

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
AUGUST 12, 2010**

**(Approved: 8/26/2010)**

**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, 1:32 p.m., Thursday, August 12, 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: Good afternoon, this meeting of the Board of Variances and Appeals will now come to order. It's 1:32 p.m. on August 12<sup>th</sup> 2010. And the record shall reflect that we have eight Members of the Board present today, although I will be leaving early and will not be here for all of the agenda items, just for your information, and for the preparation of the Vice-Chair. At this time, we'd like to call our first item: B-1, and I can read it into the record.

**B. APPEALS**

1. **To determine a hearing officer to preside over the following matter:**

**FAYE KASHIWA OTSUKA representing STREAM RESOURCES, INC. appealing the Director of the Department of Public Works' determination that roadway lots in the S. R. Inc. Subdivision application (DSA File No. 2.3118) are not "developable lots" as it pertains to Ordinance 2372 [Maui County Code, §18.04.020(C)] for property located off of Lower Ulumalu Road, Haiku, Maui, Hawaii; TMK: (2) 2-8-003:036 and former Lower Ulumalu Road (BVAA 20100003)**

Chairman Endo read the agenda item into the record.

Chairman Endo: At this time, we'll open it up for public testimony. Is there anyone in the public who wishes to testify as to this agenda item? Seeing no one, we'll close public testimony as to this agenda item only, and ask the parties to come forward and introduce themselves.

Mr. Blaine Kobayashi: Good afternoon, Chair Endo and Members of the Board. My name is Blaine Kobayashi and I represent Stream Resources, Inc., the appealing party in this particular case. So just for the Board's information, Faye Otsuka to my left is also present, and she's a representative of Stream Resources, Inc. As your agenda item indicates, this is a determination of a hearings officer for this particular matter.

As far as my position, we believe that the issue in this case is a relatively narrow legal issue. And from our perspective, we just feel that it would be appropriate for a hearings officer to be appointed in this matter. I know the County has a difference of opinion as far as who they believe the hearings officer should be. And I'll leave it to Ms. D'Enbeau to give her comments to you, but we

believe a hearings officer should be appointed to this case, so it'll be – I feel a relatively short hearing, but I think given the legal nature of the issues involved, we feel that a hearings officer would be the appropriate person to hear this appeal. Thank you.

Chairman Endo: Thank you.

Ms. Madelyn D'Enbeau: Good afternoon, Mr. Chair and Members. I'm Madelyn D'Enbeau representing the Public Works' Director in this case. The County's position is that it would be most appropriate to have the Board itself act as the hearing officer because as Mr. Kobayashi said, this is a limited issue. There are not a lot of factual disputes. It's just a legal interpretation. And I think the Board is perfectly capable of looking at these issues. They're not particularly complicated issues. They have to do with the intent of the County Council in passing the ordinance, that's the question, which just briefly, it's the ordinance that allows consolidation and resubdivision of lots as long no new developable lots are created. And the issue here is what's meant by developable lots. And the appellant's position is that the roadway lot should count as developable lots, and the County's response is that, no, roadway lots are not developable lots. So that's the issue in a nutshell. I don't think there's anything else. I see Mr. Kobayashi's nodding. That's basically the issue. I don't think hiring the hearing officer and going through that long – I appreciate that the hearing itself might not take so long, but it's a protracted proceeding to get to that point. I think the Board could handle it perfectly well, and that would be, as I said, our position.

Should the Board decide it doesn't want to hear the matter and does want to appoint a hearing officer, we have agreed on the order of the hearing officers that we – would be acceptable, so there's no dispute about that. It would be in order: Judge Mossman, Judge McConnell, and Guy Haywood are the hearing officers that we agreed to. But again, the County's position is that it would be a fairly straightforward matter, and it would save time and resources to have the Board itself review this issue. And of course, the hearing officer is only able to make a recommendation in any case. So it's still always up to the Board. So usually I think a hearing officer is to go through a mountain of facts and try to distill them for the Board, and so the Board having listened to days of testimony, which would not be the case here. I think it would be submitted pretty much on written memorandum, oral argument. Thank you.

Chairman Endo: Okay, so if we do appoint a hearings officer, the parties I take it have agreed that the first choice would be Boyd Mossman; second choice, Judge McConnell; third choice, Guy Haywood? Is that correct?

Ms. D'Enbeau: That's correct.

Chairman Endo: Okay. For the Board, then the decision is whether to appoint a hearings officer, or to proceed without a hearings officer. Just for your background, sometimes we have taken matters up without a hearings officer. And it's just up to the Board which way you'd like to proceed. Anybody have any questions? Any Board Members have any questions for the parties?

Mr. Bart Santiago: I guess I have a question reading through the documentation. There are meetings in 2009 at certain junctures that the case was being dealt with. Why wasn't it resolved at that point at those different dates?

Chairman Endo: You're asking – you wanna ask that to the parties or you wanna ask that to the Board?

Mr. Santiago: The Board, in general, I guess, the question. I think I got the right case.

Chairman Endo: Just by way of background, as you check your documents, basically, the Department of Public Works has made a decision or a ruling with regard to the pending subdivision. So they've made a ruling in so far as which lots can be counted in a consolidated resubdivision under Ordinance 2372. And the appellant is appealing that decision because they believe that certain lots, roadway lots, can be developable lots.

Mr. Santiago: I stand corrected. It was the Maui Land and Pine that I was citing. So I apologize.

Chairman Endo: Okay.

Mr. Santiago: So no questions.

Chairman Endo: Alright. Before the questions, the Chair would like to ask the parties regardless of whether it comes before the Board without a hearings officer or goes to the hearings officer first, do you anticipate having how many witnesses and/or any need for discovery?

Mr. Kobayashi: I think from our perspective, we may have at least two witnesses, I'm thinking. I haven't discussed it with Ms. Otsuka, but in my thinking, at least two. There may be some discovery issues. I may be asking the County to provide us some legislative history or other cases in which this issue may have come up in the past, just get a better understanding of the issue. So I think there will be some discovery in terms of witnesses. Right now, at least the best as I can guess, possibly, two, maybe more.

Chairman Endo: Okay. Ms. D'Enbeau?

Ms. D'Enbeau: Yes, I don't anticipate the County calling more than one witness. And I think the legislative history would of course be material and it is a public record, so we could certainly assist in obtaining that if that's necessary. The question about whether there have been other similar cases, I don't think is particularly relevant, but we could look into that as well. I don't think that's a really time-consuming kind of discovery.

