BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
SEPTEMBER 23, 2010

(Approved: 10/14/2010)

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, 1:37 p.m., Thursday, September 23, 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 is 1:37 p.m. on September 23, 2010. Let the record reflect that we have a quorum present of six Members of the Board. According to the advice of our Corporation Counsel, we do not have to take public testimony as to this contested case item, the Appeals Item B-1 through 4. If there's anyone in the public who wishes to testimony on any other agenda item on this agenda for today, please sign up on the clip board, or raise your hand, or come forward. Seeing none, we'll close public testimony as to this entire agenda for today, and move forward to our appeals.

B. APPEALS

1. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director of the Department of Public Works' letter dated March 25, 2008, amending the preliminary approval letter dated March 3, 2008 for the Makila Nui Subdivision (DSA File No. 4.957) located off of Pua Niu Way, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-001:025 (BVAA 20080003).**

2. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director of the Department of Public Works' letter dated March 25, 2008, amending the preliminary approval letter dated September 11, 2006 for the Makila Ranches - Phase 1 Subdivision (DSA File No. 4.924) located at 373 Haniu Street, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-001:027 (BVAA 20080004).**

3. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director of the Department of Public Works' letter dated March 25, 2008, amending the preliminary approval letter dated October 17, 2006 for the Makila Ranches - Phase 2 Subdivision (DSA File No. 4.927) located off of Kai Hele Ku Street, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-001:026 (BVAA 20080005).**

4. **THOMAS D. WELCH, ESQ., MANCINI WELCH & GEIGER, LLP representing MAKILA LAND CO., LLC, appealing the Director of the Department of Public Works' letter dated March 27, 2008, amending the preliminary approval letter dated October 17, 2006 for the Makila Ranches - Phase 3 Subdivision (DSA File No. 4.929) located off of Kai Hele Ku Street, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-001:030 (BVAA 20080006).**

   a. **Hon. E. John McConnell (Ret.), Report of Hearing Officer: Recommended Findings of Fact, Conclusions of Law and Order.**
   b. **Appellant Makila Land Co., LLC's memorandum in support of exceptions to Hearing Officer's report and recommended findings of fact, conclusions of law and order, dated March 29, 2010; appendices "1" - "2"; certificate of service.**
   c. **Appellant Makila Land Co., LLC's exceptions to Hearing Officer's report and recommended findings of fact, conclusions of law and order, dated March 29, 2010; certificate of service.**
   d. **Appellant Makila Land Co., LLC's post-hearing brief; appendix "1"; certificate of service**
   e. **Appellant Makila Land Co., LLC's proposed findings of facts, conclusions of law, decision and order in consolidated appeals; certificate of service**
   f. **Appellee Director of Public Works' closing brief**
   g. **Appellee Director of Public Works' proposed findings of fact, conclusions of law, and decision and order.**

Ms. Trisha Kapua`ala: It used to be Thomas Welch. It is now Jim Geiger of Mancini, Welch and Geiger representing Makila Land Company, LLC, appealing the Director of the Department of Public Works' letters dated March 25, 2008, and March 27, 2008 amending the preliminary approval letters dated March 3, 2008, September 11, 2006, October 17, 2006 for the Makila Nui, Makila Ranches Phases I, II, and III Subdivisions which is DSA File No. 4.957, 4.924, 4.927, and 4.929 for property located off of Pua Niu Way, Haniu Street, Kai Hele Ku Street, which is in Launiupoko, Lahaina, Maui, Hawaii; TMK: 4-7-001:025, 027, 026, and 030. And these are BVAA 20080003, 0004, 0005, and 0006.

Mr. Jim Geiger: Good afternoon, Chair, Commissioners. Jim Geiger . . . (inaudible) . . .

Chairman Endo: Good afternoon. Please use the microphone when you speak so we can record everything for the County.

Ms. Jane Lovell: Good afternoon, ladies and gentlemen. My name is Jane Lovell. I'm Deputy Corporation Counsel and I'm here representing the Department.

Chairman Endo: Okay, so we'll be taking up all four appeals in a consolidated manner, I take it. And we do have the report from the Hearings Officer. I think what we would like to do is have Judge McConnell, the appointed Hearings Officer make some introductory remarks. And after that, allow both parties to make their presentations. I've been informed that Mr. Geiger has a power

point presentation. Is that correct?

Mr. Geiger: That's correct.

Chairman Endo: Okay. And then after that– That'll be like part of your argument time. About how long will that take?

Mr. Geiger: I would think 20 minutes, hopefully, less.

Chairman Endo: Okay. And that would include a background of the facts and everything. Okay. And Ms. Lovell would then be allowed to provide her closing argument.

Ms. Lovell: I'm just a little bit concerned about a power point presentation at this stage in the proceedings with the evidence is closed and I haven't had an opportunity to see what is proposed.

Chairman Endo: Okay, why don't we–? Do you have a hard copy of all of your slides?

Mr. Geiger: I do.

Chairman Endo: Maybe you could show them to Ms. Lovell and then we'll let Judge McConnell speak first. And then after he's done, we'll – I'll check back with the County; see if they have objections.

Ms. Lovell: Thank you very much. Thank you for the opportunity to work with him.

Chairman Endo: Okay. So, Judge McConnell?

Judge E. John McConnell: Yes, thank you, Mr. Chairman, and Members of the Board. I've spent– I wrote a report in this case in which I tried to be as concise as I could. It's only ten pages. And I hope you get a chance to think – to read it and think about it. All four of these appeals are related, of course. But basically here what we're looking at are – these four parcels, two of them are not in the SMA area, two of them are in the SMA area. Excuse me. And they're two real problems that these appeals present.

The first is whether the Appellants should have gone and gotten an SMA permit before even preliminary approval. They admit themselves that they have to get it before final approval. I discuss that. My conclusion reading the Coastal Zone Management Act and the case law is that the proper construction of the State statute is they should do that first. That the environmental concerns have to be addressed first. It does read for legal argument on it, but I do think it's primarily a legal question.

The second big problem presented by these appeals is the 45-day limit because the Director exceeded by two years almost. That limitation . . . (inaudible) . . . made sweeping revisions to the preliminary approval. And whether other less sweeping revisions might be made is probably a question we don't have to look at, but in this case, it was obvious to me from the Director's – former Director's testimony that he didn't like these applications, and he made sweeping revisions to what had been preliminarily approved about two years earlier. And basically what I said is 45 days is

what it is. And you can't just avoid the 45-day limitation which is in the ordinance by saying, well, we're making it subject to whatever these other departments may say, and then basically, leave the whole question open, and make changes much later.

Those are the two big problems. I think they are significant problems. The first is I think a serious legal issue. And the second is contrary to the practice of the Department for many years. And I think I would be of most help to the Board if I just responded to your questions after you've had a chance to hear their arguments on it. They are a little complex, but those are the two basic problems that at least I tried to deal with. So I'll take a seat.

Chairman Endo: Okay. Thank you, Judge.

Judge McConnell: Thank you.

Chairman Endo: So now we'll address whether or not the County has an objection to the slides or the power point.

Ms. Lovell: I've had a very brief opportunity to look at them, and I don't object to the slides themselves. I'm not sure I agree with some of the legal conclusions contained in them, but I'm satisfied that there is no – that there are no slides that constitute evidence that's not in the record. That was my concern.

Chairman Endo: Okay.

