks. There's a sign-up sheet where you can sign up to testify. And I will be allowing public – or we will be allowing public testimony as to each agenda item as they come up. So you don't have to testify at the very beginning if you're talking about the third or fourth item today. But if you have to leave early and just need to speak early in advance, you can do so. You will be limited to three minutes of testimony. And I should – I'm not trying to stop anybody from testifying or from giving a full presentation, but we do have a bare quorum, and some of us do have some other appointments this afternoon. So I'm going to try and with the Board's cooperation, try and move our agenda items along at a slightly faster pace than normal. Okay, so with that, will the Planning Department call the first matter?

B. PUBLIC HEARING - VARIANCES

1. **CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (LDS), A UTAH CORPORATION SOLE representing MAUI LANI VILLAGE CENTER, INC. requesting a variance from Maui County Code, §19.78.020(B)(1)(b)(iv) to allow a church steeple to exceed the 30 feet height limit by 37 feet and 8.25 inches for the proposed Kahului LDS Church, to be located off of the future extension of Maui Lani Parkway and Kuikahi Drive, Kahului, Maui, Hawaii; TMK: (2) 3-8-007:151 (por.) (BVAV 20090014)**

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

Chairman Endo: Thank you. Do you have a video presentation?

Ms. Kapua`ala: What I have for you is a conceptual master plan which has been submitted by Maui Lani. This is the area where the proposed development will be. This is the Pomaikai Elementary School. This is Maui Lani Parkway, and this is Kuikahi Drive. So this is the proposed area. As you can see there's residential uses that are proposed here, a commercial mixed village area. The Dunes at Maui Lani is located here. These are existing single family subdivisions: the Traditions, the Legends, Na Hoku. This is just to give you an idea of what the proposed development will look like. And here representing the applicant is Mr. Mich Hirano of Munekiyo and Hiraga. He has a power point presentation for you.

Chairman Endo: Thank you. Let the record reflect that Member Ajmani has now joined us and we

now have six Members present.

(Mr. Harjinder Ajmani entered the meeting at approximately, 1:36 p.m.)

Chairman Endo: Will the parties please make an appearance?

Mr. Mich Hirano: Good afternoon, Chair Endo and Members of the Board of Variances and Appeals. My name is Mich Hirano with Munekiyo and Hiraga. We've prepared a power point presentation to provide some information on the project for the Board Members. It's on the desk in front of you. And with me today is Arnold Wunder who is the State President for the Church of Latter-day Saints, the Church of Jesus Christ of Latter-day Saints, and as well, Alvin Yoshimori is with GYA Architects, and he will as well help in the presentation in this morning or this afternoon.

The request before you is a variance for the steeple height for the LDS Church at Maui Lani. I'd like to just again provide some background information for the Board Members. The need for the steeple height—The LDS Church property is zoned PDWK-1 residential within the Maui Lani Project District. Churches are permitted as a special use in the residential district in Maui Lani and throughout Maui County. The maximum height in the residential district is 30 feet. The LDS Church building overall is under 30 feet. The variance is only required for the steeple. Just to give the Board Members and the audience the orientation of the project site, this is Kuihelani Highway. Kahului is out in this area. Maui Lani Parkway is in this configuration. This is the roadway, Maui Lani Parkway. And Kuikahi Drive is on the lefthand side of the church property. The church property is at the intersection of Kuikahi Drive and Maui Lani Parkway, and it's approximately, a four-acre parcel. It's a fairly large parcel. Right now— This is Pomaikai Elementary School. Right now, Maui Lani Parkway is built right out to the LDS Church site, and Kuikahi Drive as well is completed to intercept with Maui Lani Parkway. These roadways, however, are yet to be opened to the public, but they will be extended and will be public roadways in the very near future.

The height variance is, as I mentioned earlier, for the steeple. This is the cross section of the church plans. And as you can see, this is the 30-foot height limit at this point. The overall building of the church is under that 30-foot height limit, but the steeple extends on the roof line to a height 37 feet above the rooftop. I'd like to just add that currently, this is the built up area of the Maui Lani Project District as you see it today. These are the residential single family subdivisions. And then you have the Dunes at Maui Lani, the golf course. There are no current single family residences in and around the proposed church site.

Today, we would like to talk about the variance application. And I think it's important to talk about the symbolic message that the steeple represents. As well, we'd like to touch upon the technical justification for the variance application. And then Alvin Yoshimori will talk about the architectural features of the church and the steeple. So I would like to ask Arnold Wunder, President, Stake President, for the LDS Church to just talk a bit about the background of the LDS Church.

Mr. Arnold Wunder: Members of the Board, as I begin my testimony today, I just want to thank you for taking time to hear our appeal. I serve on a Commission for the County of Maui as well, and I know you take time away from your jobs and families to be here with us.

We would like to propose to you that the steeple that extends on – that we're asking for on this

church is a distinguishing architectural feature of any church building. As we drive through our communities, many of our churches have steeples which express that. The LDS Church style and design, the purpose of the steeple is to raise people's thoughts and vision towards heaven, and ties into belief – our belief of our ascension towards God. And it conveys a very strong LDS religious message. As you travel anywhere throughout the United States, any church building that has been built over the last 12 to 15 years utilizes this same type of design, and it instantly identifies itself as an LDS meeting house.

This meeting house that we're proposing to be built is it will be a regional stake center. As the Stake President, I preside over 14 LDS congregations in the County of Maui, and this will be our main gathering site when we have meetings that require all of our members on Maui to attend. We purposely purchased this slot, and we're looking at this area because it is centralized here on the Island of Maui, and really is in very prominent regional location for us. And this steeple will be a dominant design feature in the construction of this.

One of the important things for us as members of the church is our meeting houses are used for multiplicity of things. We have scout meetings in them. We have sport activities, wedding receptions, baby luaus, graduation parties, a number of things. But one of the purpose of the steeple is it brings us back to the fact that whether you're a member of the church or not, when you're at the facility for whatever reason you're at, you are in a church building. And that steeple brings that point out as a very important part for us. We feel that without the steeple, we would be limited in our ability to express our religious message to our members and to those in the community. Thank you. I'll turn the time back to our speaker.

Mr. Hirano: Thank you, Arnold. I'd just like to as well before – talk about two kinds of laws outside of the criteria for granting variances that also recognize what the church steeple represents. There's the Religious Land Use and Institutionalized Persons Act (RLUIPA). And this is a Federal law recognizing that churches have unique functional symbolic requirements of their buildings, spaces, or land. And the LDS Church steeple is an essential expression of LDS religious beliefs and the LDS theological requirements. As well, the steeple is represented as symbolic speech. And as symbolic speech, it's protected by the 1st and the 14th Amendment of the U.S. Constitution.

As I noted earlier, the approval of the variance for the steeple height will not alter the character of the neighborhood. The LDS Church will be the first development in the Maui Lani area in this particular location. The steeple height will not adversely impact neighboring properties. And the approval of the steeple height variance will not cause public health, safety, or welfare concerns.

And I'd like again to point the Board Members to some pictures of the area. As you can see in the foreground is the – this is the extension of Kuikahi Drive. This is one-bound lane traveling kind of northbound. There is a large median in the middle. And then this is the other travel lane on the other direction of Kuikahi Drive. Maui Lani Parkway is in the background, and that parkway extends out to Kuihelani Highway. And this is the existing conditions of the church site. And as you can see, the fairly significant landscaping features that will be bordering the project site, and then the LDS Church will be built on the four-acre parcel at the intersection of Kuikahi Drive and Maui Lani Parkway. Again, this is another picture of the site. As you can see, it's a fairly easy site, very flat. And right now, no surrounding property. So the church and steeple itself will not cause

any impacts to surrounding properties. And I think that's a very important consideration.

I'd also like to just talk a bit about the architectural features of the project, and I'd to ask Alvin Yoshimori of GYA Architects just to lead us through some of the project information.

Mr. Alvin Yoshimori: Mr. Chairman, Board Members, my name is Alvin Yoshimori, architect with GYA Architects. Today, what I'd like to present to you people is two items that – of concern as far as the steeple is concerned. The first function is the architectural feature.

As far as the architectural feature for this particular project, we had to do the steeple in proportion to the roof structure itself. So consequently, when we show you the slides of the steeple reflected on the roof, you'll see that it extends up to 67 feet, 8 inches. The steeple itself is only 8 feet wide at the base that sets on the roof, and the rest, the 37 feet, extends past that. We did try to accommodate the steeple in proportion to the rest of the building, and you will see that it's not a very overpowering structure. And the importance – the architectural feature or the importance of it is it symbolizes a place of worship and gathering. And consequently, we felt that the steeple was very important part of the church. As we present the other slides to you people, we'll show you slides that occurred, church functions that occurred on Maui in the '60s, and how the design evolved through the '80s – I mean, not '80, but the 2008.