Chairman Endo: Okay. The Board have any questions or statements? I think from my perspective, it's bit of a difficult call because on the one hand, if we wanna save the County money. If we think it's an easy, simple enough hearing to do on our own, we can forego having to hire a hearings officer on taxpayer money, and we can just move forward. And we've done that on that basis at least once or twice. On the other hand, if it's a legal issue, and we wanna make sure we have the best guidance on how to rule on a legal issue, by hiring a hearings officer who is usually a retired judge or an attorney familiar with land use law, what we'll get is an independent, neutral opinion as to the law and how to interpret it, which can help us in our final decision-making.

Mr. Rick Tanner: I'll make a motion, if we're ready for that.

Chairman Endo: Sure.

Mr. Tanner: I would make a motion that this Board would appoint a hearing officer.

Chairman Endo: Is there a second?

Mr. William Kamai: Second.

Chairman Endo: Okay, it's been moved and seconded to appoint a hearings officer I take it as the three agreed to by the parties previously stated on the record? Okay. Discussion? All those in favor of the motion, please say aye. Opposed, please say no.

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

**VOTED: To appoint a hearings officer as the three agreed to by the parties previously stated on the record.**

**(Assenting: R. Tanner, W. Kamai, R. Shimabuku, K. Tanaka,  
B. Vadla, R. Phillips, B. Santiago.)**

**(Excused: S. Castro.)**

Chairman Endo: **Motion is carried and the hearings officers are appointed as stated previously.**

Mr. Kobayashi: And we'll work with staff to figure out the logistics of appointing a hearings officer and contract.

Ms. D'Enbeau: Thank you very much.

Chairman Endo: Thank you. Okay, moving on to Item C-1.

## **C. VARIANCES**

1. **WAYNE ARAKAKI of ARAKAKI ENGINEER, LLC, representing DAVID EASTON & CYNTHIA WRIGHT requesting a variance from Maui County Code, §18.16.230 to allow a two (2) lot subdivision of a 4.265 acre lot with recorded road and utility easements totaling 0.962 acres whereby the required subtraction of said easements would result in two (2) substandard agricultural lots, both of which would be less than the required two (2) acres for the proposed Easton Subdivision located off of Hana Highway at 61-63 Kakio Road, Kakio, Hana, Maui; TMK: (2) 1-4-011:027 (BVAV 20090005).**
  - a. **Wayne Arakaki, on behalf of David Easton and Cynthia Wright, requesting to amend Condition No. 2, liability insurance requirement, of the variance granted on August 27, 2009.**

Chairman Endo read the agenda item into the record.

Chairman Endo: Is there anyone here? Well, Mr. Arakaki, I see you're here. Good afternoon. Is there anyone in the public who wishes to testify on this matter? Hearing none or seeing no one approaching, we'll close the public testimony as to this agenda item. And, Mr. Arakaki, do you want to explain your subject matter for today?

Mr. Wayne Arakaki: Thank you. Good afternoon. My name is Wayne Arakaki. The owners have contacted me and requested that if I could amend the insurance, if we could have it deleted out. Apparently, it was a – they're having a difficult time trying to obtain this particular insurance. Let me show you a background. Francis can help me.

Chairman Endo: So we granted this variance previously already, right?

Mr. Arakaki: Yes, the variance has been granted. The property is located outside of Hana about 1.5 miles towards the Seven Sacred Pools. And it's a – there's a State highway, Hana Highway. And the road that goes in is – well, let me go to the board. This is where the property is located—here. This is Hana Highway. This is Hana Town. The property is located right over here. It's about 4.265 acres. And this is going toward Hana Town and this is going to Seven Sacred Pools.

There was a subdivision that was done across this particular property. And there was a road-widening that was granted – a roadway dedication about ten feet. And the owners would like to do the same where they're gonna dedicate a portion of this property, and then create a 40-foot right-of-way. The variance that we got was for the substandard lots which was granted the other year. But of course, it came with the, you know, that we had to apply for insurance when we do the subdivision.

This road is actually paved only about to here. I mean, there's very little traffic. Most of the properties above is Ranch Land, agricultural lands. When I was working on this property, I would say maybe like one or two cars for every hour. So it's not a heavily used road. And of course this is Hana Highway. It's a State highway. So I guess the question would be along this side, what kind of exposure we'll be getting. And based on the subdivision ordinance, beside doing the road-widening, we'd also have to do some kind of road-widening pavement improvements also.

So the owners are requesting that if they could delete the requirements for the insurance. The property – whatever is dedicated to the County, the road-widening, will belong to the County. And whatever belongs to the landowners will remain with them. So I can't see any kind of liability kind of problem. It's a clear differences or division of responsibility. Do you have any questions?

Mr. Santiago: When you say "difficult in obtaining the insurance," what difficulty exactly are they up against?

Mr. Arakaki: From what I understand, and I'm not one insurance person, but from what I understand is that it's not really a homeowner's insurance. It's something like for the road. So it becomes like— They're not a government entity. They're private, and yet they have to buy this insurance for this road. And then they cannot tack it on to the homeowners' insurance. So it's just difficult in

obtaining this kind of thing. And I've done variances before, and I have some subdivisions that they're still paying for this kind of insurance, but it gets very difficult to obtain this kind of insurance. I guess not every insurance company writes up this kind of policy.

Mr. Francis Cerizo: They're coming in for a two-lot subdivision. And this lot, the parcel now is four acres, 4.26 acres. And if they cut the lot in half, for example, what would happen is that what you would have is a little more than – well, you'd have less than two acres on both sides. Even though it's 4.2 what happens is that there's a piece – there's a road easement here. This is the property line. The dark line is the property line. And there's an easement here that runs something like this. It's parallel to the roadway lot. So this portion here actually becomes – you subtract out any roadway easements from the lot. So what happens is the net, you'll have less than two acres, and the minimum lot size is two acres. So the variance is to have a lot less than two acres. And they're asking for a reduction or elimination of your insurance requirement.

Mr. Arakaki: As we stated earlier, the variance was granted on that, on the substandard lots. Where Francis denoted where the easement is, nobody is using that because the road is not there. The road is actually more toward the – where the road is actually shown on this tax map key map. And again, we did approach – Hana Ranch owns that easement. And we did approach Hana Ranch several times asking them to take that easement out because the road is actually clearly on the Hana side. And they said, they don't have anything to gain, so they just left it there, but it becomes a problem for this landowner. That's why we had to come in for a variance on that, but physically, the road is actually where it's supposed to be, not where that easement is. It's on the map.

Ms. Bernice Vadla: Excuse me. So are you saying that the easement is owned by Hana Ranch?

Mr. Arakaki: Yes, in favor of Hana Ranch. The property is owned by my client, but the easement is in favor of, yeah, Hana Ranch.

Ms. Vadla: And it's not a roadway at all? There's no traffic on it or--?

Mr. Arakaki: The pavement is – I mean, the roadway pavement is not there. It's actually where it's supposed to be.