Mr. Geiger: Chair, Members of the Board, if I may begin? In follow up to what the Hearing Officer McConnell said, as was indicated, we have four consolidated appeals here. I represent Makila Land Company who was the entity that filed four – or submitted four separate applications for subdivisions with preliminary plats and supplemental material. The applications were for a Makila Nui Subdivision, which was a three-lot subdivision; Makila Ranch is one, which was a 11-lot subdivision; Makila Ranches II, also an 11-lot subdivision; Makila Ranches III, which was a seven-lot subdivision. Now, these subdivisions are all located over in Lahaina, and I'll show you a map a little later on to give you a better idea, but we're here because we appealed decisions that were made by the Director on these four subdivisions in 2006 or 2008. But what happened was we got a report and recommendation back that included not only our appeal of the decision, but also a declaration, and that's what Judge McConnell was talking to you about at the beginning. He included a declaration concerning the SMA.

All that you have before you, if you look at the notice of appeal is back in March 2008, the Director of Public Works wrote some letters, and we appealed certain of the conditions that were attempted to be imposed on the preliminary plats on those letters. That's all we appealed. And then we got into the hearing, and after the close of the hearing, the Director made a legal argument that said, oops, the preliminary plats are invalid because you didn't get your SMA first. That is not before you because there is no written determination from the Director. There's no letter. There's no decision. There's no order from the Director saying that these plats are invalid.

So what is the scope of your review? When I was preparing for this, I had a hard time figuring out what I was going to talk to you about today. So I thought, well, I'll go back and look at the Charter

because this is the power that you folks have. The Charter says you hear and determine applications for variances. Board of Variances and Appeals. Makes sense. You hear and determine appeals alleging error on a decision and order. Board of Appeals. Makes sense. Variances and Appeals. You hear and determine other matters required to pass on pursuant to ordinances. Fine. You adopt rules of procedure. Your BVA rules, which you adopted pursuant to the Charter said that anybody that's aggrieved by a decision or an order of the Department can make an appeal. That's what we did. We filed an appeal. And then what do you do? You review the decision and order under appeal, and you can either reverse, or you can modify if substantial rights have been impacted. That's your power. That's what you have the right to do.

How does that apply to us here today? Well, you can't act on the SMA declaration. You don't have the authority as shown under the Charter. You don't have the authority as shown under your rules. There is no decision or order that is in the record before you of any department or any Director that the approvals of the preliminary plats from Makila Ranches II and III are invalid. They want, and what they're asking you to do is to substitute yourself for the Director, and to issue a determination, but the Director hasn't done that, and that's not your function. Your function is to review what the Director has done, not to do the Director's job. And there is simply no part of the notices of appeal where anything is mentioned about the invalidity of these plats.

Where are the subdivisions? This is an aerial view of the subdivisions. This is Launiupoko Park, Lahaina on the south or the north, rather. This is the old Olowalu Landfill on the south. It runs about two and a half miles. There are four subdivisions as I indicated: Makila Ranches are one, 11 lots, all 15 acres or more; Makila Ranches II, 11 lots, all 15 acres or more; Makila Ranches III, which was eight lots, all 15 acres or more; and Makila Nui, which was three lots, all 15 acres or more.

A little bit of background so you know how long this has been going on. My client started this process back in 2003. They came in with a plan to develop Makila Ranches I and II as a single subdivision called Makila Farms I. They came in at the same time with a plan to develop Makila Ranches III as a subdivision and called it Makila Farms II. Within a week of submitting the application and the preliminary plats, they were rejected by the Planning Department. They were rejected because they said we needed to take into consideration, the West Maui Community Plan, and we needed to take into consideration, the Lahaina Bypass. So initially, we appealed, and then decided, wait a minute, we'll just redo it. So my client hired Rory Frampton. And Rory spent two and a half years putting together these designs taking into account these items, meeting with the County representative saying, okay, what do we have to do to comply with the West Maui Community Plan? What do we have to do comply with where the roadway's gonna be? What do we have to do to comply with the Pali to Puamana? And what happens is we come up with three subdivision plans. We submit them to the County in March of 2006. It takes the County until August and September to finally say that our applications are okay and they'll start processing them. And within 45 days, by September and October of 2006, they had approved the preliminary plats for each of these subdivisions. We then started the process of doing the other things. You can see the record's rather thick as to what all else happened after that. That's in the record. That was before the Hearings Officer. But in January of 2008, we then submitted for Makila Nui, and we said we wanna go ahead and do this subdivision, too. The Makila Nui preliminary plat was approved again within 45 days. So all this sounds wonderful.

Why are we here? Well, we're here because in March 25th and March 27th, two decisions were made by the Director that we appealed. Again, August, September, the first one's January, preliminary plat approval, conditions imposed.

What were the conditions we appealed? Well, the first letter we got involved the two mauka subdivisions: Makila Nui and Makila Ranches Phase I. And the first condition that they wanted to impose said, hey, this subdivision, the two mauka ones need to be combined and redesigned with the two makai ones because we don't think the makai ones comply with the West Maui Community Plan. Now, stop and think about that. It's not that the mauka ones don't comply. It's saying we don't think the makai ones comply, and so we want you to combine the two and redesign. Now, folks, that just doesn't make sense. It didn't make sense to us when we got it especially, when it was 18 months after the preliminary design was approved, and they said, hey, you gotta go back and redesign everything.

We got a second condition. It said, wait a minute, you have to redesign the subdivision boundaries consistent with the Honoapiilani Highway movement. Well, hello. We had done that. Here's the Honoapiilani Highway realignment that we all know about. We had done that when we came in the first time. So we're saying this doesn't make sense. So we appealed those two.

Two days later, we get another letter. And this time it says, well, your two makai subdivisions, now you gotta go back and redo those because they don't comply with the Pali to Puamana when, in fact, we had a greenway design down here, we had other things that took into account, the Pali to Puamana. That's what we were doing for two and a half years before we even got to preliminary approval.

So why is the Director wrong in this case? Because the Subdivision Ordinance, which you're tasked to review says that within 45 days after submission of the accepted application plat, the Director has to review it and act on it. Forty-five days. It doesn't say 45 days and some. It says 45 days.
What does the Director have to do? He has to submit the preliminary plat and the supplement materials to four groups: Planning; Health; Sanitary Engineer; and if there's a highway involved, you submit to the Department of Transportation. This was done. In the submittal, the Director has to say, you have a certain period of time in which to respond. That was done. And all this is in the record. All this are in the findings.

So what happens? Forty-five days is up. And the Director has to do: shall approve as submitted, shall approve as modified, or shall disapprove. Now, if the Director doesn't have enough information, the Director can say, wait a minute, I'm gonna defer. I need some more time because I need more information, but that's not what happened in this case. What happened in this case is, the Director gave approval of the preliminary plats within the 45 days, and then comes in 18 months later, and says, no, change everything, redesign the whole thing.

What do we ask of you? Well, the BVA rules as you saw say that if somebody comes before you, and the decision was wrong, and they've been injured or prejudiced, then you can correct it. So that's what we're asking. There is no dispute that the action taken in this case was wrong. The Department did not file any exceptions to the Hearings Officer's report in any fashion. The Department did not file any support of the Hearings Officer's report in any fashion. The Department

didn't reply to the support that we provided in the filings with you folks. And the Department did not reply to the exceptions that we took in this case. So for purposes of these appeals, what's before you here today no one is disputing that the conditions that were attempted to be imposed in March of 2008 was the wrong act that needs corrected. And that's what you should do. Put us in the position that we would've been in back in March of 2008 as if those stupid letters hadn't been sent in the first place.