This is at Lahaina LDS, and this was done in 1960s. So you can see the steeple is sitting on the ground. This is the Pukalani LDS Church was also done in the '60s, and this was also a ground steeple. Now, we're referring back to the year 2008, two years ago, when the architecture has now transformed into a classical revival, and the steeple now sits on the roof. And all the slides will now show you here on after, the steeple will be sitting on the roof itself. This is the similar tower with . . . (inaudible) . . . sphere that will reflect in our design at Maui Lani. This is the LDS Church on the – this was the Big Island? This is the LDS Church on the Big Island. This is the Kauai LDS Church. So the steeple is very important as far as the architectural feature is concerned. Again, we stressing that this is a place of worship and gathering. So the steeple is designed in proportion to the rest of the structure. The steeple height is designated to convey the LDS religious message which Arnold pretty much explained to you people. Okay. Thank you.

Mr. Hirano: Thank you, Alvin. I'd just like to now touch upon the criteria for the variance, and that – relating to the steeple and how the steeple meets the criteria for justification for a variance.

As noted, churches are permitted as a special use in the residential-zoned land. And churches have requirements which are different from residential zoning standards. The zoning is site specific and geographical. The assessment on special uses that we put forward is twofold. One is the use requirement that it is a special use recognized by the Maui County zoning provisions to be permitted in a residential area. However, there's also the design requirements that we would like to put forward. And we felt that the staff report that was assessing the variance application was limited in that it did not really adequately analyze the design. It analyzed the use, a special use, but it didn't address the unique design requirements as required by the LDS doctrine. So our assessment is that it is – it meets this criteria because of the very special functional requirements of design.

Practical difficulty is another criteria and unreasonable use of property is another criteria that is

used to justify a variance. The staff analysis, and I quote from it, is that the Department is not convinced that this is a difficulty that requires a variance to prevent unreasonable use of the property. And this was a very subjective assessment. And it did not take into consideration the full doctrines of the LDS Church and the significance of steeples to the LDS doctrinal belief.

There was in your package, in the staff report, a case that was cited about the Korean Buddhist Church in Honolulu. And the conclusion of that was that the hardship that was brought about the Korean Buddhist Church was self-induced. And I would like to just draw your attention to this letter from – that we provided from LDS's attorney, James Ellsworth, who looked at that particular case because it was used to justify kind of the denial of this application or that it didn't meet the criteria. And when we looked at the facts of that case, we really found that it wasn't really appropriate and fair to use that situation to base a decision on the LDS Church application.

And when you look at the facts of that particular case, the Buddhist Church in Honolulu had a building permit that was approved by the Department of Construction or Department of Public Works at the County of Honolulu, which allowed that building to be 66 feet high. And those were the approved plans for the building. When they went into construction, they added another floor to that building without getting the plans permitted, without getting the plans reviewed and permitted and modified. So they went through the process. They built a building that was not to the specifications or to the approval, built another story on it, and then sought an after-the-fact permit for that to – because they exceeded the permitted height of 66 feet by building another story onto that building. And then they appealed the County's decision on that. And then the Judge ruled in favor of the County saying that they inflicted that hardship upon themselves by changing the plans and not getting approval for that. Well, that's not the case in this particular application. The application is being brought before you before the plans have been submitted to the County. The special use permit application has been submitted to the County, but has not been reviewed. The applicant is coming to the Board of Variances first for approval of the proposed development. And as well, the proposed development in this particular case as we have shown meet the criteria to grant the variances. So I think it meets the criteria and it's before the building has actually begun construction.

The hardship for this particular application is that the geographical conditions of the property are governed by the zoning. And the residential zoning standards for churches should recognize that churches are special uses and have unique design requirements different from residential standards. As I noted that the zoning is on this property, residential; however, churches are permitted as a special use in the residential district. But the zoning standards are really for single family stories or two-story residential buildings. They're not really developed for churches. And so that is the hardship that's brought upon this application. They're permitted as a special use, but the zoning standards do not recognize their special design requirements. For example, in the – our own Maui County Code, in the – or in the agricultural district, there is a zoning standard for buildings, agricultural dwellings, which is 30 feet in height. But for other related agricultural uses such as silos or farm buildings, there's a different standard for height that they are allowed to go to. And that is a ratio of a setback for every foot of height exceeding 30 feet, they have to be set back an additional one foot from the property for every vertical feet that they go up. So I think that the analogy is that there is recognition of special uses within various zoning districts and for different kind of buildings. But in the residential situation, that doesn't apply for churches or schools, as a matter of fact, as special uses that are permitted. And that is a hardship that the LDS

Church is alluding to in this particular case. It's imposing residential standards to a nonresidential building such as a church or a school.

In conclusion, the LDS Church variance for the steeple has met the criteria for a variance. The LDS Churches with steeples have been built on Oahu, on the Big Island, and Kauai, as well as the existing LDS Churches of Lahaina, and Pukalani, and Kaunakakai on Molokai, which all have steeples that exceed 30 feet. I've also been involved in height applications and variances that were approved by this Board for Pomaikai Elementary School, for Kamehameha Schools up in Pukalani, as well as there have been variances, height variances for the Jesus Is Alive Church. So precedent has been set, has been made, and recognition of unique functional uses of schools and churches in residential districts have been recognized by this Board. So the LDS Church requests that the Board of Variances grant the variance to allow the proposed steeple height. So thank you very much.

Chairman Endo: Thank you, Mr. Hirano. At this point, we would like to allow the public to testify. Like I said earlier, we're trying to move things along at a slightly faster pace than normal. So initially, could I see a show of hands of who's gonna testify on this agenda item? Okay, it's not too bad. I would just want to recommend that if you are going to come up after somebody, and you're going to say exactly the same thing, try and shorten up and say, you know, I support it for roughly the same reasons as the prior testifier. After that, Mr. Hirano, are you going to waive reading of the Planning Department's report?

Mr. Hirano: Yes.

Chairman Endo: Okay, thank you. And then, before we go to public testimony, are there any letters in opposition or in support of this variance request?

Ms. Kapua`ala: No.

Chairman Endo: Okay. Our first testifier on this agenda is Thomas Miyamoto, and you'll have three minutes.

Mr. Thomas Miyamoto: Good afternoon, Mr. Chairman, Board Members. My name is Thomas Miyamoto, and I'm here to say a little about the future use of the proposed building, the Church of Jesus Christ of Latter-day Saints in the Maui Lani Subdivision.

First of all, its main use is for religious meetings on Sundays. Other meetings and activities are scheduled throughout the week from Monday through Saturday. Young men, ages 12 to 18, of the church use it for Scouting and other activities at least one night per week. The young women of the church, ages 12 to 18, meet once a week to learn sewing, crafting, and other activities such as cooking, dating, and dancing. The ladies auxiliary known as the . . . (inaudible) . . . Society also meets monthly to learn and share with other – with each other such things as family relationship, emergency preparedness, crafts, homemaking skills, homemaking, cooking, sewing, and other activities. The younger girls, ages 8 to 11, also meet to learn crafts also. Other groups and auxiliaries also use it throughout the week for specific meetings.

The proposed building will not only be used by one congregation, but two. The building will be well

used. The church building is also used for funerals, weddings, baptisms, birthday parties, graduation parties. And the family history center where people have access to various types of records to help trace their genealogy will be available to all people in the community, but not only just for their church members. The Boy Scouts of America uses the building for meetings also. The Blood Bank will be using the building for blood drives. Counseling sessions for drug and alcohol abuse will also use the building. In the future, this building could be used for an evacuation center being away from the lower coast during a tsunami or a hurricane. This also benefits the entire community. For this reason, I recommend that this variance be approved. Thank you very much for your consideration.

Chairman Endo: Thank you. Any questions for Mr. Miyamoto? No? Thank you. Next we have Richard Olsten.

Mr. Richard Olsten: Good afternoon. Is it possible that the other members of the church that are here in support of this project they could stand at this time to identify themselves?

Chairman Endo: Sure.

Mr. Olsten: Thank you. I'm here to speak this afternoon on the importance of the steeple. I'm a member of the Church of Jesus Christ of Latter-day Saints, and speaking of what the steeple – the significance of it, and what it symbolizes for the church.

In the United States, churches and steeples are almost inseparable. Just as we associate shapes with items such as stop signs, the Coca-Cola bottle, or the Red Cross, so too the shape of a steeple represents the church. In December 1832, the Lord commanded the members of the church to build a temple in Kirkland, Ohio. They were to establish a house, even a house of prayer, a house of fasting, a house of faith, a house of learning, a house of glory, a house of order, a house of God.

The plans for the Kirkland Temple were shown to the first presidency of the church, Joseph Smith, Sidney Rigdon, and Frederick G. Williams in a vision. The three men knelt to pray and they saw a vision of the temple. During the building of the temple, someone tried to get Joseph Smith to change some of the design, but Joseph insisted that the temple be built just as it appeared in the vision. Frederick G. Williams said that when the temple, Kirkland Temple, was completed, it looked exactly as it had in the vision. The Kirkland Temple was also a special meeting house where the Saints held their church meetings as we do today.