Chairman Endo: Mr. Arakaki, I think the point that Mr. Cerizo is trying to make or explaining what the variance was is that the insurance that your client is required to have is not insure necessarily for a liability for use of the road or the easement, but insurance to protect the County from any liability that might arise out of our Board having granted the variance which allows two substandard lots. So the variance is allowing a less than two-acre lot to exist, not necessarily to allow for a road or an easement. So of course you never can tell exactly how somebody might frame some sort of litigation in the future arising out of our actions, but I think that's what Francis is trying to point at is that it's kind of – maybe your client was not talking to his insurance in the most – framing the question as to what they need coverage for in the simplest way or the easiest way because the liability to the County for granting a less than two-acre lot is probably a very, very small risk. So you would think it wouldn't cost that much to get that much insurance as opposed to saying, yeah, you gotta cover a liability for a roadway. Is that correct, Mr. Cerizo?

Mr. Cerizo: Yes, that was my intention as far as trying to convey that to the Board. The variance is basically for a lot size, nothing to do with the roadway.

Mr. Arakaki: The landowners, I guess one of the things they had to sign was the hold harmless agreement. I guess that would be with the land also. Doesn't that provide some kind of safety or whatever to the County?

Chairman Endo: It does as long as the parties who are basically indemnifying the County have the ability to pay. So you're right, as long as they have money, they would have to pay for the liability first. And then only if – or in addition to that, or to cover the situation where the party who is giving the hold harmless doesn't have any money, then at least the County could rely on the insurance. That's the idea for having both: to have double – two resources to potentially protect the County.

Mr. Arakaki: I'm just trying to brainstorm some ideas here. Is it possible to have one lot with two acres and the other lot be substandard, and we carry the insurance on just the substandard lot? I can make one lot at least two acres, and then the other lot would probably be 1.6 acres or 1.7. Is that possible?

Chairman Endo: Yeah, you could probably do that. That would be like changing your variance, though, possibly, right? I don't know. I can't remember exactly how your variance was worded.

Mr. Santiago: Can I make a comment?

Chairman Endo: Sure.

Mr. Santiago: There appears to be a question in the interpretation of the insurance requirement. Would it be prudent for us to provide something in writing that they can take to their insurance agent as far as what's required?

Chairman Endo: That's a good suggestion, in general, yeah.

Mr. Santiago: Because I think if they were trying to quote a liability insurance on that easement, the dollar amount probably would've been pretty big for something they wouldn't grant to an individual as opposed to a State agency.

Mr. Arakaki: That's a good idea. So what you are saying is that this insurance is actually, because the lot is substandard, but not so much the road or the access road.

Mr. Santiago: Well, as far as what Randall said, to protect the County from our decision to grant the substandard lots not so much the liability. Am I saying that correctly?

Mr. Kevin Tanaka: Well, the liability for the granting of the variance.

Mr. Santiago: Yeah, not so much the liability . . . (inaudible) . . . that could arise on the easement.

Mr. Tanaka: Mr. Arakaki, what was the insurance requirement that went along with – was it a million dollars?

Mr. Arakaki: It was a million, but you folks brought it down to about half a million.

Chairman Endo: According to this, it's a hundred thousand.

Mr. Arakaki: Oh, was it a hundred thousand?

Chairman Endo: Under this letter dated November 17<sup>th</sup> 2009 from the Department of Planning.

Mr. Arakaki: Yeah, I'm sorry, but I remember you folks brought the value down, the amount down.

Mr. Tanaka: Because I remember that in part because the chances of any kind of action against the variance was slim. So that's why we reduced it significantly.

Mr. Santiago: I think the insurance agent might be looking at a liability on the road.

Mr. Tanaka: Well, potentially, that is true. I mean, if that is a misunderstanding.

Mr. Arakaki: Okay, I think what I'll do is I'll go back to the owners and explain that to them, and coordinate that with their insurance company saying that it's more on the substandard issue, and not so much on the road issue. Is that my understanding?

Chairman Endo: Yeah, and if you're gonna come back – I'm not sure if we're gonna defer this or just deny it for now. I mean, you can always try again, but if your client would submit something with details what the insurance company actually said in terms of why they can't cover it, or just so we can have the details, I think would be good.

Mr. Arakaki: It's kind of important, so if you don't mind, if you folks can defer this, and then I can come back with the right information.

Chairman Endo: Okay. Is there any objection to deferring this matter? Sure, Corporation Counsel?

Mr. Michael Hopper: Mr. Arakaki, just to note, the condition itself is pretty specific with respect to what the policy needed to cover. So hopefully if the insurance company could get a copy of – I'm not sure what they were given or what they said, that says a policy of a hundred thousand dollars against any and all claims or demands for property damage, personal injury and/or death arising out of this variance approval, including but not limited to, and then it goes over the specific – you know, some of the specific things the insurance would need to cover. I think it's a pretty good description that they could have, so I think it would help you to be specific if that's what you are looking for, for that.

Mr. Arakaki: Okay. Thank you.

Chairman Endo: So when would you like to defer it to?

Mr. Arakaki: Could you give me at least two months?

Chairman Endo: Okay, is there any objection to that by any of the Members? No? Okay, so we'll



do that. She can give it to you later or–

Mr. Arakaki: Yeah, okay, that's fine.

Chairman Endo: In about two months, though.

Mr. Arakaki: Thank you.

Chairman Endo: Thank you. Before we move to our next agenda item, Unfinished Business, I have to leave for a flight. So I'm late, so I'm sorry, I'm gonna have to leave, but I'll turn the gavel over to our Vice-Chair Kevin Tanaka.

(Chairman Endo then left the meeting at approximately 2:00 p.m.)

Mr. Cerizo: Mr. Chair or Vice-Chair, on that Arakaki variance, we don't have any room in two months, so it's gonna be in November. So we'll schedule it sometime in November.

Vice-Chair Tanaka: Yeah, I think that'll be fine. Next item on the agenda: Item D-1, Unfinished Business.

#### **D. UNFINISHED BUSINESS**

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).**
  - a. **Applicant's motion for a determination that the application for variance is deemed approved; declaration of Yarrow Flower; Exhibits "A" and "B."**
  - b. **Paul Horikawa, Attorney for Applicant; order denying West Maui Preservation Association Inc.'s Petition to intervene**
  - c. **Lance D. Collins, Attorney; order denying West Maui Preservation Association Inc.'s Petition to intervene**

Vice-Chair Tanaka read the agenda item into the record.