How do you go about doing that? Well, in this case, it might cause you a little bit of pause and say, how we gonna fix this problem because the Hearings Officer has already come in and told you that you ought to act, and act on something that's not before you that hasn't been appealed. Well, what I would propose to you is go ahead and move to adopt the Hearings Officer's report as amended by the exceptions that we raised in our exceptions. We specifically went through, and if you go through the exceptions you'll find we said, delete these conclusions, delete these findings, delete these conclusions of law, add these findings, add these conclusions of law. And I've got a list of them, if the Board would like later on that I could provide.

What's the effect of that action? The effect of the action is that it gets rid of the portions of the Hearings Officer's recommended proposed findings of fact, conclusions of law and order that you folks don't have the authority to rule on. It adds the findings to support the ruling that should've been made, and it changes the order so that we have an order that adopts the correct finding on all four subdivisions that the three conditions that they attempted to impose in March of 2008 can't be imposed.

Now, why should you do this? Well, again, the BVA is supposed to correct an erroneous action when somebody's been prejudiced. Our subdivisions were proposed, as I said, initially, in October 2003 and denied immediately, almost. We redesigned them, spent two and a half years to meet all the objections. We resubmitted in March. We get our preliminary approvals in August, in September and October. And then it's almost a year and a half later before we get the objections. That's not fair. We've been injured. We've been prejudiced. You need to fix it.

Now, some of you may say, well, Judge McConnell is a very learned Judge. I agree. He's a very learned Judge. And so he's telling you that there's something wrong. So why shouldn't we do it? Put aside whether or not we have jurisdiction. Why don't we just go ahead and address the issue? Well, all of that, and if you read his report, as I'm sure you have, and the County's position is all based upon a belief that the very first approval that you must get is the SMA, but that's not the very first approval that you have to get when you do a development. There are many other approvals that come first. I'm sure some of you folks already know them. For example, if I wanna get an SMA, I have to have consistency between community plan, zoning, State land use in order to get an SMA. So if I'm not consistent, I have to go get a zoning change before I can get an SMA. SMA isn't the first approval. Zoning is first. Community plan, same thing. State land use designation, I might have to get Land Use Commission. I have to get all of those. If Chapter 343 is triggered where there is an environmental issue, I have to go get my environmental assessment and get my finding of no significant impact before I can get an SMA. The SMA isn't the first thing I get. In addition, if I'm getting an SMA, and I have landscaping involved, and I have architecture involved, I gotta go through the Urban Design Review Committee again, before I get an SMA. Now, there are other things that happen after SMA. Grading permits, if I wanna move dirt, I gotta do that afterwards. If I wanna build, construction, gotta do that afterwards. If I want my final plat, I have

to do that afterwards if the SMA is involved.

So what's the difference between . . . (inaudible) . . . ? What's the difference between the two? I'll talk louder, if that's okay with you. The difference between the two–

Chairman Endo: Hang on, because they gotta record it.

Mr. Geiger: I apologize. What's the difference between the two? One is development. One is not development. Grading, construction, final plat are all development. Zoning, community plan change, environmental assessment, urban design, not development.

Let's look at the statute because that's what was cited to you in the Hearings Officer's report. No development shall be allowed within the special management area without first obtaining a permit. Development, no agency shall authorize any development until approval is received. No development shall be approved until you get first SMA. The key is, is a preliminary plat a development? Chapter 205A doesn't define – well, it defines development, and it tells us development is when you erect something, when you grade, when you're actually – subdivide the land, when you change the intensity use of water, or when you construct. Those are all developments. They don't define subdivision. They say it's a development, but they don't say what a subdivision is. So we have to look at Maui's Subdivision Ordinance to find out what a subdivision is.

A subdivision is the improved or unimproved lands divided into two or more lots for the purpose of sale. It doesn't say to be divided. It doesn't say proposed to be divided. It says divided. It's an act that means that it's done. To be a development, you have to do it. It's not like, well, I propose to construct. If you construct, that's a development. If you propose to construct, that's not a development. The Subdivision Ordinance speaks of preliminary plats. It speaks of final plats. It speaks of proposed subdivisions and it speaks of subdivisions. Nowhere in the Subdivision Ordinance does – do the words "preliminary subdivision" exist. It doesn't exist. Why? Because there is no such thing. You have a subdivision or you don't have a subdivision.

What is a preliminary plat? Because that's what we're talking about here. It's a map or drawing made for the purpose of showing the layout and design. Does that sound like something that's final? Something you can take and go down and say, okay, I'm gonna divide up the land, and I'm gonna put this part here, and that part there? No.

What's a final plat? A map accurately surveyed by a registered land surveyor that's capable of recording in the Bureau of Conveyances at the Land Registrar. That's a division. That's something that you actually can say I've got this parcel, I've got that parcel, I've got that parcel.

So what does the approval of a preliminary plat allow? Well, and this is again from the Subdivision Ordinance. It's a directive to the person who received approval to prepare detailed drawings on the plat submitted. And you can't change them because if you change them, you gotta go back and start the process over again, and you have to comply with the rest of the chapter. That's what a preliminary plat is, nothing more. Is that a division of land? No. That's something that says it's a prerequisite. It's a hurdle. It's something that you have to clear to get to the next step. It tells you that once you have met this prerequisite, you can do surveys. You can prepare construction plans.

You can do conditions, covenants, and restrictions on your subdivisions. Then you can prepare the final plat, but again, it's not a development.

So I was trying to think maybe there's some analogies we could use about, well, what's like a preliminary plat for development? I thought, okay, I'm a lawyer. I went to law school. I got a degree from law school. Did that give me a right to practice law? No. I could've gone to a real estate school. Attend real estate classes. Did that give me a right to sell real estate? No. I had to do something else. It was a prerequisite. Driver's license. Many of you may have teenage kids. I know I just got through having a daughter who got a driver's license. They get a learner's permit. They have to take additional classes, do additional things, and get an operator's permit. It's approval. It's a first approval, but it's prerequisite. As I've told you before, environmental assessment, if Chapter 343 is triggered, you have to get your FONSI before you can get an SMA. Again, the SMA is not the first approval you get. An environmental FONSI is. Urban Design Review Board, same thing. Change in zoning again, same thing. Change in community plan or change in land use designation, the bottom line is that preliminary plat approval is only a prerequisite to do certain other things, but it's not a development.

And what are we before you here today? There's really three things that are before you here today. Number one, we appealed the three conditions that were imposed in May – excuse me, March of 2008. And I don't think there's anything – anybody out here who's gonna say that it was wrong to impose these conditions 18 months afterwards. It has to be reversed.

The second thing that's before you is, you have to decide can we even act on whether or not Makila Ranch II, Makila Ranch III preliminary plats are invalid? And the answer is no. You don't have before you in this record anywhere, a decision and order, anything from the Director of Public Works invalidating those two subdivisions because they didn't get SMA approval. Can't even consider it.

And finally, even if you wanted to, it's not a development. The law is clear. Development means subdivision. Subdivision means dividing – divided, past tense, not present tense, or future. And Chapter 205A only comes into play if you have a development. A preliminary plat is merely a prerequisite to this development. It's not a development.

I wanna thank you for your attention and time. If any of you have any questions, I'd be happy to answer them. And of course, I would be – would reserve the right to respond to any arguments that are made.

Chairman Endo: I think I'm gonna let the parties all make their presentations before we do questions and answers.

Mr. Geiger: That would be fine.

Chairman Endo: For the record, your presentation is about 23 minutes. So I'd like to allow the County at least – well, approximately, the same about of time, if she wants that much, but hopefully, not.

Ms. Lovell: I will take the hint and try to be brief.