Members of the Church of Jesus Christ of Latter-day Saints believe that our purpose on earth is to become like our heavenly Father by emulating the life of his son, Jesus Christ, and one day return to live with him. The steeple is inspiring. It points towards to heaven, to our heavenly Father, and our Savior Jesus Christ. It reminds us of the faith encouraged of the first members of the church in carrying forth the Lord's plans and construction. It reminds us of the covenants that we made at our baptism. The steeple reminds us of the covenants we have made in the temple. And it reminds us of our goal to become like our heavenly Father and to return to live with him. Mahalo.

Chairman Endo: Thank you. Any questions for Mr. Olsten? No? Thank you. Next we have Robert Krueger.

Mr. Robert Krueger: Thank you. My testimony is on a more personal note. Twenty-two years ago, my wife and I were not married. She took me to church and had missionaries teach me the gospel. When I attended church, I met with the congregation and I could feel a special spirit there. In this church meeting house, I learned about the gospel, and as a result, we got married. And then I entered the waters of baptism. I became a member of the Church of Jesus Christ of Latter-day Saints, the Mormons.

In this chapel, I received the priesthood. I blessed and baptized my children. My family was blessed as we lived a gospel-centered life. We spend many hours in our church meeting house. On Sundays, we keep the Sabbath day holy and we attend our church meetings. During the week, my children go to scouting and youth meetings. In the morning before high school, they go to seminary and they study scriptures. As a result, my oldest son earned his eagle scout award, and he served a two-year mission in Japan blessing the people there. My two daughters earned the recognition awards for the young women program that they attend. My older daughter this weekend just got married in the Kona Temple, another sacred church building. And her husband also served a mission. These three older children of mine attend college. My youngest son has already completed his eagle project. He's 16. His goals are to attain his eagle scout award, serve a two-year mission and go to church college. My family and I love our church meeting house. They attend meetings and learn to become good neighbors. We celebrate birthdays, baptisms, graduations, weddings, anniversaries. We even celebrate the lives of the loved ones we know from church as they pass on, but now we've outgrown our beloved chapel.

Fortunately, we are blessed to have a new church meeting house centrally located with good access for church members coming from all areas on Maui. The Maui Lani Stake Center will be blessed and dedicated onto the Lord. This new building will be carefully landscaped. It'll be visually appealing to the neighborhood. I ask you to please consider our request for a height variance for our steeple. This new church building will mean so much to so many people. We want this building to be beautiful. We want it to look beautiful and be balanced. And we especially want to please our Father in heaven. Thank you.

Chairman Endo: Thank you. Any questions for Mr. Krueger? Seeing none, thank you. Does the Planning Department have a recommendation?

Ms. Kapua`ala: Based on its analysis, the Department of Planning finds that:

1. There is no exceptional, unique, or unusual physical or geographical condition existing on the property which is not generally prevalent in the neighborhood or surrounding area;
2. Strict compliance with the applicable provisions of this title would not prevent reasonable use of the subject property; and
3. The conditions creating the hardship were the result of previous actions by the applicant.

Based on the foregoing findings of fact and conclusions of law, the applicant has not met all of the requirements for the granting of the subject variance. Therefore, the staff recommends DENIAL

of the subject variance.

In consideration of the foregoing, the Department recommends that the Board of Variances and Appeals adopt the Department's staff and recommendation reports prepared for this January 28, 2010, meeting and authorize the Planning Director to transmit said findings of fact, conclusions of law, and decision and order on behalf of the Board of Variances and Appeals.

Chairman Endo: Okay, at this point, we would like to allow the Board Members to ask questions of the applicant or the Planning Department, and begin deliberating. Member Kamai?

Mr. William Kamai: Yeah, regarding any of the other steeples located in the other locations of the churches, was there any variances sought for those steeples?

Mr. Hirano: We are not positive on that. We had asked the contractor to see if that was the case, but as you can see from those steeples that they are quite high, and they're the standard design. And we would assume that they had received some sort of variance to have that built. The Pukalani and Lahaina buildings were built in the '60s and that was before comprehensive zoning was established. So I think they're kind of nonconforming existing uses.

Chairman Endo: Any further questions?

Mr. Ray Shimabuku: In regards to the other facilities, you have here 226% deviation from the requirements. Is there a percentage for the rest of the facilities as far as how high they went?

Mr. Hirano: They are all under the 30-foot height limit. So it's only the steeple that is above that. And the reason that analysis was done is that – you know, the height limit is 30 feet and the steeple is 67 feet. So on that basis, they determined – the staff's analysis was that it was, you know, above the height requirement by 220%, but when you look at the steeple itself, it's a very small part of the church building. That church building overall is 2,500 square feet, which the steeple is approximately, 7 feet by 7 feet. So the area of the steeple is approximately, 50 square feet over a 2,500 square foot building. So it's a very small portion of the building in which the LDS Church is asking for a height variance. Does that answer the question?

Mr. Shimabuku: Actually, I was looking for a percentage of the heights from the other churches compared to this one.

Mr. Hirano: Oh, I see. I'm sorry. I don't have that. I don't have that information, but as I noted, there was a – those are standard designs of the LDS Church.

Chairman Endo: Hari?

Mr. Harjinder Ajmani: You mentioned that Pukalani and Lahaina was built in the '60s. Have there been any new church built here in Maui County in the last few years which may have come under the jurisdiction of the current codes?

Mr. Hirano: Well, not for the LDS Church, but I personally handled a variance for the chapel at the Kamehameha Schools, and that variance exceeded the height, and that was approved.

Mr. Ajmani: I see, but I think the exceeding of the height is not an issue. I think exceeding to what extent is the issue. And I was wondering if there are other—

Mr. Hirano: I'm not aware. I'm not aware of that. I'm not aware.

Mr. Ajmani: So there is any special religious significance for the 67-foot height?

Mr. Hirano: I think it was basically the — based on the models, there are three standard models of church buildings, and this is the legacy model. I'm not sure of any other than just what Alvin Yoshimori mentioned about just being in balance with the rest of the building. I'm not sure of any other formula of proportion that indicated why that — of a specific height.

Mr. Ajmani: Is the design of the steeple something unique for the LDS Churches?

Mr. Hirano: Yes, it's a distinguishing feature of the LDS Church is the steeple. And that's why in our pictures we show that they have prominent steeples. And as Alvin had mentioned there are basic designs for LDS Churches. This is the legacy design in that it serves as a functional building for a number of people. And they felt — the LDS Church felt that this was the appropriate model for serving the Stake on Maui. Yes, Alvin . . . (inaudible) . . .

Mr. Yoshimori: Mr. Ajmani, I just wanted to let you know that when we received the documents from the LDS Church on their different models that they had what we did was most of the models that came to us was of steep roofs. Because they were Mainland built, they were concerned about snow loads. So therefore, the roofs exceeded the 30-foot height limit. But when we met with the LDS people here on Maui and with Mr. Mich Hirano, we decided that the buildings could be reduced in height as far as the roof concern. We can flatten out the roof because we don't snow loads to speak of. So consequently, we reduced the chapel area roofs down to below the 30-foot height limit, and we proportionately designed the steeple to accommodate the 30-foot height limit. And we had the church people look it over, and they accepted that reduction. And consequently, that's the evolution that you see here today. Does that answer your question?

Mr. Ajmani: Yeah, I think that sort of gives me some explanation, but I still don't quite understand if the total height has any significance. You know, I don't think in all the churches that I have or seen always have all the steeples which project beyond the roof line and so on. I was trying to see if there was any — you know, proportionately, was there any significance if the roof is 30 feet, then it has to be 67 feet, or it has to be 67 feet, or—? I'm just trying to get some idea.

Mr. Yoshimori: I just think through the evolution of the design process that the church has gone through from the '60s to the year 2008, the steeple has gone back on the roof, and the proportion has been pretty much a design, so throughout the nation, they have a pretty similar height of the roof structure in proportion to the roof slope itself that consequently, that was the criteria that we based our design on also besides the changing of the materials that is not available here on Maui.

Mr. Ajmani: Okay, thank you.

Mr. Yoshimori: Thank you.

Chairman Endo: I have a quick question. Is there any position on the surrounding, the homeowners' associations with regard to this application?

Mr. Hirano: No, because there no homeowners in the area, and there have been no letters.

Chairman Endo: What about the master developer?

Mr. Hirano: Maui Lani?

Chairman Endo: Yeah.

Mr. Hirano: They're supportive of the application.

Chairman Endo: Any other questions? Otherwise, the Chair would request that somebody make a motion.

Mr. Kamai: I'd like to make a motion that we approve this variance.

Chairman Endo: Is there a second?