Mr. Paul Horikawa: Hi. Good afternoon, Chairman Tanaka, Members of the Board of Variances and Appeals. Excuse me. My name is Paul Horikawa. We have three matters – two matters on the agenda as I see it. I may be wrong, but from my understanding, one, there is a motion for a determination that the application is deemed approved. And the other matter is for the Board to adopt the order that denied the petition to intervene that was filed by West Maui Preservation Association. Mr. Collins and I both submitted orders to that effect, so it's basically up to the Board

to decide which order it wants to adopt. And as far as the motion that's before the Board, as I said, I don't know how you wanna proceed on this.

Vice-Chair Tanaka: If you can kind of give us a recap, Mr. Horikawa, of – because I looked over and it was determined – the petition to intervene was denied.

Mr. Horikawa: That's correct.

Vice-Chair Tanaka: And that the – even after going over this, the variance was – did the Board act on the actual variance itself?

Mr. Horikawa: No. Well, the Board attempted to act on it. During the first reading, there was a motion to approve the variance. And that motion – the vote on the motion was four to one. And so there was no decision on that. That was on November 10<sup>th</sup> of last year. Then on December 10<sup>th</sup>, the Board – There were two issues at that meeting: one, there was a motion for reconsideration, which again was untimely. I mean, the initial petition to intervene was filed. It wasn't even placed on the agenda, so the Board ultimately denied the motion – excuse me, the petition. Then on December 10<sup>th</sup>, there was another untimely petition for reconsideration which the Board denied. And then there was a motion to approve the variance. And I believe that that failed two and two, and there was a motion to deny the variance application, and the vote on that was two and two. But what I would note is that on the record – I mean, excuse me, the minutes that was held on December 10<sup>th</sup>, and this is on page 22 of your minutes, Trisha Kapua`ala did note to the Board that – her statement to you as Chair was that:

I'd like to raise the issue that pursuant to your rules, the Board shall render a decision on the variance within 60 days of the close of the public hearing. And that calculates to making a decision today for us to be able to issue a final decision and order by January 11, 2010. If no decision is made by today, the variance shall otherwise be deemed granted.

And with that, I think the Board voted – there was a motion to deny. That was denied. And then I recall some discussion about an order would be circulated or a letter would be circulated. In checking up with staff, the position changed that they requested that I file a motion to have the motion deemed approved, and basically, that's why we're here today.

Just far as time lines, let me just give you some – what I believe are some guidelines of what the statute provides, the statute and the rules provide in this case, and then provide you with some relevant time lines and apply those to the provisions of the statute, as well as the rules that the Board has previously adopted.

I think the starting point is the Hawaii Administrative Procedures Act which guide the statutes and decisions of all administrative agencies. And the language is mandatory and the Board is mandated to adopt rules by which they specify the maximum time period by which they have to act on – either grant or deny an application. And the statute specifically provides that if you fail to act within those guidelines, then the petition or the relief requested is deemed approved. Back in 1999, the Board adopted rules, actually amendments to the rules to implement provisions of HRS 91-13.5. And the discussion surrounding those rules are set forth in the pleading that I had filed with the

Board. But nevertheless, the Board adopted two provisions: one is in 12-801-14 and one is in 12-801-22. The provision that Trisha referred to when she addressed the Board back in December stated that you had to make a decision within 60 days of the date of the public hearing or the application would be deemed approved.

In this particular case, the public hearing was held on November 12<sup>th</sup> of 2009, and the Board, as you recall, closed the public hearing on that date. So the 60 days that Trisha was talking about is based upon the original hearing date when the Board closed the public hearing. And that date has come and gone. I mean, that date I believe was in January. Now we're in August. So the 60 days from November 12<sup>th</sup> of last year has long past. And based upon that particular provision, we would request that the Board grant the motion that's before you and deem the variance approved. The other provision is 12-801-14 which requires that the Board issue a written decision within 120 days after the application is deemed complete. On September 29<sup>th</sup> of 2009, the Planning Director issued a letter to the applicant in this case advising the Maui Land and Pine that the application was deemed complete. From that date, the Board had I believe until January 29<sup>th</sup> of 2010 to issue the written decision. That date has come and gone and they still haven't issued the ruling on that case – I mean, on this particular request. And so those two dates have pretty much come and gone. And based upon that, we would suggest or request that the Board adopt the motion.

There was some discussion that I was – came to a point that the provisions of – if time deadlines have not – do not apply to this particular case because it was a request for intervention, but 12 – we would submit that 12-801-22 is clear that those deadlines do not apply only if an intervention is granted. And if the Board may recall, you denied the intervention on at least two occasions: one specifically in the motion for reconsideration was also denied. So under those – under these circumstances, we would ask that the Board about the petition.

Mr. Chairman, did I respond to your question?

Vice-Chair Tanaka: Yes. Now, I guess my question would be for Corp. Counsel. I do remember this and it is from the dates given, it's well past that 60-day mark. So the application for the variance is deemed approved because this Board has not taken action within that 60-day?

Mr. Hopper: Well, Mr. Chair, I think I would respectfully disagree with that statement in this case. If you do read 12-801-22, which is the provision dealing with the 60-day and the only provision that deals with an automatic approval, it states that:

The Board shall render a decision on a variance within 60 days from the close of the public hearing on such variance, otherwise the variance shall be deemed granted.  
The following shall not apply.

And this is kind of the key, it says, "The foregoing shall not apply." So this grants exceptions to that 60-day automatic approval time period. It states:

When review of the variance application is conducted pursuant to the intervention, contested case and post hearing procedures set forth in subchapters 3, 4, and 5 of these rules.

If you turn to subchapter 3, which is one of the sections listed, it's entitled "Intervention and contested cases." It's very brief, but it goes over the procedure for filing a petition to intervene, and how to determine whether or not a petition is granted or denied. And it appears that the intent of this rule is to provide that this 60-day time period doesn't apply when you have to consider a request for intervention even if it's ultimately denied. And I would say that at this point, you haven't entered an order actually denying the petition. That's actually on your agenda for today. That's my reading of the rule.

As far as the State law requirements of a variance being under State law, something that has to have a minimum time period otherwise, it's deemed approved in a certain period of time, there was a recent case out of the Big Island by the intermediate court of appeals that did find that a variance is not considered a business or development-related permit that is subject to that State law rule requiring all of the boards to adopt rules providing that minimum time period. But my reading of the rule in 12-801-22 would state that if a petition to intervene was filed even though it was not ultimately granted, and actually, that's still up for discussion today because you have to enter the order to finalize that, I don't see how – that this is a mandatory decision for you as far as it's automatically granted. Now, certainly, on prior occasions you've taken votes on this case. You can grant the variance today and make a decision on the variance today based on the merits. But respectfully, I would disagree that you, as a Commission, are under this rule that the variance is going to be deemed automatically approved in this case. And that's my reading of the rule at this time. And I think it is significant that even if an intervention is not granted, it does take time to consider the intervention and make a decision on that. And the rule I think could see that you may need that extra time. A 60-day time period perhaps would be inapplicable in the situation where you would need to consider the petition to intervene whether it is granted or denied. So that's my reading of the rule.