Chairman Endo: First, we have one question from Member Kamai.

Mr. William Kamai: Is there any chance of us getting a hard copy of that?

Chairman Endo: Is there any objection of passing that out from the County?

Ms. Lovell: I do think it's cumulative to the actual oral arguments, but I leave that to your discretion.

Chairman Endo: Okay, we'll take it.

Ms. Lovell: I would like the record to reflect that I obviously don't agree with the legal analysis.

Chairman Endo: Okay. This is not evidence. This is argument by the counsel–these slides.

Ms. Lovell: Right. Chair and Members, thank you for the opportunity to appear before you today. The Director of Public Works finds himself in a rather unusual position. The Hearing Officer ruled against the Director and found that the Director, and his staff, and the Department had been doing things wrong for some period of time, things that were not allowed by State law, things that were not allowed under a decision of the Hawaii Supreme Court. The Public Works Director, and his staff, and the Planning Department, and the Water Department have all gotten together, have read Judge McConnell's recommendation, have taken to heart his criticisms, and have agreed that he is right, and that the County is wrong. Therefore, the Director, despite the fact that there were many things that we fought over in this proceeding has concluded that Judge McConnell's recommendation comports with the law, it's fair, it's reasonable, and it should be adopted by this Board.

There are basically two parts as Judge McConnell indicated to you to his decision. The first dealt with this so-called 45-day issue. And that is what has to be done when a project comes in for preliminary subdivision approval within 45 days. The practice has always been that the – and as Mr. Geiger acknowledges was done in this case that the subdivision office sends out the paperwork to various departments both to the State and the County government for comments. If they get their comments back in time, they're included and given to the developer. But one way or the other, unless they need more information, the Director must make a final decision within 45 days. The Director did that in this case. However, comments came in late from the Planning Department. The whole question was, were those comments valid or were they invalid because they took too long? Judge McConnell said, "Look, your ordinance says 45 days. The comments didn't come within 45 days. You didn't ask for more time. You're stuck. Next time, do it better." You know what? We agree with that. We're gonna try to do a better job. We've met with the various departments. If it turns out that the project is too complex, and one department or another needs more information, we're gonna tell the developer that, and try to work things out. But in any event, Judge McConnell pointed to our own statute and said, 45 days means 45 days. He got us. Guilty. So we're not disagreeing with that part of his decision.

But there's another part of his decision. And that has to do with the decision of the Hawaii Supreme Court called Leslie, no relation to our Lesli Otani. In the Leslie Decision, the Leslie Decision came from the Big Island, and it was a lot like what happened here. It involved preliminary subdivision approval. And the practice on the Big Island as has been the practice here has been to allow a

developer sort of a choice if the project developed is in the SMA. If you wanna go for your SMA permits first, and get all that done, or do you wanna do subdivision first, or do you wanna follow the same track at the same time, do it more or less simultaneously? The Hawaii Supreme Court said in the Leslie Decision that because the subdivision process is defined as development, you don't have a choice, you have to do your SMA first, and get all your SMA approvals first. And that doing it the other way, the way that the Big Island had done, and the way that we've always done it here on Maui is legally incorrect. Judge McConnell recognized that. He pointed it out to us in his decision. We think again that he is right despite the fact we have been doing it the other way in giving developers a choice in the matter, and it makes some sense frankly to go through the SMA process first if your land is in the special management area. Because if you go through preliminary subdivision first, and then go through the Planning Commission with your SMA, the Planning Commission may make you change your project. They might want you to move your roads around. They might you change your drainage and so forth. It makes everybody, both the developer and the County have to go through everything twice.

And so we see the wisdom of the Leslie Decision, and frankly, whether we agree with it or not, whether we like it or not, the Hawaii Supreme Court is the Hawaii Supreme Court. Judge McConnell doesn't get to decide what parts of the law to pick and choose. He, as a retired Judge and as a Member of the Bar is bound to follow the law as set forth by the Supreme Court and so are we.

Now, the Leslie Decision is kind of interesting because it's not something that the County brought up in this case. It was brought up by the developer. And it was specifically cited – the Leslie Decision of the Hawaii Supreme Court was cited on Cases 24 and 26 of the Appellant's pre-hearing brief. So that's where it came up. They were relying on it for something else, but I read that decision because they pointed it out and Judge McConnell read that decision. And it was kind of an ah-hah moment. We said, wow, we've been going about this all wrong. We've been doing preliminary subdivision approvals first, and then doing this – the SMA process second, or at least allowing people to do it that way. The Hawaii Supreme Court is telling us no, preliminary subdivision approval is subdivision is development. You're gonna do that first. And so once that happened, then Judge McConnell, having read that decision, having considered it, having thought about the law as set forth by the Hawaii Supreme Court came to a conclusion that the County's process was wrong and needed to be changed. The Public Works Department accepts that recommendation, and has already taken steps to start making those changes working with the other departments involved: both Planning and in some cases, Water.

So therefore, I strongly disagree with Mr. Geiger's argument that this Body has no authority to consider this decision of the Hawaii Supreme Court. Quite the opposite, I think that once it was brought to his attention, Judge McConnell couldn't ignore it. This Body cannot ignore it. And the County can't ignore it. It's up to us to conform our procedures to the law as given to us by the Hawaii Supreme Court. And so therefore, despite the fact that Judge McConnell's decision rules against the County in a number of respects, we accept it, we acknowledge its wisdom, we acknowledge its justice, and we ask you to uphold his decision in its entirety. Thank you.

Chairman Endo: Thank you. So at this time, Judge McConnell, did you wanna say some more, or you wanna just wait for questions?

Judge McConnell: Maybe I can help clarify a little bit, and then we can try to answer your questions as best we can. Mr. Geiger's done a good job of slicing and dicing on some of the words here, and I appreciate his argument. Essentially, it's that, well, you know, the question of whether you gotta get an SMA first before preliminary whether than final was never decided by the Director.

You know, though, there's no question that subdivision is a development. The CZMA says so. There's no question that you gotta get the SMA permit before a development. His argument is, well, the preliminary development is not a development because you can't divide the land, or alienate the land, or lease the land, sell it, whatever. That's true. I don't know that that necessarily takes it out of the meaning of the statute regarding – which requires developments first having SMA, but I'll agree there's room for argument. But somewhere I recall, and I believe it was in the SMA that the counties are all empowered to adopt rules to try to mesh these two things together because essentially what you have here is an ordinance, Subdivision Ordinance, then you have the CZMA, and nobody really tried to make them work together.

Mr. Geiger seems to be saying, well, a preliminary subdivision application, even though it's deemed approved is not the final, so therefore, we don't have to get the SMA permit before that even if we do have to get it before the final. I don't agree, reading the statute, because there's an intent I think underlying the CZMA that you deal with that first. If you accept Mr. Geiger's argument, I think you're just looking at further litigation. In other words, it won't be before this Board, of course, but somebody will contest what's gone on, but – as violating the CZMA, but – and Mr. Geiger may then say, well, but you're too late.

So I think essentially, the Appellant here has done a good job of slicing and dicing, but whatever the Subdivision Ordinance says, whatever the Charter says, you're faced with a State statute. And it could be clearer, but the State statute controls over both the Charter and the Subdivision Ordinance. I think a proper construction of it is that you do that: you get the SMA first, and that means before the subdivision process, including a preliminary subdivision. In the Leslie Case, the facts are a little different. I'm not saying that completely answers the question, but Leslie does say very clearly that the long-standing practice which is almost identical to ours that they followed on the Big Island was not enough to save that decision. Anyway, thank you and I've responded to any questions I could.