Ms. Rachel Ball Phillips: Second

Chairman Endo: Okay, it's been moved and seconded to grant the request for a variance. And, Mr. Kamai, I will assume that incorporated within your motion is to adopt the recorded rationale given in the applicant's application as the findings of fact testifying the meeting of the criteria for a variance.

Mr. Kamai: That's correct, Mr. Chair.

Chairman Endo: Thank you. Okay.

Ms. Kapua`ala: Excuse me, Mr. Chair?

Chairman Endo: Yes?

Ms. Kapua`ala: Staff would like to recommend that – an amendment to the motion to include the standard hold harmless agreement and insurance policy indemnifying the County at any amount that you desire.

Chairman Endo: Member Kamai, did you want to—?

Mr. Kamai: Yes, I'd like to make a motion to include the hold harmless agreement.

Chairman Endo: Okay. So you want to incorporate the standard conditions of Section 12-801-76.1?

Mr. Kamai: Yes.

Chairman Endo: So that would include having a liability insurance policy. Is that correct?

Mr. Kamai: Yes, of--

Chairman Endo: The standard amount is a million dollars.

Mr. Kamai: Of let's say maybe, ten thousand dollars.

Chairman Endo: Okay.

Mr. Kamai: Instead of the million dollars.

Chairman Endo: Okay, so just clarify your motion is to grant the variance with the standard conditions except with for the insurance being reduced to ten thousand dollars?

Mr. Kamai: That's correct, Mr. Chair.

Chairman Endo: Okay. If there's no objection, that'll be the motion, and the second still stand for that motion as clarified? Okay. Discussion? Hari?

Mr. Ajmani: I'm in support of giving the height variance, but I'm still troubled by the height of 67 feet in that neighborhood with what is going to come up over there, and how it's going to affect the views and the aesthetic of the people living around it. And so while I agree with having a variance for a steeple above 30 feet, I'm a little troubled by the height. Any other Board Member have any other thoughts on that?

Mr. Kamai: I do, Hari. And with the regards to the pictures, the slides, that were shown, it was just the steeple that was -- that needed the variance. And considering the size of this church, again, it was just the steeple that exceeded that -- needed that height variance. And that's what made me think that if somebody was to complain about the -- it wouldn't be the church, it would just be a steeple, and it didn't look like it would obstruct that much of a view for a neighboring house or a business. That was my reasoning.

Chairman Endo: Further discussion?

Mr. Ajmani: Yeah, I think my thoughts are that if we set a precedent like that next time somebody comes in and he wants to build a 200-foot pole over there, would we say, oh, it's just a pole. We should deviate from the height limit. Whether it's a right way of looking at it or not, that's what I'm sort of debating myself.

Mr. Shimabuku: I had a concern on the height also, but as Mr. Yoshimori had mentioned about the design of the church where the roof was much higher to accommodate the snow stuff, I think that would block the view and the height. But as far as the steeple, because it's so streamlined and thin, it would be able to see right around, so I'm in favor for the approval.

Chairman Endo: Further discussion? Hearing none, all those in favor of granting -- all those in favor of the motion to grant the variance, please say aye. Opposed, please say no. Okay, the

Chair votes aye.

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

VOTED: To grant the variance with the standard conditions except for the liability insurance being reduced to ten thousand dollars.

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

Chairman Endo: **And so the motion passes, five to one, and the variance is granted.**

Mr. Hirano: Thank you very much.

Chairman Endo: Can the Planning Department call the next item?

C. APPEALS

1. **JAMES W. GEIGER, ESQ., of MANCINI, WELCH & GEIGER representing UWE H. H. SCHULZ appealing the Department of Fire and Public Safety's decision to require an automatic sprinkler system for an existing lanai enclosure (Building permit application no. B T20080351) at the Kaanapali Royal Condominium located at 2560 Kekaa Drive, Kaanapali, Lahaina, Maui, Hawaii; TMK: (2) 4-4-008:023-0059 (BVAA 20080009)**
 - a. **Appellee County of Maui's motion requesting the Board to reopen case to take further evidence and to hear oral argument by the parties; Exhibit A.**

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

Ms. Kapua`ala: Representing the County of Maui we have Deputy Corporation Counsel Mary Blaine Johnston. Mr. Geiger is here. Mr. – I'm sorry. Judge McConnell, the Hearing Officer that you appointed is also here. And, Mimi, I guess you can go ahead as the maker of the motion.

Ms. Mary Blaine Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, appearing on behalf of the Department of Public Works and the Department of Fire and Public Safety. And I have with me today representatives from both of those Departments. And I want to– In looking back, this is a very specific motion. It's a motion in anticipation of what is going to come up before you on your agenda on February 11th which is consideration of the findings of fact, conclusions of law, and the Hearing Officer's conclusion and decision, recommendation to the Board. I wanted to bring this motion ahead of that time because I believe at the time you take into consideration the report, the objections that the County has filed and the conclusions in that report, and the opposition to the County's objections, that it may be a help to you have the opportunity to ask the key witnesses that were heard by Judge McConnell during the hearing so that you can ask some

questions you may have, and also the County would like to open the evidence to further testimony to address those issues that the Hearings Officer did not consider. So this is a very, very specific motion that's provided for by your rules.

Now, I wanted to do this today rather than wait till the time of the hearing on the 11th so the County wouldn't be charged with sandbagging somebody by requesting that evidence be put on. This motion gives you an opportunity to think about that issue. You don't even necessarily need to make a ruling on this motion today. If you want to defer it till the 11th when you have had a chance to study the kind of significant stack of documents that have been given to you in preparation for that hearing, that's fine, too, but what the County would like is for the opportunity and the option to be there, and the witnesses for both parties be prepared to testify in the event you want to hear that.

Now, the opposition to this motion— Well, first of all, let me just give you a little factual background about this case. This case involves the enclosure of lanais in a condominium project called the Kaanapali Royal. There are 15 separate buildings with a number of apartments whose owners over the years have enclosed lanais off of a second bedroom. There are some other lanai enclosure issues that are not part of this proceeding that will be taken up later. There were no permits obtained for any of these enclosures. Notice went out to the apartment owners. Originally, there were 67 that had enclosed their second bedroom lanais that they need to apply for after-the-fact permits to their lanai enclosure. Uwe Schulz, who is a respected former Member of your Board was one of those who enclosed his lanai in 2005 without a permit. The notice was both by the Fire Department of fire code violations and the Building Department of building violations. The matter came to the Board who appointed a Hearing Officer, former Judge John McConnell who I respect highly on, practiced in front of him for many years when he was a Circuit Court Judge. We believe in this case, his conclusions of law and findings were erroneous, and asking or will be asking by way of our exceptions filed to those findings for the Board to look at the recommendations and remind you that the Hearings Officer is not the final decision-maker. The Board is the final decision-maker.

In opposition to this particular motion, the appellee's – the appellant's attorney, Mr. Geiger, has said that – cited to some cases that say, oh, you can't open it up. You can't overturn it, but this is not correct. Those cases are not done in the context of this situation where you have – appoint a designated individual to hear the case for you and make recommendations. Judge McConnell's recommendations are not the final decision.

Rule 12-801-59, Board Action, of your rules, the – well, (a) says, "If no statement of exceptions is filed in as herein provided, the Board may proceed to reverse, modify, or adopt the recommendations of the Hearing Officer." Well, exceptions were filed. So, (b), "Upon filing of the exceptions and briefs together with the briefs in support, the Board may render its decision forthwith upon the record; or if oral argument has been allowed; after oral argument; or may reopen the docket and take further evidence or may make other disposition of the case that is necessary under the circumstances." So contrary to appellee's position that this is not warranted, your rules anticipate that this kind of situation can arise. So the motion I filed today is both to permit oral argument on the 11th as well as to open up, and let us present additional testimony which will give you an opportunity to ask questions of these individuals. As I said, the Board does not need to rule on the motion today. You can take it under advisement and decide when you've had more time to look over the submissions whether or not you feel that you would want to hear further testimony

and to ask questions of the witnesses yourself.

One further thing, the appellee's attorney cites to a case. We raise the issue that what the Hearing Officer has suggested this Board order is that the Fire Department be ordered to sign off of those building permits. This would be the Fire Department against its best judgement and evaluation as determined that these enclosed lanais do create a threat to life, safety that that would expose the County to liability cites to a case that actually has – there's a case that deals with where does liability lie between the County and a developer of the subdivision. It does address the issue of when – under the various codes in this case, the Fire Code, when the Department feels that this is not a safe thing to do without putting in a sprinkler system. And these lanais can stay there. It's just that they need to sprinkle the building. You're forcing them to do something and verify that this permit's okay. You've met all the safety concerns. And this certainly in this case would be not what is a very strong decision of the Fire Department, the reason that they wouldn't sign the after-the-fact permit in the first place.