I did talk with Mr. Giroux about this before the meeting to get up to speed on all these issues. I did review the minutes. I've reviewed the pleadings. And I think that's our position as your legal advisor in this case. It would not prevent you from issuing – or from acting on the orders on the petition to intervene. You can decide which order to adopt. And it would not prevent you from obviously, acting to act on the variance which it is before you on the agenda today. So I think that's our position at this time.

Vice-Chairman Tanaka: Thank you. Mr. Horikawa, if you can respond to that?

Mr. Horikawa: I think some positions, people don't like to leave. Several years ago, we filed similar motions before the Board, and the Board denied it, and so we had appealed it to the circuit court. The same argument that Corp. Counsel is making now was presented to the circuit court, and the court reversed that particular – no, it reversed the decision of the BVA, and put it in an order that the application was deemed approved as a matter of law. And this is the Boettner case which eventually also went up to the intermediate court of appeals.

But nevertheless, a couple of things: one, with respect to the Big Island case, even if there is a finding that the State law is not applicable to the granting of a variance, the rules have been adopted. The rules were adopted ten years ago. And these provisions that are set forth in 12-801-22 are applicable to variances. So if the Board ultimately wants to decide that these provisions are not gonna be applicable to variances, then I think you have to amend the rules so that these provisions don't apply. I haven't read the case, but as the rules as they stand now, they are the

guidelines that have to be met. And they haven't been met in this particular case. I think it's a novel – I think it's kind of a circular logic that is being presented, and I don't think my client necessarily agrees with. The fact of the matter is, there were petitions to intervene. They were denied. And so this procedure is not being guided by Chapters 4 and 5. Okay? These provisions are – I mean, the petition was denied at least once. And so, I mean, picking a more practical approach, there may have been a delay. And even if we were to add the delay that was caused by considering the petitions to intervene, the fact of the matter was even if you were to give it a month or maybe two months, the deadlines has still long past. I mean, I don't necessarily agree with Corp. Counsel's interpretation, but that's just my position—just trying to approaching the issue from a practical standpoint.

Vice-Chairman Tanaka: Mr. Cerizo, is there a reason, or if you can explain to us, this came to us in November and December, and this issue was brought up the fact that the 60 days would've come on January 11<sup>th</sup>. Is there a normal procedure as far as Planning Department that says – because I can understand the applicant's stand that, well, I'll just wait 60 days, and it'll be deemed approved. And from reading from my minutes from the December 10<sup>th</sup> meeting, anyway, when Trisha brought up that fact, and it was discussed pretty much that I guess reading from the minutes here, my statement was, "It's now in the hands of Corp. Counsel and the Planning Department. So there is no action taken by the Board on this item." What was the next step that was taken or should've been taken?

Mr. Cerizo: As you can see before your last statement, Mr. Giroux, our Corp. Counsel at that time, he indicated that – well, he says:

Well, I don't think you guys have to make that ruling. I think that either action, or no action, and possibly deferral, and Corp. Counsel will have to talk to the Department to see how they want to proceed.

Now, I talked to Corp. Counsel since then, and they indicated, as Mike said, that there is an exception to what Trisha noted that the 60-day would apply, but we weren't aware of the exceptions. We weren't looking at the exceptions. So being that the exceptions have been brought up, I feel that we'd have to concur with our Counsel that because we went through an intervention, this was part of an intervention process that the 60 days does not apply. So perhaps if you want to go into executive session, you can talk about the options. That's something that might be a good idea.

Mr. Hopper: Well, if you need an executive session. I mean, I've kind of already on the record, I think, explained the position. It's basically based on I don't see the intervention as acted upon until you enter your decision and order on it. That's a State law requirement that says any decision that's adverse to a party, in this case, adverse to Mr. Collins, has to be issued in writing, and then there's a 30-day appeal period from that time. That doesn't prevent you from acting on the variance. That's just my reading that Subchapter 3 at least in part govern your disposition of the petition to intervene. Subchapter 3 was even cited in the intervention – the order that's been prepared for you as the basis for denying the petition. So my reading of the rule is that you did utilize Subchapter 3 in disposing of the case to date, haven't quite done that yet as far as issuing your order, and therefore, the rule doesn't apply. That's my reading of the rule. It is the Board's decision ultimately, but that's, I would say, it's not mandatory for you.

Mr. William Kamai: When you say the "order," is it denying of the intervention or the approval of the—?

Mr. Hopper: I'm talking about the order denying the petition to intervene hasn't been entered yet. That's on your agenda.

Mr. Kamai: Regardless of it being in the minutes of our November 12<sup>th</sup> meeting?

Mr. Hopper: We actually had a case on Molokai where the board took a vote, but was dissatisfied with the proposed decision and order, and reversed their vote, and changed their minds on the case. So until the decision and order is issued, that I would say is not the final disposition of the proceeding as far as whether or not you're still dealing with the intervention.

Mr. Kamai: So would be a clerical error as opposed to this Board already having decided to deny the intervention?

Mr. Hopper: The Board would need to issue a decision and order whether it's prepared by anybody. I would say that's an error. I don't know why— With the order being issued, it has to be drafted. You have to have findings of fact and conclusions of law to dispose of that because that's an order that can be appealed from, and that hadn't been entered yet. It's the same thing if you grant a variance, a decision and order needs to be prepared. And that to me is the final act to be done and it's gonna be adopted by the Board. That's how I would read the rule.

Mr. Santiago: I have a question. So it's a procedural issue in entering the denial of the intervention. Who was supposed to process that entry, or who was supposed to take care of that process back in December 10<sup>th</sup> 2009 when the intervention was denied?

Mr. Hopper: My understanding was that there was a request for the parties to prepare the orders, and usually the prevailing party would prepare the order. But regardless, the rule, and I'm just going by the rule, I'm not trying to make things up, says, "When review of the variance application is conducted pursuant—" this is the exception:

When review of the variance application is conducted pursuant to the intervention, contested case and post hearing procedures set forth in subchapters 3, 4, and 5 of these rules.

I'm saying it was conducted at least in part under those procedures.

Mr. Horikawa: Does the rules say 3, Chapter 3, because my version only has Chapters 4 and 5?

Mr. Hopper: Yeah, I have 3. I have 3, 4, and 5 of these rules.

Mr. Santiago: I guess I'm trying to understand why we're where we're at eight months later.

Mr. Hopper: My most recent amendment is 2005 that I have of the rules.

Vice-Chairman Tanaka: The thing is—

Mr. Horikawa: The orders was submitted in December of last year, and it just hasn't been put on the agenda. We cannot – the applicant cannot control your agenda. We cannot. I mean, we submitted it, and we've just been waiting.