Chairman Endo: Thank you, Judge. You're still gonna stay around, though, yeah?

Judge McConnell: Sure.

Chairman Endo: Okay. We'll let Mr. Geiger have a short rebuttal argument, and then we'll do questions and answers.

Mr. Geiger: Thank you. Just wanna make two points in response. Number one, no one here has told you – you didn't hear from the Hearing Officer, you didn't hear from the Director that they've ever issued any decision or order that says Makila Ranches II and Makila Ranches III are invalid because they didn't get an SMA first. If they've changed their policies and if they've changed everything that they've said they've changed, wouldn't you think that that would've been a letter that they would've sent out in this case in some point in time between the date of the hearing, which was May 14th and 15th of last year, our pre-argument briefs were due before then, the date of the closing

arguments, which were in July of last year, and the date of the hearing today, or even the date of the Hearings Officer's decision and order, which was February of this year? They've had over a year. Haven't done it. I'm here to tell you that unless you have that decision and order, this Board doesn't have authority to do anything on it. Whether you like it, don't like it, you don't have authority to act on something that's not before you.

The second point that I'd like to make is the Leslie case was different. The Leslie case didn't address whether or not in the case of the Big Island a tentative plat or approval of a temporary preliminary plat was a development. The Leslie case said a subdivision is a development. We don't disagree. But nobody's analyzed when you have a subdivision under the terms of the Coastal Zone Management Act, Chapter 205A. So until you have a subdivision, you don't have development. And until you have development, there is no obligation to get an SMA permit. And I realize environmentally, that's the driving force here. The SMA is an environmental issue and shouldn't we get that first? Handle the environment stuff first? Remember, you have to get your environmental assessment before the SMA. That's another environmental matter. That specifically has to come before the SMA. So I would submit that this argument that, well, the legislature really intended 205A to mean that preliminary plat is a subdivision, is a development really isn't accurate. It's a belief that maybe it would be better to do that first, but that's not what the statute says. And in this particular case, we're here only on an appeal of did the Director act properly to issue conditions after he'd approve a preliminary plat? And the answer is no. Thank you.

Chairman Endo: Okay. We'll open up to the Board for questions and deliberation on this matter. I'll start off with a question, then, while you folks are developing yours. If they're already – if the County's already gonna adopt it as a policy from now to require an SMA prior to preliminary subdivision approval, is it only going forward, or is gonna be retroactive? If it's gonna be retroactive, then it doesn't matter what we do in this case. It's still gonna apply to everybody from now on.

Ms. Lovell: I've got Lesli Otani here from Subdivisions, and she can help me out if I answer that question incorrectly. But basically, as starting first with this case, we didn't see any need to issue some Director's decision saying that the preliminary subdivision was invalid because we felt that Judge McConnell did that. And so we – as far as this particular case and these two particular subdivisions that are in the SMA are concerned, we feel that that came up. It was subjected to legal analysis. Judge McConnell made a legal decision. We looked at it. We kinda reluctantly agreed he was right. And that's where we are with this particular case.

Going forward, we are asking people who come in for preliminary subdivision approval, if their project is in the SMA, to go through the SMA process first. And the reason for doing that is because we feel that that's what the Leslie decision of the Supreme Court requires us to do. It's not only what Judge McConnell said. In this particular case, we went back, we read the Leslie decision. We realized that just as the Big Island had been doing things incorrectly, probably Maui County had not been doing things strictly by the book either. And therefore, going forward, we are going to definitely try to follow the Leslie decision of the Supreme Court.

Now, what do we do about other subdivisions that have gone through the whole process and so forth? For the moment, we are not going to be dealing with those and trying to undo things that have been done where someone hasn't filed an appeal or the issue hasn't come up especially,

where final subdivision has already been granted. Oftentimes, the SMA approvals and final subdivision approval happened either together, or subdivision happens just before SMA, or SMA happens just before subdivision. So we don't wanna open that whole can of worms and go back and try to see if there are other subdivisions that need to be undone. This is the one that came up. It came up on an appeal. It required all of us to look at these legal considerations. We did– Judge McConnell gave us his guidance. We agreed that he was right. And from henceforth, we're gonna try to follow not only his guidance and recommendation, but what we now see as the correct interpretation of the Supreme Court in the Leslie decision.

Chairman Endo: Thank you. Follow up question to that, then, on the jurisdictional issue. I think the basic idea under our rules is, a decision is made that a party feels is invalid for some reason. They file an appeal of that decision by the County. And we, the Board, hear the evidence and either reverse that decision, or affirm the decision, or affirm and reverse in part. I think what Mr. Geiger is saying is that there's been no appeal with regard to the SMA issue. So it's not within our power to make a ruling with regard to the SMA issue.

Ms. Lovell: Yeah, I'm happy to respond to that. Basically, this Leslie decision which Judge McConnell based that part of his opinion is an opinion of the Supreme Court. It's a question of law. And it's a question of legal interpretation. And so in the course of deciding this appeal, he couldn't decide part of it while ignoring the law that related to it. So what you have here in this appeal, it grew out of a dissatisfaction with the County missing the 45 days. But in looking at that issue, the Judge and eventually the County had to also look at our laws. Did our ordinance, did our Subdivision Ordinance, comply with what the Supreme Court tells us is the proper way to proceed? And you certainly have the jurisdiction to consider the legal question that impact the facts that are before you on appeal.

And I think another way to look at is that if the comments of the Planning Department came in too late, which we agree that they did, then – and they're invalid because they're too late, then we also have to look at the whole process in light of what the Supreme Court is telling us is the proper way to proceed, and see if the rest of the process was done accurately.

So in any event, this whole thing about whether you do the SMA procedures first or not, that's a question of law. It came up in the course of this appeal. This appeal couldn't really be decided without looking at that law. And unfortunately, for better for worse, we can't ignore it. The Supreme Court told us – told the Big Island, you can't be doing this, this way. You've gotta do it this other way. The County of Maui was doing it the same way as the Big Island. So it would be nice if we could just slice off a little corner of this appeal and only decide that, and ignore all this other stuff. But all this other stuff comes down to us from the Supreme Court. And the Supreme Court was interpreting State statute. And as Judge McConnell just indicated, a State statute and certainly a Supreme Court decision interpreting the State statute takes precedence over County practices, County ordinances, and so forth. So when there's a conflict between the two, it's the State statute and the interpretation of the State statute by our Supreme Court that governs. I find myself in such a funny position because here I am arguing against what the County's been doing all this time, but we took a real hard look at this, and we kind of reluctantly came to the conclusion that we had been doing things wrong, and that we had to change. And so therefore, we're in the process of doing just that.

Chairman Endo: Mr. Geiger?

Mr. Geiger: Just in followup on that, the problem is that there is no record before you upon which you can make this decision. Had this issue been brought properly, had a decision or order been given, and then the parties could've created a record, you'd have something upon which you could make your decision, but that hasn't happened, and that's why you don't have jurisdiction over this. We can say, well, this is the law, but the problem is, as you've heard the Hearings Officer and as I'll tell you, Leslie doesn't stand for that proposition. Leslie didn't address this issue. Leslie involved Hawaii – County of Hawaii's Subdivision Ordinances. You don't know whether they're the same, whether they're different, whether they're substantially the same as the Maui County ordinances. That's the problem. You don't have a record before you upon which you can make a reasoned, rational decision. Thank you.

Mr. Rick Tanner: Chairman, I have a question.

Chairman Endo: Go ahead, Member Tanner.