So all I'm asking you to today by this motion is to hear oral argument from the attorneys, and also to at least if not saying today that you will permit further testimony, that would be nice because then we would all need to get prepared, but at least say that see what happens, and if we decide we wanted – you can go forward with the additional evidence and testimony on February 11th, then we can just be prepared to do that. So that would be my request to the Board. Thank you.

Chairman Endo: Just procedurally, I guess we'll let Mr. Geiger speak. And then maybe we'll give Judge McConnell an opportunity, if he wants to make remarks, and then you can have a final rebuttal.

Ms. Johnston: Okay, thank you.

Mr. James Geiger: Thank you, Chair, Members of the Board. My name is Jim Geiger. I am here representing Uwe Schulz who is the appellant in this matter. There are also some intervenors, other owners, who have their own counsel who is not present today who also filed an opposition to this particular motion. And I will tell you that Mr. Schulz is present here today for the record as are in excess of ten other owners.

This particular condominium project has 105 units. Seventy-one of the units have had lanais enclosed as long ago as 30 years on up to about five years ago. So this is very important to all of these people here. It's been going on for a while. We would like a determination sooner rather than later.

We are here on a very discrete issue. And I'm not going to address the specifics, the merits of the case, because that's going to come later on. We're here because appellee wants to have you come in and say we want to ask additional questions. Now, the only basis for this in 12-801-59(b), which says that after a contested hearing, and the Hearing Officer has submitted his report, and his findings, and his proposed conclusions, then this Board can do one of four things. They can either – if there were exceptions, which they were, and support, which there was. They can either have no argument, and just go ahead and rule based upon which you have. That's an option available to you. You can have oral argument from the parties, and say we're going to go ahead and listen to you. You can explain things to us. You can say, no, we're going to reopen the

evidence. We're going to reopen the hearing for further evidence. That's important, further evidence. And then finally, it has a catchall that says, well, we can do whatever we feel is best under the circumstances. Unlike the variances where you have some criteria, there really is no criteria as to what you're supposed to choose of these four items. It's up to you. It's up to your discretion. We understand that. But the cases that we've provided to you, and more importantly, the legal . . . (inaudible) . . . These are statements by professors who have had experience of administrative law, who have looked at all the cases out there, who have written on this, and they've come up and they've said this is how it ought to be done, and they've given you a criteria. They say that you can reopen the evidence, but only in extraordinary circumstances, extraordinary circumstances. Why would they say that? Well, it's real clear.

First of all, if you could reopen the hearing at any time if you wanted to, then there's no discretion. You have to do it in every case. You have no discretion about it. Any time anybody wants to come in and say I want more evidence, you'd have to say, okay, sure, we gotta do it. Clearly, there has to be some reason why you can exercise your discretion. That means there has to be extraordinary circumstances. The other reason is a common sense reason. You've hired a Hearings Officer to do action for you. You've paid him good money, and you've said you go out. You make the record for us. You have the witnesses testify. You create the record. You give it to us with your proposed findings, with your proposed conclusions, and then we review that. You've hired somebody to do that. You've paid him to do that, and so what you're now saying is, oh, gee, well, we can just decide we're gonna ignore all that? Not unless there is a very good reason, and that's what extraordinary circumstances are.

The cases that we cited you showed that are three bases for an extraordinary circumstance. Number one, that there is a change in the law. How would that apply to this case? Maui County Council comes in and says, okay, particular ordinance upon which Judge McConnell said the case turns, we're going to change it to make it apply retroactively. They haven't done that. So you don't have that extraordinary circumstance. You have a change in facts. That would be a situation like, for example, Mr. Schulz sold his unit. He's no longer the owner. Then you have to have somebody else come in. That would be a change in circumstance where you could open the record to have a complete record. Have the proper party before you. We don't have that, and there is no allegation that there is any of that. The third thing would be if there was newly discovered evidence. That would be where they'd have to come in and say, oh, well, there's been some change. For example, there was an individual with the County who had meetings with people. It may have been notes that he took of those meetings. We couldn't find them before. Since the day of the hearing, we found the notes. It adds information. It's newly discovered evidence. They don't have that. They have said nothing to you other than, oh, gee, it might be a good idea for you guys to ask your own questions. That's not an extraordinary circumstance. And if you open it up based solely on that, I will tell you that that is an abuse of your discretion because you're not saying that there's anything different about this. You're just saying, oh, wait a minute, we wanna ask our own questions. You're telling the Hearings Officer, oh, gee, we'll ignore whatever you did. We just wanna ask our own questions. That would be an abuse of discretion. You cannot do that.

I think the last thing I'd like to point out is that the cases also indicate that you shouldn't open a hearing, reopen a hearing, if there's going to be undue delay. And the reason for that is you don't want to prejudice people. You want people to have finality so they can go forward. These people out here who had these enclosures, some of them have been there for 30 years. If this thing

continues to drag on, and it will because if you reopen the testimony, you're gonna have to re-notice that there's a contested case. You're gonna have to provide notice to the public that they can come in and testify about this. All the parties are gonna be able to bring in the witnesses in. And they're gonna be able to bring in not only those witnesses that you may wanna hear, but any other witnesses that are necessary for rebuttal purposes. A supplemental transcript will have to be prepared, which will have to be typed up and given to you before any findings of fact or conclusions can be done. The parties have an opportunity and a right to submit supplemental proposed findings and proposed conclusions. That's gonna add more delay. After all of that, even if you don't have any more argument from us, you're gonna have to go through all of the proposed findings, all of the proposed conclusions, all of the record, and come up with your own proposed findings and conclusions. And then after those are prepared, you're gonna have to have another meeting at which you vote on those. What we're talking about is not a delay of two weeks, not a delay of two months. We're talking about a minimum of four meetings that you're gonna have to have. Four months, minimum. Now, that's undue delay that is not necessary in this case, and it's not necessary in this case because all of the arguments that they're raising, and all of the testimony that they wanna get in was given to the Hearings Officer. He addressed it in his report. They want another bite at the apple to convince you guys that, oh, well, gee, maybe you should come to a different conclusion. That is not how the process is supposed to work. That is not how the process works. And that is not extraordinary circumstances. So to open it up based solely upon what they've given you would be an abuse of this Board's discretion. And we certainly don't believe this Board will take such an action. We recognize and believe that this Board understand its duties. We hope that you'll want to proceed forward to help us out. We've been pending on this matter for two years now and we'd like a conclusion. Thank you.

Chairman Endo: Okay, at this point, does Judge McConnell wish to make any remarks?

Judge John McConnell: Mr. Chairman, John McConnell. I don't think it's really my place to tell the Board what to do on a motion to reopen. The only thing I guess I would add, and this may go to the merits and get both of these people mad at me is that you might wanna defer the motion as Ms. Johnston has suggested until you hear what the case is, really, the totality of the case, because I have high regard for the Fire Department. And I don't lightly take the position contrary to Fire Department testimony, but I think there is a mixed question of fact and law here that is the basis really for my decision. And if you can go into that on February 11, I'd be happy to explain why I said what I did.

Chairman Endo: To me, it does appear that the motion is somewhat premature because we haven't actually read the reports, or the exceptions, or anything, so we don't, in my mind, know whether or not we want to reopen yet until we've reviewed all of those things. That would be my initial—

Judge McConnell: You may not want to or you might, but it's — it really requires a good look at the case.

Chairman Endo: Okay. Thank you, Judge. Ms. Johnston?

Ms. Johnston: First of all, as I suggested, you may wanna defer ruling on this motion until the 11th. Second, however, I want to respond to a couple of arguments made by Mr. Geiger.

He's citing to some cases that are outside the purview of this sort of situation when we have an administrative panel here that delegates the duty. None of his cases deal with that circumstance. Your rules do not say that you can only open up testimony or only hear oral argument in certain three to three situations he described. You're given – you have given yourself carte blanche. It's basically the jury to hear what you feel you need to hear. As far as the delay issue, I purposely filed this motion to be heard today because if I came here on the 11th and said please open it up, there would be screams, sandbagging, it's not fair, you didn't give us notice. So this is why I intentionally filed it today to give you time to think about it, and think when you are reviewing for February 11th, if there are things that you would like to have opened.

Now, as far as his argument that this is gonna be delay, delay, delay, if it takes a little bit longer to get it right, then it's going to take longer to get it right. I've tried to speed it up by bringing this motion today so on the 11th we don't say, we can't go forward. We have to put it off so we can get our witnesses. We all know that coming in on the 11th that you may decide that you want to hear further testimony. So rather than delay, this is a matter of speaking up.

This is a contested case hearing. This is not where the public – and James can correct me if I'm wrong, this is not where the public has an opportunity to come in and comment on this case. That's not – you're not sitting in that capacity on this matter. So re-agendizing, re-advertising, no, those are just not – that's just not what's happening. It will be on the agenda, and you may decide to let people come in and speak to the issue, but they're not part of the case. And they don't get to give testimony on the case because they're not in it.