Vice-Chairman Tanaka: Just procedurally, it can be argued. What I'm – I'm going off of what I remember. And we got to the point where we got to a vote, and it was split. Ideally, we take another vote today, because the two–

Mr. Kamai: Was split on their petition, but not the intervention. The intervention was–

Vice-Chairman Tanaka: Yeah, the intervention was denied.

Mr. Kamai: Denied.

Vice-Chairman Tanaka: But the actual variance was–

Mr. Kamai: No, but he's saying that the D&O wasn't issued by the prevailing party as being the sticking point for us to move forward.

Mr. Hopper: Well, it hasn't been adopted. It was apparently issued by the prevailing party. It seems that it wasn't – I mean, it hasn't been adopted because it's on the agenda today. That's the key. That's the key time I think is when it's adopted, but the petitioner says they submitted in December. I can't explain why it wouldn't be scheduled earlier.

Mr. Cerizo: The Department does not have a copy of that proposed order of December. So I'm not sure if it was submitted to Public Works or Planning Department. But my understanding of what Corp. Counsel has indicated is that we still – since there is no action taken, the 90-day – the 60-day rule doesn't apply. That, you can actually act on the merits of the case today. I mean, it's still going on. You don't have a deadline. The 60-day deadline doesn't apply, so if you're prepared to make a decision today, you could either vote for or against the variance request.

Vice-Chairman Tanaka: Well, I would like to do that, but the problem was there are three Board Members here that were not here at that time. So that's our dilemma here, because I think it would be really simple if we could just vote on it again, because from my position at that time was in favor of.

Mr. Cerizo: So if the Board needs to be re-briefed on the application or on the merits of the case, that could be – if the applicant is here, she might be able to do that, or they might need to have more time to prepare. I'm not sure if they're prepared to make a presentation again.

Vice-Chairman Tanaka: Would the Board be willing to hear the application from the applicant in the hopes that we could actually approve or deny the variance today?

Mr. Santiago: For me personally, I would need to hear the information to make a decision.

Vice-Chairman Tanaka: Oh, yeah, definitely. Is the applicant willing and able to?

Ms. Yarrow Flower: Yes. Good afternoon. My name is Yarrow Flower with Maui Land and Pineapple Company. And if the Board wishes, I'd be happy to give the presentation again.

Mr. Hopper: You can absolutely do that, yes. It depends on the order you wanna go. You can decide on the order denying the petition to intervene. You could adopt an order and just make that decision. You could decide on this motion, or defer deciding on this motion till after a vote on the presentation. So you have a variety of options there. You wanna hear the presentation now, you could do that, too, but those are really your three things: you could hear the presentation and act on the information. You could act on the – you will have to act on the adoption of the order for the petition to intervene in any case. The order in which you do that doesn't necessarily matter, but you do need to adopt that order sometime today. And then the third option is to – I mean, you do have the option to grant the automatic approval. It's your decision. You've got my legal advice and Mr. Horikawa's made his argument. So you've got a variety of options on how you proceed. It's ultimately up to the Chairperson and the will of the Body.

Vice-Chairman Tanaka: If it's possible– Oh.

Mr. Horikawa: I don't wanna confuse or make the issues more complicated, but just so that the Board knows, and I don't know where we're at, I guess, but wait. Hold on. This whole variance arises because as the Board – I mean, the people who were there remember, there was a non – what they call a "non conformity" of the different levels of – I mean, this property probably has three or four – I mean, different zoning districts. There's different community plan designations. And at one time even the application, if you review it, it refers to the requirement – there's a request for a variance that the property conform with the applicable land use ordinance, you know, the community plan, and everything else. But last week Friday, the Council did adopt the ordinance that changed the language. I reviewed the ordinance, but I was advised that this was to – I mean, there's no doubt that they deleted the language of "conformity" and they implemented the word, "consistency." And there's a specific definition of the term, "consistency." And just in reviewing Table 1 which is set forth in the application, it appears as if it is consistent with the community plan, General Plan, and all the designations, but I think in trying to track it down with Planning earlier this week, there was a suggestion from one of the Planners that it could be consistent, but the actual and final determination that really counts is with the Director of Public Works. In fact, the December 10<sup>th</sup> – excuse me, the November 10<sup>th</sup> meeting, Lesli had testified, and her testimony is on page 22 of the minutes. She talked about the requirement of conformity of all three levels. And we haven't had a determination from Public Works on what that means. So I just wanted to put that out that the subdivision may be consistent. I mean, my understanding is that the bill has not yet been formalized. There were amendments on the floor on Friday. Corp. Counsel is still revising the bill to comply with what was adopted at the meeting. And certainly, the Mayor hasn't adopted – hasn't signed off of the ordinance, or nor has she – it's probably gonna pass because it was submitted by the administration. So it's probably gonna pass, but I just wanted to provide you with the background that we may be going through an academic exercise. And it's also ultimately gonna depend on what Ms. Otani and Mr. Arakawa decides on that issue. So I know this is a volunteer group, but I just wanted to bring that up that there's an issue hanging out there. I didn't want you to go make a decision not knowing that there is a law out there that may change the necessity of acting.

Vice-Chairman Tanaka: Bill?



Mr. Kamai: Mr. Horikawa, if you were to have filed a decision and order in a timely manner to staff, and they had received it, we wouldn't be dealing with the petition at this point? Is that correct? We still have to adopt it if he had it in his possession?

Mr. Hopper: Well, theoretically, you would've had an earlier meeting and you would've adopted it at an earlier meeting. You may still be facing the same argument at that meeting, but, yeah, if he had filed it earlier, and then you as a Body could have had an earlier meeting and adopted it earlier.

Mr. Kamai: When are we gonna be re-receiving this decision and order?

Mr. Hopper: Oh, you have it. You have the proposed decision and order with you. All you need to do is adopt it today. In fact, I think you're gonna have to do that anyway today at some point because you made that decision. This memorializes it and puts it in writing, which is a requirement, as a matter of record. So, yeah, that's – Items B and C on your agenda are basically that.

Mr. Kamai: Would us adopting this decision and order—? I guess what you brought up regarding the current consistency and conformity bill that was passed by the Council, if this was adopted prior to that, this decision and order, would you be grandfathered in by any of the changes in the current adoption?

Mr. Horikawa: No. Let me tell you, no. The answer is no. And the reason is, there's two orders before you today, and you have to adopt one of them. And the two orders basically address the denial of the intervention from WMPA. So it's not the granting of the variance. Basically, it's just saying WMPA is not gonna be able to take part of certain procedures. That's all that is involved there.