Mr. Tanner: To say that the County missed the deadline, the 45-day deadline is kind of a gross understatement in this case. And my question is, what were they doing? What took so long? Did they forget about it?

Ms. Lovell: The County here, and particularly, the Public Works Director is not making any excuses. The Public Works Director did what he had to do and his staff had to within 45 days. We acknowledge that the Planning Department dropped the ball on this one. We're like pleading guilty. We're not making any excuses.

Mr. Tanner: Yeah, I haven't heard any.

Ms. Lovell: Yeah, we're not. We're not. We're saying there was 45 days. We missed it. Judge McConnell called us on it. We took a look and said, boy, really blew it in this one. We take that to heart. We're gonna make sure that we do better in the future. So please don't accept any of my remarks or arguments as saying that we don't – we're not saying that we did something correctly.

Mr. Tanner: But that's not my question. My question is, what happened? And I haven't heard anything. To say "we dropped the ball" doesn't tell me what happened?

Ms. Lovell: I'm not here representing the Planning Department. I can't speak to that because – all I can say is we concede that the Planning Department didn't get their comments in within 45 days. The Planning Department's comments were very late. Now, having said that, I will say that 45 days is a very short period of time for departments to do a thorough analysis. Whether it's of the highways, of the water, of the planning issues, and so forth. My personal opinion is that someone should go to the County Council and say, you know what? For a big complicated project, a 45-day window of review is very short. You might wanna consider extending it and making it a little longer.

Mr. Tanner: To what, a year and a half?

Ms. Lovell: I don't know. It might be.

Mr. Tanner: Well, I mean, you're arguing that they needed a little more time.

Ms. Lovell: No, I'm not. I'm not.

Mr. Tanner: It sounds like it.

Ms. Lovell: Absolutely not. Our present ordinance says 45 days. We acknowledge we didn't do it within – we didn't get these comments from Planning within 45 days. End of story. Why Planning took so long? I can't respond to that. All I can say is, our ordinance says 45 days. They didn't get them in, in 45 days. Judge McConnell called us on it. We agree he was right. That's all I can say. I can't make excuses for the Planning Department.

Mr. Tanner: You are making excuses for them.

Ms. Lovell: I'm not. I'm absolutely not.

Mr. Tanner: You're saying they . . . (inaudible) . . .

Chairman Endo: Okay, Member Tanner, let's end this question and answer at this point. I think that you asked a question more than once. It's been answered already to the best of her ability. And I think I want to point out at this point, there's really no dispute as to those parts of the appeal. So we can already rule upon it. We don't need to go too far into that aspect of it. I think the SMA issue is the one where they're really arguing over, and I think we should try and focus on that.

Ms. Lovell: Precisely. I agree with you, Chair.

Chairman Endo: Okay. Any other questions, Member Tanner?

Mr. Tanner: Question on SMA.

Chairman Endo: Okay.

Mr. Tanner: I think at the very best, it should be void for vagueness because it is very vague when you look at the definitions. And when you try to take this Leslie law and say this applies exactly in this case, and the law determines this, so it fits this, I don't see that it does. I think Mr. Geiger made a very good argument about when something becomes a development. And I haven't heard anything to really show me much different.

Ms. Lovell: Well, all I can say is if you look at Judge McConnell's decision, it's all in there. Judge McConnell took our ordinance, our Subdivision Ordinance. He took the CZMA State law. He took the Leslie decision. And in his decision and his recommendation, he made that analysis. And I think he did a really good job with it, and I'm not gonna try to second guess him on this. It's all in there. It's purely a legal ruling. Now, if this Board believes that Judge McConnell's legal analysis is wrong and you have some other legal analysis, then that becomes a question of law that some party or other can take up further on appeal, if necessary. But I believe it's purely a legal question. I believe it was thoroughly analyzed in Judge McConnell's recommended decision. And therefore, I think you should adopt it. It's on pages – it starts around page 4, 5, 6, 7. I mean, basically, it's

Judge McConnell's whole – a big chunk of his decision, and I think it's a well-reasoned decision, legally speaking.

Mr. Kamai: I got a question.

Chairman Endo: Member Kamai?

Mr. Kamai: Yes, so after the submission of the subdivision, the County missed the 45-day window, clearly. And in Judge McConnell's findings of fact, he cited the Leslie Law that said Makila should've gotten their SMA prior to even submitted. What Mr. Geiger brought up was where is the line in the sand that the County is gonna start enforcing this law? Because I know since then there have been subdivisions approved after this law, Supreme Court law, went through. What do you say about them?

Ms. Lovell: Well, first of all, not every subdivision is even subject to the SMA. Obviously, the subdivision–

Mr. Kamai: But there are those that already been approved by the County and it's moving forward. Some already built.

Ms. Lovell: Right. Right. And we can't go back and unbuild those. We can't go back and correct every mistake of the past. We can prevent ourselves from making mistakes in the future.

Mr. Kamai: When is that day, is what I'm–?

Ms. Lovell: We started from the day we got Judge McConnell's decision.

Mr. Kamai: A notice went to out everybody in Maui County?

Ms. Lovell: No. The Supreme Court actually gave us that notice when it got the Leslie decision. And we failed to take appropriate – pay appropriate attention to that decision, but it was raised actually by Mr. Geiger in one of his pleadings. We read it. We kinda went, oops. Then the Judge told us what we should've been doing, and we agreed with him. And so it's a question of law. It's a question of law. Which law– When our Subdivision Ordinance doesn't match State law, then we have to give way. And so that's what we're doing. We are bowing to the Supreme Court, to the Leslie decision, and saying, you know what? You're right. We should've never issued this subdivision approval in the first place. We should've made him get the SMA approval first.

And in a way, it kinda makes sense. This isn't just one of those egg-headed things that the Supreme Court sat around and thought up just to be devil developers and everybody else. When you think about it, the SMA approval process involves a lot of give and take. People come in front of the Maui Planning Commission, and they're often asked to move roads around, change drainage, change densities, be concerned about historic preservation, be concerned about archaeological sites, and so forth. And so the project that goes to the Planning Commission for SMA approval often comes out looking a lot different than it did when it went in.

Now, when if you've got your preliminary subdivision approval first, and then you go and get SMA

later, you may end up with two maps that don't look at all alike. So kind of as a practical matter as well as a legal matter, it makes sense to do the SMA part first, at least that's what the Supreme Court decided. And I can't see that they're wrong. And even if I thought they were wrong, I gotta follow what they say. They're the guys in the black robes who get to make those final decisions.

Mr. Tanner: Mr. Chairman, I have a question, if he's–

Mr. Kamai: Personally, I just don't think that's practical that you gotta get your SMA before you even start to do anything. In reading Judge McConnell's finding, I clearly wanted to know the definition of development. And I think Mr. Geiger's presentation was very thorough.

Ms. Lovell: Well, I can just point out that in Leslie, what was happening there was in the Big Island they call it tentative approval, and then they give final. Here in Maui County we call it preliminary approval, and then we give final. But basically, tentative approval and preliminary approval are basically the same thing. So I don't think there's any question there.

As far as what is a development, again, the Leslie decision looked precisely at that issue. And one of the questions in front of the Supreme Court in Leslie was, when you come in for your tentative approval or as we would take, preliminary approval, is that subdivision, which is defined as development in the CZMA? And the Hawaii Supreme Court said yes. That was what the Big Island argued. They said, oh, this is just preliminary. It's not a development until final. And the Supreme Court said, no, it's any subdivision whether it's preliminary or final. So I think this is a legal question. And I would suggest– Obviously, you're listening to argument of the two parties. You're listening to what Judge McConnell has told you. You also have an attorney here who is capable of looking at that decision and telling you his advice on how to define development in the subdivision process so at least you have that resource, if it would help you.