So I would just urge you to – in court, they would say take the motion under advisement. Think about it. When you prepare for the 11th, think about what you want to do whether you want to take further testimony based on the observations that have been made in the appellant's objections as to what was not really dealt with as part of this proceeding, and then make a decision at that point in time. We'll be here. We'll be ready. We'll have the Fire Department. We'll have the Building Department. There is a second issue that – a legal issue, a very legal issue having to do with Building Code, but we're focused on the fire safety and the life safety issue because that was the focus of Judge McConnell's conclusions. And so I thank you for your time. If you have any questions, I'd be happy to answer them.

Chairman Endo: Okay, before we deliberate on the motion, is there anyone in the public would want to testify as a member of the public on this agenda item? Seeing none, we're going to open and close public testimony as to this agenda item. If I'm may, with the Board's approval, the Chair would suggest that the Board defer ruling on the motion until the next meeting when we actually – or not the next meeting, but the actual meeting where we hear the case, because at that point, we will actually see the evidence in terms of – well, at least hear about it through the Hearing Officer's recommendations. We can have oral argument and get in-depth into all the facts. And at that point, I would hope that it should become clear then as to whether or not we feel we need more information about this or that. So at that point, it would be more appropriate, I believe, to rule on this motion to reopen the case. So does anybody have any objections to doing it that way? No? Hari?

Mr. Ajmani: I don't have any objection. Just one question. There is a Hearing Officer's report in here. So we are expecting some more reports next time?

Chairman Endo: There'll be the exceptions by each side – optional.

Mr. Ajmani: Included in here?

Chairman Endo: Yeah. And then there will be – typically, we would allow the parties to have oral argument. And in fact, we can just tell them now, is there any objection to allow them to have oral argument because that's usually quite helpful? So seeing no objection, you can count on having oral argument. Okay. Does the Planning Department have any comment on the matter?

Ms. Kapua`ala: No.

Chairman Endo: Okay, so by consensus then, we will do what I said. Thanks. So we'll take – yeah, so we won't rule. We'll take it under advisement, and you can argue it again at the hearing.

Ms. Johnston: You should have in your packets, I think– Trisha, do they have everything?

Ms. Kapua`ala: In the next agenda mail-out, they will receive the Hearing Officer's proposed findings, the exceptions, and the support memos. They'll have it in front of them at the same time as the – well, they'll just keep – hold on to your motion today.

Mr. Geiger: I'll assume that they'll also get the record?

Ms. Kapua`ala: No, we do not transmit the transcripts or any other pre-hearing documents.

Mr. Geiger: Okay, thank you.

D. UNFINISHED BUSINESS

- 1. JAMES G. & ELIZABETH P. WHITEHEAD requesting a variance from Maui County Code §19.30A.030(F) to allow an existing wall, approximately five (5) feet in height, to remain within the agricultural setback area whereby a maximum of four (4) feet in height is allowed, for property located at 701 Kai Hele Ku Street, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-010:017. (BVAV 20090007) (Deferred from the November 25, 2009 meeting)**

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

Ms. Kapua`ala: And again we have Mr. Whitehead as the applicant. Deputy Corporation Counsel Jane Lovell is here representing the Department of Planning. Thank you.

Chairman Endo: Is there anyone here in the public who wishes to testify on this agenda item? Seeing none, we'll close public testimony as to this agenda item. And I know we didn't have enough time to rule on this application. Does the Planning Department want to give us a summary of where we are procedurally?

Ms. Kapua`ala: In the first meeting, Mr. Whitehead had waived his – waived the applicability of the

60-day and the 120-day rules as far as making a decision. So there is no controversy there. The last meeting that you saw Mr. Whitehead, the Board was deadlocked in its decision. It wasn't able to make a motion either way for approval or denial of the variance. And the Board also wished to see the Department of Public Works' decision as to Mr. Whitehead's request to allow a wall in excess of four feet. So before you, you have the Department of Public Works' response to Mr. Whitehead's request. And Mr. Whitehead had also submitted a letter in response to the proceeding that happened last year. And for the record, on October 20th 2009, which actually was before we had met last time, the Department of Public Works made a decision that – well, I'll just read it into the record:

Mr. Whitehead, your request for an exemption to the wall height in the agricultural district per Section 19.30A.030(F) has been denied. In order to approve a wall over 4 feet in height, justification must be provided that the excess height is needed to retain earth, water, or both for health and safety reasons. The 5'-6" privacy/entry wall built along your road frontage does not qualify for this exemption.

And it was signed by the Director of Public Works, Mr. Milton Arakawa.

Chairman Endo: Thank you, Ms. Kapua`ala. So at this point, does the applicant wish to – has anything new occurred that you want to make a remark about?

Mr. Whitehead: Yes, I would. Good afternoon, Board. I wrote a letter to you, Mr. Chair. I'm not sure if you got the letter that I sent to you over a month ago. I put it in care of the County, the Maui Planning Department for you.

Chairman Endo: I see it in front of me now.

Mr. Whitehead: So what I was pointing out to you that I was going to go to the County Council because I feel this law is ambiguous. It doesn't cover all the bases. I wanted to see if the Council feels the same way. And I have been to the Council. I don't know if you've noticed that it was on a main agenda and it assigned to the Planning Committee for review. I have met with the Chairman of the Planning Committee, Sol Kahooalahala. He's in total agreement that this is a problem. The fact that I pointed out to this Board, and I pointed out to the Zoning Inspectors, you've issued permits in violation to your own law, yet you tell me you didn't do anything wrong that they don't apply. Well, we all know that's wrong because I've got a neighbor down the street who just recently got a letter from the Director of Public Works, same as mine, disallowing exemption for a wall in excess of four feet retaining wall, the same one that they issued a permit, same type of wall that was issued down the street from me in 2007 and on a number of other projects that I took pictures of and put in on my application. So I don't feel you guys should be caught in the middle of this. I mean, I had to do what I had to do go up and go to this variance thing, but I feel that really, I didn't do anything wrong because I didn't even know the law existed. Neither did anybody else. Neither even the Zoning Inspectors. Why would you issue permits and violation of your law if I'm wrong, and then start turning them down now since this has all come to a head? Well, the Chairman and other Council Members agree with me. It's a big mess. And they want to review the law to see if possibly the law should be changed, reworded, or deleted, just got ridden of because the real intent, and I was told at the very first meeting, it was view planes. This was for view planes. If you've got bushes right there 12 feet high, how is that not affecting the view plane?

If a five-foot is affecting it, then the 12-foot bushes should be too. So the first 25 feet, the law should say nothing over four feet, the first 25 feet. But as I said, I've met with two Council Members. They agree with me. They think something's seriously wrong especially since the County's issued permits in violation of this same law that I've been wrote up on, and they want to review it. And they're gonna do this as soon as possible. He wants to get a meeting before the budget hearing starts to get this out in the open, discuss it, have all the people come in that's got violations which apparently is just Launiupoko because some of the people I took pictures of up in Kula, Kahana, I actually spoke to them, and their walls were built after the law was put in effect. I promised them I would not turn them in. I told them— They're scared to death. The whole— Everybody in ag zones is scared to death. It's like the mafia is out there ready to get you. So I promised them all when I took the pictures and I talked to them, I would not disclose their names. I would not file a complaint against them. We're gonna try to work with the Council, all of us to see if this law is fair for everybody, and it really should be on the books. And if it is, and the question the Chairman had, if it's something to do with the building of a wall, why isn't the Public Works Department involved with it? Because it's not in their code. It's only in the Planning Zoning Code.

But I was really surprised when I got a letter from a person in this room from my neighbor rejecting him on the same thing that they just accepted and gave permits out for the last ten years. I'd like you to— I didn't realize I waived my right to any time limit. I thought it was 90 days or 120 days which we're over the 120, but if I did, I did. Okay? If you wanna nail me to the cross, give a year to tear my wall down, but in the meantime, I'm still gonna go through this Council thing. I think a lot of people are very, very upset because of such a small issue. No harm to the general public do these walls create, but it's like the Planning Department wants to bury everybody especially, Launiupoko. Why do they wanna just keep coming after us? No complaints have come up, or violations in Kahana have come up, Kapalua, Kula, Haiku, all these other areas with ag lots that all have these same walls. Some retaining, some just boundary, but no, no violations.

So I sound a little upset, and I am, and I'm sorry. I don't mean to raise my voice. I ask this Board to go along with us and the Council. Let the law be reviewed. Let the public speak up and see what the result of that is. If they come back and say this law is — this is it, it's gonna stay the way it is, so be it. But I think just to wait and see what the Council does with this through the Planning Committee as far as the wording of this law, I'd appreciate if the Board would take that into consideration before you do anything.

Chairman Endo: Ms. Lovell, did you want to make remarks?