On the grandfathering, it's hard to say because I don't know how – I mean, I don't know how the Public Works Director is gonna interpret the ordinance. I was led to believe that the consistency issue may be resolved, but if it's not, then Maui Pine is certainly gonna need the variance.

Mr. Tanner: Mr. Chairman?

Vice-Chairman Tanaka: Yes?

Mr. Tanner: I apologize. At this time, I'm gonna have to leave due to an unexpected emergency.

(Mr. Tanner left the meeting at approximately 2:34 p.m.)

Vice-Chairman Tanaka: The three items, anyway, would be the variance itself and the order denying the petition to intervene, which the Board denied in the end of last year. Now it is just – would it be adopting or – sorry, what is the correct term?

Mr. Hopper: You would choose which order to adopt, or you can make changes to the orders as well. This memorializes the basis, facts, and law on your decision to deny the petition, and would allow the petitioner to file an appeal within 30 days. It advises them of that fact. It's a requirement because it's adverse to one of the parties, in this case, WMPA saying that their petition is denied. And you need to memorialize it as all of your decisions are memorialized that – in the form of a

decision and order.

Mr. Santiago: Can I suggest that we go ahead and adopt the order to deny the intervention and move on beyond that one, that item?

Vice-Chairman Tanaka: Yeah. I guess, the Chair would need a motion and second, and to call for a vote for just that.

Mr. Hopper: And you'd want to identify what two orders. You'd want to identify – do you wanna adopt Mr. Collins' order, which is this, you have in your packet; or Mr. Horikawa's order, proposed order, which is a different document. You'd want to identify which one you would adopt and if you'd want to make any changes.

Mr. Santiago: I'd like to make a motion to adopt the order to deny the intervention for WMPA per Mr. Collins'–

Mr. Hopper: There's two different ones. You would read through them and decide which one. I mean, typically, the prevailing party would prepare the order, not the party who was denied the petition. I mean, they can submit an order that you can look at, if you want as well. But you would identify which of the two you would like to adopt, read through them, because this is gonna state the basis of the decision that you made. You are required, if you didn't participate in this case to make yourself familiar with the record in the case. That's a State law requirement for voting on a decision and order for everyone. And that's something to – it's important. So, everybody, when you vote on the order, it's important that you've read, I think, through the minutes, and became familiar with the – it is actually a requirement: HRS 91-11. It's actually in your rules as well. So if you didn't participate in these past hearings, just be sure you've familiarized yourself with the past facts that led to this so you can make an informed decision about which order to adopt. So you'd want to identify which of the two orders you'd want to adopt at this point.

Vice-Chairman Tanaka: Okay, so would you like to continue your motion or–?

Mr. Santiago: I'll try to continue my motion. I'd like to make a motion to accept the order to deny the intervention filed by WMPA.

Mr. Hopper: Mr. Horikawa's proposed order?

Mr. Santiago: No, Mr. Collins' proposed order.

Mr. Hopper: I mean, it's up to the Body. If you wanna adopt Mr. Collins' order, you could adopt that order as well. If you wanna adopt Mr. Horikawa's proposed order, you could adopt that order. It's up to you.

Mr. Kamai: I would adopt Mr. Horikawa's.

Mr. Santiago: Horikawa?

Mr. Kamai: Yes.

Mr. Hopper: It depends on – yeah, you can have a vote on it and decide.

Vice-Chairman Tanaka: Yeah, we can still discuss this.

Mr. Hopper: Or you can change either order, if you want.

Vice-Chairman Tanaka: Okay, let's see if I can – well, just in summary what you're saying is, you're moving that we adopt the decision and order denying West Maui Preservation Association Inc.'s petition to intervene as stated through Mr. Horikawa's order. It has been moved that way. Do I have – is there a second?

Mr. Kamai: Second.

Vice-Chairman Tanaka: It has been moved and seconded. Call for a vote. All those in favor of recording?

Mr. Hopper: I'd say "adopting."

Vice-Chairman Tanaka: Adopting the order to deny the application for intervention, please say aye. Any opposed?

Mr. Hopper: Can you identify again for the record which of the proposed orders?

Vice-Chairman Tanaka: As in Mr. Horikawa's packet.

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

**VOTED: To adopt the decision and order denying West Maui Preservation Association Inc.'s petition to intervene as stated through Mr. Horikawa's order.**

**(Assenting: B. Santiago, W. Kamai, R. Shimabuku, K. Tanaka, B. Vadla, R. Phillips.)**

**(Excused: S. Castro, R. Tanner.)**

Vice-Chairman Tanaka: Okay, one down. So we would like to move forward and hear from the applicant.

Ms. Flower: May I have a couple of minutes to set up the—?

Vice-Chairman Tanaka: Sure. I'll call a two-minute recess.

(A recess was then taken at 2:40 p.m., and the meeting reconvened at 2:46 p.m.)

Vice-Chairman Tanaka: The applicant has their presentation?

Ms. Flower: Okay. Good afternoon. Once again, my name is Yarrow Flower with Maui Land and

Pineapple Company presenting an application for a variance today for the Kapalua Bay Park Subdivision.

So this proposed subdivision would divide a 2.46-acre parcel into two lots. The first lot is the existing public parking and access to Kapalua Bay, and the remaining parcel includes an existing restaurant. All improvements that are on the parcel were constructed in the 1970s. There is no construction or material improvements associated with the subdivision.

This is the location of the parcel. You can see Honoapiilani Highway along the bottom. And the Ritz Carlton is located right on Kapalua Bay adjacent to Coconut Grove and the new residences at Kapalua. So here's Honoapiilani Highway. The Ritz Carlton is located right here. This is Lower Honoapiilani Road, Kapalua Bay, and the parcel is located right here on the end of the bay.

So this is the subdivision map which was originally submitted to the County for review and approval in 2005. Proposed Lot A-1, A-2 is shown in yellow, and that will include the existing public parking, the restrooms, and showers, and the access path to Kapalua Beach. There is an agreement and declaration in place to preserve the parking amenities, public access to Kapalua Bay. So that will remain. The existing use shall remain.

The other parcel, the remaining parcel, Lot A-1, A-1 includes Merriman's Restaurant. The outline of the existing restaurant is what that black shape is there. It's where the existing restaurant is.

So the reason that we are here today is to request a 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 the County zoning and community plan designation, Maui Land and Pine is currently unable to subdivide the land. And again, this is where Bill 45 that Mr. Horikawa spoke about comes into play where at this point, nine months later, the County Council has now actually approved a bill that will not require the parcels to conform exactly but to be consistent, and that consistency does apply to the existing uses within the subdivision. And since there won't be any changes in uses, it will remain consistent.