Mr. Kamai: You see briefly, before the discovery of the Leslie SMA first, the Director already missed the 45-day window.

Ms. Lovell: Yeah, if I could just make one correction? The Public Works Director did not. The Public Works Director did everything he was supposed to do within 45 days. It's just that after he issued his subdivision approval, his preliminary subdivision approval, when he did so, he put in kind of placeholders for conditions. He said, "Comply with the Department of Water, comply with Planning, comply with State Highways." That's how they've always done it. If the departments don't get their comments back in time, the Public Works Director can't do much else, right? So he knows that they're gonna get comments eventually, so he just tells the developer, "Look, when Planning comes around with comments, you're gonna have to comply with those. When Water comes around with comments, you're gonna have to comply with those." So the Public Works Director, and particularly, the Subdivision folks represented here today by Ms. Otani, they did what they were supposed to do. In this case, it was another department. It was the Planning Department who, for whatever reason, didn't make that 45-day deadline. And then the question is, once they got in comments late, what was the Public Works Director supposed to do? So I just want to make it clear that the Public Works Director and his staff did respond within 45 days. It's just that they got these comments very late from the – in this case, the Department of Planning. Sometimes it's the Water Department. Sometimes it's the Fire Department. Sometimes – often it's the Department of Transportation. These things happen but–

Mr. Kamai: Yes, because what you just said bodes to the fact that how impractical getting your SMA first before getting all these things done, what you just said, comments from the different departments.

Ms. Lovell: Well, actually, the SMA process goes in front of the Planning Department – in front of the Planning Commission, and they have hearings. They have a whole process for getting all these comments. They actually have time to do a more thorough job. The 45 days is a pretty short period of time for Highways, for Historic Preservation, for the Water Department, the Planning Department, and so forth. So in the SMA process, you have public participation. You have often extended hearings. You have an environmental assessment. Sometimes you have a full EIS. You have a lot more information. And then the Planning Commission has an opportunity to deal with that. In the subdivision process, it's a very short period of time. And in this case, the Public Works Director and the Subdivision Office in particular did exactly what they were supposed to do within 45 days. It's just a question of what do you do with these comments that come in a little late. But that's what we're arguing here. We've already pled guilty on that part. So that shouldn't be really our focus of our attention, I don't think.

Chairman Endo: Yes. Member Tanner?

Mr. Tanner: I think what my fellow Board Member said deserves a little more attention, and that is, where is the line drawn in the sand? Because what I'm hearing from you is, well, when we looked at this and we recognized we were doing it wrong, we're committed now, we're gonna go ahead and do it right, but we didn't really notify anybody, but we're gonna kind of think about it now, and maybe something going forward we'll apply that to, stuff that's already in existence, we're not gonna back and mess with, but with this client we are. Why?

Ms. Lovell: I'm sorry, but I think you've misconstrued my remarks and misunderstood at least part of what I've said. When the Supreme Court issues an opinion, that is notice. That's notice to the world. That's notice certainly to everybody in Hawaii. Sometimes we're a little slow on the uptake to figure it out so–

Mr. Tanner: I understand that. I'm talking about what the County does. How the County decides that they're gonna take these decisions from the Supreme Court and apply them. It appears that you're saying that they didn't apply them when they should have. Now it's brought to our attention. We're gonna apply it now and we're gonna start with this guy, but not with anybody else in the process, and maybe we'll do it going forward.

Ms. Lovell: Actually, that's not quite what I said. I said we're not gonna go back and we're not gonna undo things that already built, that are already finished. From the date that this was brought to our attention–

Mr. Tanner: No, you said in the process. You didn't say built and finished. You said things that are in the process.

Chairman Endo: Let me perhaps help clarify with a question along the same line, if you don't mind.

Mr. Tanner: Sure.

Chairman Endo: Are there currently pending subdivisions within the SMA in Maui County currently being processed that have been granted preliminary subdivision approval that you are now gonna revoke that preliminary subdivision approval because they did not do an SMA?

Ms. Lovell: I don't know the answer to that question. I don't know if Ms. Otani knows the answer to that question. I do know that, of course, many subdivisions come through what, maybe how many are approved in any given year? But fortunately, for us not only all of them are – not even a large number are in the SMA. We did look at that issue generally when we first got this advice because we kinda freaked out. We thought, oh, my gosh, we've been doing this wrong, what are we gonna do? But I believe that we reached the conclusion that we start with this one because these guys are the ones who brought up Leslie first, not us. And then moving forward, we're gonna deal with the issue the way Judge McConnell has instructed us and the way the Supreme Court has instructed in Leslie. Do you know the answer to that question?

Ms. Lesli Otani: There are several, but right now . . . (inaudible) . . . So we're waiting to see what happens . . . (inaudible) . . .

Ms. Lovell: Ms. Otani has indicated that we're dealing with this case because it's in litigation. We're dealing with all future cases in accordance with the Leslie decision. And as to anything that's like partway through the system that hasn't reached final yet, we're kinda waiting to see how this one comes out, as a practical matter.

Chairman Endo: Who wants to go–?

Mr. Tanaka: I have a question.

Chairman Endo: Okay, Member Tanaka.

Mr. Tanaka: As far as the timing, because it's– You use the word "final approval," but no final subdivision approval has been granted at any point, so this is still preliminary?

Ms. Lovell: That's my understanding.

Mr. Tanaka: What– And I understand the arguments. And I agree and disagree with some of the points made, but as far as regarding this – these subdivisions particularly, what I would like to see is, okay, there – procedurally, there has been some things done that shouldn't have been. From this day forward, it shall be done correctly, but let's move forward without penalizing this project in particular. The reason I say that is, if it's – if all subdivision approvals are only preliminary at this point, the developer knows that anything that comes up within the process going forward whether it be the SMA, any part of the SMA, if they designed their lot lines, and they find archaeological sites, they'll have to redesign. The Bypass, there's a corridor, but that may change, so they will have to redesign, and which they know that from day one. So moving forward without backtracking on them to redesign before these issues come up, that's what I'd like to see ultimately.

Ms. Lovell: I definitely hear what you're saying. I do somewhat disagree just with your word choice of "penalizing." The Public Works Director wasn't trying to penalize anybody. He was trying to do his job. His Subdivision people were doing their job. They were trying to get their comments in

from everybody in time and so forth. But this particular developer or applicant, I guess I should say, or series of applicants for these four subdivisions brought this issue up in the first place. This is the second time now that these appeals over these subdivisions have come up. They first came up back in 2004, I think Mr. Geiger said. Then the appeals were withdrawn. Then now, here we are again. You're absolutely right. They are not final yet. They're still gonna have to go through the SMA. We don't know what's gonna happen in the SMA. The question is, though, since these guys did appeal, and they raised these issues, the question is, can we ignore the law in deciding the issues that they raised? And our point is, no, we can't.

Mr. Tanaka: Okay, can I–? Sorry. Can I pose that question to Judge McConnell? Sorry. I mean, no, well, because timing is in question, is that possible? I understand that there's a law that's been brought up and must be followed, but it's been brought up and realized that something from a year ago, a year and a half ago, three years ago that was already in the process, can that be done, legally?