Ms. Jane Lovell: Thank you. Good afternoon, Chair and Members. My name is Jane Lovell. I'm Deputy Corporation Counsel and I'm representing the Department of Planning in this proceeding. I'm afraid that some of the things that have just been mentioned by Mr. Whitehead are not really a part of the record before you. What you've been asked to do is to rule on a variance request. And in order to rule on a variance request, whether on this case or any other case, there are very specific criteria that by law you have to consider. And by law, you do not consider whether the Council might get involved, whether certain Council Members are interested, whether there might or might not some day be a change in the law.

You are required to consider whether there is an exceptional, unique, or unusual physical or

geographical condition existing on the subject property that is not generally prevalent in the neighborhood or surrounding area, and that the use sought to be authorized by the variance will not alter the essential character of the neighborhood. You're also asked to consider—I thought I had my cheat sheet right here, bear with me for a second—whether strict compliance with the applicable provisions of the Title would prevent reasonable use of the property. And finally, whether the applicant for the variance himself created the hardship.

Now, we haven't really heard any evidence in this case that there is some exceptional, unique, or unusual physical or geographical condition of the property that would warrant a variance. We haven't heard and I don't see how it could be that requiring the lowering of the fence or a wall would prevent reasonable use of the property. And we have heard in this case that Mr. Whitehead himself was the builder, that he was in the construction business for many years. So I don't think that he has established that the conditions creating the hardship that he's coming to you with were not the result of his own actions. So therefore, under the rules that you must follow in order to grant a variance, the criteria have not been met. And therefore, the Planning Department respectfully asks you to deny the variance.

Chairman Endo: Thank you. Okay, so the Planning Department could correct me if I'm wrong, but I know this has been going on for quite a few meetings now. It's been kind of taking many months. But we've heard all of the facts of the case, and we've read the applications, and we've heard a lot of testimony. I believe the Planning Department intervened. We granted their intervention. So we heard more evidence and we've heard from their – the Planning Department's attorney. So at this point, we can rule on the matter, and either grant or deny with or without conditions. Or if you don't want to rule and you want to defer for someone, you can make that motion, too, of course. So at this point, we'll throw it out to the Board. Hari?

Mr. Ajmani: Yeah, I think I would like to go and go ahead with the Planning Department recommendation and deny the variance.

Chairman Endo: Is that a motion?

Mr. Ajmani: That's the motion, yes.

Chairman Endo: Okay. Is there a second? Okay, there's—

Mr. Kamai: I'll second.

Chairman Endo: Okay. It's been moved and seconded to deny their request for a variance. Discussion?

Mr. Kamai: Yeah, I got a question for the Department. Okay, so say Mr. Whitehead's variance is denied, what's his next step? Is there a time limit on when he has to remove his wall? Or are there fines incurred? Is there a—? What's the next step?

Ms. Kapua`ala: We are in the warning process. I believe there is no notice of violation issued for your property. Is that correct, Mr. Whitehead?

Mr. Whitehead: Can't hear you.

Ms. Kapua`ala: Is there a notice of violation on your property? Our Inspector here is saying no. So we would work with Mr. Whitehead. We would like to work with him on a timeframe to remove the wall. And based on the cooperation of Mr. Whitehead, there should be no problems. We do have the authority to issue a notice of violation which comes with a thousand-dollar initial fine, a 30-day deadline to comply or appeal. And after the 30-day deadline expires, it begins accruing a hundred-dollar a day daily fine. Oh, I'm sorry, a thousand a day daily fine. So that is a possible recourse should we not get a – there should be no appeals or if Mr. Whitehead is agreeable to work with us. And after the decision and order, there is also a 30-day deadline to appeal to Second Circuit Court.

Mr. Stephen Castro, Sr.: I have another question for the Planning Department. Are there any other homeowners beside Mr. Whitehead in the similar situation that have perhaps complied or were not complied?

Mr. Aaron Shinmoto: Mr. Chairman, we have our Deputy Director, Kathleen Aoki, here present, and she can answer that question.

Chairman Endo: Okay.

Ms. Kathleen Aoki: Good afternoon, Commissioners. Just to give you some background because I wondered if this was going to come up, just for your information, we have issued a total of 49 violations – warnings, I'm sorry. Fifty-eight warnings, one violation. Of those, 13 have been for perimeter walls, 27 have been for pedestal walls, and 19 have been for columns. Now, out of those, 11 of the 13 perimeter walls have been fixed. So you have two remaining. One is Mr. Whitehead. I don't know who the other person is, but 11 out of 13 have been adjusted and lowered. Out of the pedestal walls, 9 out of the 27 have been addressed. Some of them, I understand, have been lowered and then they're just waiting for MECO and the electricians to come and – because they have meters attached to them. So you might have situations where the actual walls have come down but the meter's still sticking out, and then they're gonna adjust that. We do have applications for six variances for pedestal walls that are being processed right now: two for perimeter walls, one of which is Mr. Whitehead. So you have 44% compliance at this point from those that have been issued warnings. There's only been, as I said, one violation that was issued and we're working with that person.

So if you do not grant the variance, we would work with Mr. Whitehead and give him time like we have the other people to come into compliance, but there does come a point where if there's no compliance, we're obligated to issue a violation. And it's at that point, we issue the violation. That's when fines kick in, but we try to work with them to get them into compliance. We're not going to issue the violation right away, but there has to be kind of cooperation, communication, between both us and the violator. So if we get a violator that says I'm not going to do it, you know, there's not much more we can do except issue the violation, but we try to work with them.

Mr. Castro: Thank you.

Ms. Aoki: You're welcome.

Mr. Kamai: Another question. Maybe this is for Corp. Counsel or the Department, but what would warrant a stay from proceeding forward with the violation under the – what Mr. Whitehead mentioned working with the County Council Members regarding the change of law as this is a problem that is not just for Launiupoko?

Ms. Aoki: I'm going to defer to Corp. Counsel because I'm not sure what your jurisdiction is over that.

Mr. James Giroux: I'm not sure. Are you asking if the Board has that power or just the County in general?

Mr. Kamai: What would the procedure be? I mean, I would hate for Mr. Whitehead to start tearing down his wall, and then it would be an issue that was raised at the County Council, and they haven't taken action to perhaps change the law, and it would be too late, then he tore down his wall already.

Mr. Giroux: Then I think the administration would have to look at the issue as far as where they want to put their resources as far as resources in enforcement in order to save them, you know, future hassles. I think we saw this in the TVR situation where it's clearly zoning issues yet there was a political process going on at the same time. I think it puts everybody on a very difficult place.

Mr. Kamai: Sort of like us, yeah?

Mr. Giroux: Yep.

Mr. Kamai: When you say "administration," can you be specific?

Mr. Giroux: I think it would be between the Mayor and the Planning Department to analyze where they want to focus their enforcement efforts.

Mr. Kamai: Not so much the Council?

Mr. Giroux: Outside of just acting on changing the law, I don't think they would have very much – I would have to look into that if the Council could actually do an ordinance, but that's a tough one. I don't know. They are – as far as we know right now with the Council processes is that they have sent possibly, a proposed change in the law to the Planning Committee. So the Planning Committee would have to take action, send it to Council, go to first and second reading, and then the law would be changed.

Chairman Endo: Ms. Lovell?

Ms. Lovell: I'm sorry. Perhaps, I misunderstood, but I thought that Commissioner Kamai's question really was about whether this Body could enter some kind of stay.

Mr. Kamai: No.

Ms. Lovell: No? Okay, then I misunderstood.

Ms. Elizabeth Whitehead: I just want to say that I really wish that you'll have some compassion. The County used to have compassion many years ago for the homeowner, but it looks like apparently there isn't any anymore. And there is no urgency. The wall's been up nine years. What's wrong with waiting to see what the Council can do? They can revisit the law, re-clarify. If they vote it to leave the law, then by God, I will take it down, but I would like to see what the Council have to say when they revisit that law. I would like to give that money to my grandson in college rather than taking a wall down. So just have some compassion.

Chairman Endo: I have a general question for the Planning Department. The fact that there is this pending variance request, does that in effect affect how you are currently enforcing this?

Ms. Aoki: No.

Chairman Endo: At this point, it would stay a warning? It would not go to a violation? Or is it independent?

Mr. Shinmoto: Yes, it's independent. It doesn't – we're not staying any further enforcement because of this case.

Ms. Aoki: I mean, by Charter, we have to enforce these ordinances. We don't have any choice in that matter.

Chairman Endo: Okay. Alright. Hari?

Mr. Ajmani: I think the fact the County Council has requested the Planning Director to come up with the review of the law or whatever they're doing, I think this is totally a matter of within the Planning Department how they should enforce this. On one side is enforcing the law and the other arm is reviewing the law at the same time. So I think if the – I'm pretty sure the Planning Department will enforce the ruling based upon what is going on within themselves, and they will accommodate. They will do what is reasonable, I believe.