And here's a history of events, the sequence, really, of the land which shows how the incorrect land use designations led to this current mismatch of designations versus the original plan. Land Zoning Map 944 was adopted in 1974. This map shows the location of the future beach access which is in the same location as it is in today. A Step 3 approval for public beach access parking and facilities was approved in 1975 by the Maui Planning Commission, and as part of the process, an easement was drawn up in cooperation between Maui Land and Pineapple Company and the County of Maui. This easement map also shows very clearly the public parking and the access for the bay in the same location as it is today. The public access improvements were constructed in 1976, and the restaurant was constructed in 1977. So once again, everything was built in the '70s. In the absence of the signed easement, Maui Land and Pineapple executed and recorded the unilateral agreement and declaration of park and beaches' access parking in 2000. And again, that's the document that confirms that the existing uses for public access will remain as public access.

Okay, so the Lahaina Community Plan was adopted in 1983 after all of the improvements were

built. And the West Maui Community Plan was adopted in 1996. Both again, occurred well after 1977 when the improvements on this parcel were completed. Because it can be difficult to determine where the zoning lines are from these maps, we worked with the Planning Department to get a determination of where the zoning lines were in relation to our specific subdivision. And I'm gonna apologize right now because these are really difficult to see, but these are the actual maps that the Planning Department provided to us and that they agree represent the zoning in this area.

So the top map represents the community plan. We have a public/quasi-public section which is this blue stripe here. We have a business commercial which is this red area here. We have open space which is this green area. And there's also a multi family chunk right here. The County zoning again has resort commercial in this area. The open space is in green here. And then the apartment is over here. So in comparing these two, it's easy to see that many of the areas are inconsistent between the two, but again, the uses were existing and are still in conformity.

Most notably is that the community plan's public/quasi-public area, when it was drawn in the '80s and '90s was drawn to traverse directly through the existing building right here to a rocky outcropping. And it doesn't actually go to the beach which is this way. Also, the community plan's public/quasi-public area extends into the County resort commercial zoning. And the multi family residential designation extends into the County open space zoning area. So there's lots of very small inconsistencies there.

So Maui Land and Pineapple Company is requesting a variance from 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 public access at Kapalua has always been the common goal of Maui Land and Pineapple Company and the County since 1974 and possibly prior to that. The existing improvements on the parcel were constructed in 1976 and 1977 prior to the adoption of the community plan in 1983 and '96. And while the community plan shows the intent to provide public access to Kapalua Bay, the public/quasi-public corridor was inadvertently drawn directly through an existing building. And because of that, Maui Land and Pine is now currently prevented from subdividing our property.

So that's the end of the presentation, and if you have any questions about it, I'm more than happy to answer them.

Vice-Chairman Tanaka: Any questions by the Board Members? Any discussion by the Board Members? When we went through this in November and December, we actually got to a point where the Board actually – it was moved and we went to a vote. And it was – the vote was split. That is the reason why it was deferred, and that's why it came back to us today.

Mr. Santiago: I have a question. The subdivision, I'm just trying to understand the rationale behind it, to subdivide mainly the parking area and the access to the beach is separate from the building itself?

Ms. Flower: That's correct. The intention of Maui Land and Pine is actually to deed in fee simple the public access to the Kapalua Resort Association, which is the master homeowners' association in the area. And that way they will have fee simple ownership and be able to maintain it in

perpetuity. The other parcel will remain with Maui Land and Pineapple Company.

Mr. Santiago: So that beach access is being deeded to the association, but it will remain as public access?

Ms. Flower: It will. There is a unilateral agreement that requires it to remain public access in perpetuity. So regardless of the situation that Maui Land and Pine is in, the homeowners' association will always maintain it.

Mr. Santiago: Thank you.

Vice-Chairman Tanaka: Any other questions? Then the Chair would ask for a motion.

Ms. Rachel Ball Phillips: I'd like to make a motion that we go ahead and approve the variance subject to the County's hold harmless agreement and standard insurance requirements.

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

Ms. Vadla: I'll second that.

Vice-Chairman Tanaka: It's been moved and seconded to approve the variance. Any discussion? With that, the Chair will ask for a vote. All those in favor of approving the variance application as stated, please say aye. Any opposed? None.

It was moved by Ms. Phillips, seconded by Ms. Vadla, then

**VOTED: To approve the variance subject to the County's hold harmless agreement and standard insurance requirements.**

**(Assenting: R. Phillips, B. Vadla, B. Santiago, W. Kamai,  
R. Shimabuku, K. Tanaka.)**

**(Excused: S. Castro, R. Tanner.)**

Vice-Chairman Tanaka: **The variance is granted.**

Ms. Flower: Thank you very much.

Mr. Cerizo: Mr. Chair, can I assume that the justification that was presented in their presentation is being used as the Board's justification in the granting of the variance?

Ms. Phillips: Yes, that's correct.

Vice-Chairman Tanaka: Okay, thank you very much. Moving on, the approval of the July 20, 2010 meeting minutes.

**E. APPROVAL OF THE JULY 29, 2010 MEETING MINUTES**

Mr. Kamai: Mr. Chair, move to accept.

Vice-Chairman Tanaka: Do I have a second?

Mr. Santiago: Second.

Vice-Chairman Tanaka: It's been moved and seconded. All those in favor, say aye. Any opposed?  
No.

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

**VOTED: To approve the July 29, 2010 meeting minutes as presented.**

**(Assenting: W. Kamai, B. Santiago, B. Vadla, R. Phillips,  
R. Shimabuku, K. Tanaka.)**

**(Excused: S. Castro, R. Tanner.)**

Vice-Chairman Tanaka: Planning Department, Director's report, status on – status update on contested cases?

**F. DIRECTOR'S REPORT**

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

Mr. Cerizo: We have no status as of today. Trisha is on sick leave and could not prepare a status.

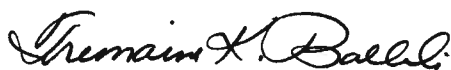
**G. NEXT MEETING DATE: August 26, 2010, Thursday**

Vice-Chairman Tanaka: Okay. Our next meeting is August 26<sup>th</sup>. If no other discussion, meeting adjourned.

**H. ADJOURNMENT**

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

Respectfully submitted by,



TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairman (1:32 p.m. - 2:00 p.m.)

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Kevin Tanaka, Vice-Chairman  
William Kamai  
Rick Tanner (1:32 p.m. - 2:34 p.m.)  
Bart Santiago, Jr.  
Rachel Ball Phillips  
Ray Shimabuku  
Bernice Vadla

**Members Excused:**

Steven Castro, Sr.

**Others:**

Francis Cerizo, Staff Planner, Planning Department  
Michael Hopper, Deputy Corporation Counsel, Department of the Corporation Counsel  
Lesli Otani, Civil Engineer, Department of Public Works, Development Services Administration