Ms. Aoki: I just wanted to clarify. I'm not sure if I misunderstood the Board Member's comment, but it's not the Planning Department that's initiating this going to Council. We don't have any issue with this law. We're just enforcing it. It's Mr. Whitehead that is requesting that it be placed on the Planning Committee's– So we actually don't know yet what's going to happen when we go up to Planning Committee. It's just a communication item at this point. So we have no idea if we're going to be asked to review it, not review it. I mean, I have no idea. If the Council's purview is for us to look at it, that's their prerogative, and we will– If they choose to vote for a resolution that's adopted by the Council Members to tell us to look at the law and take it to the Commissions, we will do it what we're told to do, but it's not being Planning Department initiated. So I just wanted to make that clear. Thank you.

Mr. Ajmani: Okay, so it has not happened yet. I got that impression from Mr. Whitehead's testimony that Council had already asked Planning Department to review it.

Ms. Aoki: They have transmitted his letter to the Planning Committee, which is not the Planning Department. It's the Planning Committee of the Council. And from what I understand, it is true that

the Planning Committee has said that they will put this on an agenda in the future.

Mr. Ajmani: Oh, I see, so it's the Planning Committee of the Council, not the Planning Department. Maybe that was my – maybe that's what I misheard.

Ms. Phillips: I should just say something. I do want to thank the Whiteheads for taking this to the Council because I do believe they're in a situation that needs resolution, and unfortunately, it's outside of the purview of this Board based on the criteria that we have to follow. So I think I'm going to have to vote with the denial not because we don't or I don't feel that you have been wronged, but I think it's outside the control of this Board at this time. So I hope that you are able to get some resolution with the Council on this.

Mr. Whitehead: . . . (inaudible) . . .

Chairman Endo: Well, we are close to voting, but go ahead, if you want to say something.

Mr. Whitehead: I understand that Corp. Counsel and the Planning Department want to push this right to the dead-end, and I understand that. I just would like to request that is it possible that you've got to make a decision based on what she said the last time and this time, or can you defer it again indefinitely until the Council Planning Committee has worked on this issue, and possibly change that law, and pushed it on to get it voted in and passed this new ordinance? That was the question. Thank you.

Chairman Endo: Well, we – I just asked that question earlier. So basically, the Planning Department is going to act in the normal course of their business regardless of whether or not we continue this proceeding here for this variance. So it shouldn't matter. They're independent items. In other words, even if we keep your possibility of your application alive by just deferring it for 5, 10, 20 months, the Planning Department is going to act in how they normally do regardless of what – this pending application. Is that correct?

Ms. Aoki: That is correct, yes.

Chairman Endo: Okay, any further discussion? Okay, so there is a motion to deny the variance. If there's no further discussion, all those in favor of the motion, please say aye. Opposed, please say no.

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

VOTED: To deny the variance.

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

Chairman Endo: **The motion is carried, and the variance is denied.**

Ms. Aoki: Thank you.

Chairman Endo: Next item?

E. COMMUNICATIONS

1. **Correspondence dated December 28, 2009, from Cathy L. Takase, Acting Director, State Office of Information Practices, to Randall Endo, Chair, Board of Variances and Appeals, regarding a Request for Opinion (S INVES-P 10-36) by Mr. Richard Mayer regarding the Board of Variance and Appeals' December 10, 2009 meeting in relation to the Maui Land and Pineapple Company's Kapalua Bay Park Subdivision Variance.**
2. **Correspondence dated January 7, 2010, from Cathy L. Takase, Acting Director, State Office of Information Practices, to Randall Endo, Chair, Board of Variances and Appeals, regarding a Request for Opinion (S INVES-P 10-12) by Ms. Nell Woods regarding the Board of Variance and Appeals' meetings of November 12 and December 10, 2009 in relation to the Maui Land and Pineapple Company's Kapalua Bay Park Subdivision Variance.**

Ms. Kapua`ala: You have two Communications before you. Two individuals placed complaints with the Office of Informational – OIP, Office of Information Practices. And both cases were closed because the Acting Director found that the Board did not violate Sunshine Laws. I have one more letter regarding Ms. Nell Woods' request to review the BVA's action. And this letter says that it was closed because the BVA did not violate any Sunshine Law. I don't think you have that before you, but both cases were closed. So other than that, do you want to discuss it further?

Chairman Endo: Well, I noticed they asked for a detailed explanation including any relevant legal citations setting forth the BVA's position on this matter. I assume Mr. Giroux is going to be working on that?

Mr. Giroux: I got a couple of phone calls from – I think it was Cathy Takase. So I talked to her about the case, clarified what our process was, informed her of our rules. And it was pretty clear that we've discussed this issue before with OIP about whether our duties as far as making this distinguishment between the Sunshine Law and our adjudicatory rights under Chapter 92 of Chapter 91, because Chapter 92, which is the Sunshine Law does have an exception to the Sunshine Law when we're practicing our adjudicatory duty.

Chairman Endo: I'm sorry. I didn't see this other letter, December 28th.

Mr. Giroux: Oh, okay, yeah.

Chairman Endo: That's the one, yeah. Yeah, sorry. So they ruled in your favor?

Mr. Giroux: Yeah, our favor. Basically, we had two people, I guess, who were here who wanted to testify but we were in the middle of deliberation on a contested case issue so we – I advised you to take action that we weren't going to stop the proceedings in order to take further testimony because we were right in the middle of rebuttal, and so they threatened lawsuit against us and OIP action. So you were successfully defended by Mr. Giroux.

Chairman Endo: Alright. Okay. I guess that's that. Do we have anything else? Oh, sorry, we have the November 5 – November 25th 2009 and December 10, 2009 meeting minutes.

F. APPROVAL OF THE NOVEMBER 25, 2009 AND THE DECEMBER 10, 2009 MEETING MINUTES

Mr. Kamai: Move to approve, Mr. Chair.

Mr. Shimabuku: Second.

Chairman Endo: Okay, it's been moved and seconded to approve those minutes. Any discussion? Hearing none, all those in favor, please say aye. Opposed, please say no.

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

VOTED: To approve the November 25, 2009 and December 10, 2009 meetings' minutes as presented.

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

Chairman Endo: **The minutes of both those dates are approved.** Trisha, do you have an update on BVA contested cases?

G. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: Just one update, the Maui's Best Gift and Craft Fair Case has been settled.

Mr. Giroux: Four years? What is that—four years?

Ms. Kapua`ala: I think I only had one baby. I have four now. Yeah, many years.

Mr. Giroux: Wow. That's great.

H. NEXT MEETING DATE: February 11, 2010, Thursday

Chairman Endo: Okay, the next meeting is February 11, 2010. Is there any further meeting – sorry, is there any further business of the Board?

Mr. Ajmani: I just have a question. You know they were talking about the February 11 meeting. It was gonna come up on the 11th. Is this the meeting they were talking about?

Chairman Endo: Is that the meeting, Trisha, where we're gonna hear that case on the Uwe Schulz matter?

Ms. Kapua`ala: Yes, yes, that's the only agenda item for that day. So if you do decide to take up the motion and want to hear testimony that day, it would probably be okay as far as timing is concerned.

Chairman Endo: So they're probably going to bring some other witnesses to that thing?

Ms. Kapua`ala: Yeah, they'll probably show up with all their witnesses just in case you grant the motion.

Chairman Endo: Do we need to set the parameters for their oral argument like time limits and things like that?

Mr. Giroux: Yeah, let me quickly talk about that because you took that under advisement, if you are going to take further testimony, it would take one more hearing after you gave adequate notice to the parties that that was going to occur.

Chairman Endo: Oh, so we couldn't do it on February 11, then.

Mr. Giroux: Yeah, you can rule on the motion. You can review the report, anything from the record, and take up the motion. You can also do your own motion, if that is something that you agree with, but the actual taking of testimony wouldn't happen at that meeting because of the Chapter 91 requirements of notice to both parties to allow them to be prepared to prepare— They need to know who is going to be testifying so that they have a chance to adequately prepare for that hearing.

Chairman Endo: Okay.

Mr. Ajmani: So I guess the Hearing Officer's report and some of the things I heard today, the basic thing of contention has been the Fire Department guy's testimony versus the Engineer's testimony. And the Hearing Officer has taken – given more credence to the Engineer's testimony. And so on that day on February 11th, will we be able to question the Fire Inspector and the other people, or that's not allowed?

Mr. Giroux: Well, that's the issue. If that - yeah, that would be part—

Chairman Endo: If you really wanted to do that, then at that point, you would vote to reopen, but then we wouldn't really actually ask them questions until another meeting.

Mr. Ajmani: Oh, I see. Okay. I don't have any reason to ask any questions. I'm just trying to find out the procedure.

Chairman Endo: Sure. Alright? Okay. Thank you, everybody. Meeting adjourned.

I. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:27 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
William Kamai
Ray Shimabuku
Rachel Ball Phillips
Stephen Castro, Sr.
Harjinder Ajmani (1:36 p.m. - 3:27 p.m.)

Members Excused:

Kevin Tanaka, Vice-Chairman
James Shefte

Others:

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