Judge McConnell: Before I answer your question, when you say the Leslie decision came down, the Leslie is just – Justice Acoba wrote that – the Leslie decision is construing the statute. The statute's been on the books since the '70s. I remember being there when they were– It says that a subdivision is a development. There's no problem with that. The question is, how do you work out the procedure? You get the preliminary subdivision approval which is a preliminary administerial act, and then go through the SMA permit. There's a practical problem with that, as she said, but that's not what we're here on. The question is, what do you do about it? As I tried to mention a while ago, I think there's rule-making authority that would – that nobody's ever done anything with it, but they would have the authority to mesh the thing in this, and say what stage do you have to be before you can come with these preliminary subdivisions approvals. But the law's a funny thing. Even if there has been a violation of the statute in other cases, in this case, there may not be any other way to really change that or challenge that because there's nobody with standing or on a timely basis has made an appeal so that in effect, prior decisions would be final. But I can't really say that's always the case or not always the case. But that's the best way I can answer it, I guess.

Chairman Endo: Since you're up there right now, Judge – if the Members don't mind, I'll jump in, don't you think that procedurally would've been better if there would have been some kind of cross appeal of some sort in order to put the matter of SMA properly before the Board?

Judge McConnell: I agree it would've been better, but I think that the legal problem should've been addressed a long time ago. And once it's here, faced with the statute, and the statute says you first go to the SMA permit, that's– I mean, Geiger says, that only applies to the final. It doesn't say that. It's a question of construing the intent of the legislature. And I find there's strong evidence of an intent that the environmental concerns be first dealt with. And as Jane said, there's practical benefit to that, but here we are. Yeah, I think it would be clearer, certainly, if there had been a cross appeal. Of course, at that point, I think Mr. Geiger could say, as he has today, well, they never made a decision on that. The problem really is that the procedure that was adopted was this basically, the Council reacted to complaints that people weren't – they weren't getting the stuff out, so they adopted this 45-day ordinance. And it's been dealt with by simply making everything conditioned on compliance with comments that come in from whoever in the County after the 45-day. The 45 days hasn't been met. I think Ms. Lovell is correct. That's gotta stop. But in answer

to your question, any specific case as to whether they can go back and review it, maybe not. You'd have to look at the case. I would think in most cases, you could not simply for procedural reasons.

Chairman Endo: Thank you, Judge.

Judge McConnell: I don't know if I've answered your question or not.

Chairman Endo: No, you did.

Judge McConnell: I'm glad you have the final word. And I often wonder whether the final word really shouldn't be the Corporation Counsel's.

Chairman Endo: Oh, yeah, we're saving him for last.

Judge McConnell: Yeah. Well, it is a legal problem for the Board and he's the chief legal officer.

Chairman Endo: Yeah. Okay.

Mr. Tanner: I have one question for the Judge.

Chairman Endo: Oh, okay, Member Tanner.

Mr. Tanner: Having read what you've prepared, the question I have is, after today, after hearing everything you've heard today, is there – do you have – I don't wanna say different conclusions, but different thoughts on it? Has anything come to light now that would make you think any differently than you did before coming in?

Judge McConnell: No, sir. You know, I had a lot of trouble struggling with trying to sort this out. I've tried to put it down and keep it condensed as possible. I hope I've made it clear. I may not have succeeded, but I did my best.

Chairman Endo: Member Vadla?

Ms. Bernice Vadla: I just have a quick question. When did the County actually find out about this Leslie appeal, and how long has this been?

Ms. Lovell: I don't recall the actual date of the Leslie decision. The County wasn't a party to it, and as you know, the Supreme Court issues maybe, I don't know, a couple hundred opinions a year. We're all supposed to know about all of them, but we don't. We don't always. I think it was 2006. Okay, 2006. In any event, it's also not always clear how a particular decision from the Supreme Court rendered in a different case is going to affect a different case until you sit down and actually analyze it and think it through. One reason that the County didn't raise this point and didn't file some kind of cross appeal is because initially, we wanted to keep doing things the way we'd always done them, and that is give the developer the choice of going to the SMA first or subdivision approval first. Mr. Geiger brought the Leslie decision up in his first brief. I took a look at it then, and at that point said, wow, I kinda wonder about this. We raised the issue to Judge McConnell. Judge McConnell did the analysis. He made his decision. We got his decision. We read it. And we

thought, boy, we kinda like to disagree with him, because it would make our lives easier, but you know what? We can't. We think he's right. So that's kinda how it came down.

Ms. Vadla: And that was back in 2006? Am I right on the–?

Ms. Lovell: No, no, no, no, no. That was just now. It was in this case. It was in this case. So that opinion came down in 2006. It's important in the way – in terms of how the County was supposed to look at its own Subdivision Ordinance. It really came up in the course of this particular appeal.

Chairman Endo: Okay, at this point, I think it would be good to ask our Deputy Corporation Counsel to give us some guidance with regard to whether or not this Board has the authority to rule on the SMA issue as to whether or not it's part of the appeal or not.

Mr. James Giroux: Randy, I don't know if we were given it, but do we have a copy of those original letters that were appealed from? It's one of the disadvantages of not actually trying the case ourselves is that– I think that's very important for the Board to have in their possession as what are the letters that are being discussed as part of the appeal?

Ms. Lovell: We also have a lengthy stipulated facts. I don't know if that would help either, but all of that should be in the record.

Mr. Giroux: I think Mr. Geiger had put up a charrette that may have summarized it, but I think–

Mr. Geiger: . . . (inaudible) . . . It's attached as the appendix . . . (inaudible) . . . a full-sized copy of it. It's also attached to the notices of appeal that we filed.

Chairman Endo: Unfortunately, I think we got your notices of appeal when you first filed it, so not all of us have brought it today.

Mr. Giroux: Is page 7 of your–?

Mr. Geiger: Actually, you should have the brief filed in support and in opposition to . . . (inaudible) . . .

Ms. Lovell: Right, but those are supplements?

Mr. Geiger: No . . . (inaudible) . . .

Ms. Lovell: One is the map and . . . (inaudible) . . .

Mr. Geiger: Yes . . . (inaudible) . . . the three conditions.

Chairman Endo: That's not the letter actually, but that's the conditions you're appealing?

Mr. Geiger: The letter is . . . (inaudible) . . . It's in the record.

Ms. Lovell: Jim, where . . . (inaudible) . . . ?

Chairman Endo: He said it's attached to the notice of appeal.

Ms. Lovell: Yeah . . . (inaudible) . . .

Mr. Giroux: The reason I want this to be very clear is because it's very important for the Board to understand that we're not the Subdivision police and we're not the Planning police. We don't go out and look at the County and start shooting the bad guys. We're here to look at decisions that are made that affect the public. And this is the venue that the public comes to voice their concern about decisions made regarding subdivisions and regarding zoning enforcement. And it's very important that we understand that.

And what complicates matters is that a lot of times we have decisions that are made by one department where they're depending on the discretion and judgement of another department. And so that really starts to muddle waters. So we have to rely on the documents that are filed to tell us exactly what are the decisions we are looking at and why we are doing it. And we've gone over this before where we've tried to distinguish our roles as variance review. And we've tried to distinguish our roles as appellate review. And that again gets the public riled up because they think that we're the Planning police and the Public Works police, which we're not.

And when we're dealing with appeals, we become like an appellate court. And the decision that is before us is the decision of the Director. And the decision of the Director is evidenced by the letter that is sent to the person appealing that. And that becomes the issue. We can't be making collateral decisions on things that are not of the issue. If we disagree with something that Planning did in the situation, we would have to look at that decision in light of how it affects the decision that Public Works made. If we don't like what Public Works did, we have to use the standards that we have to decide was that decision in accordance with the law, was it arbitrary or capricious, and so forth.

In this case, I mean, when you look at it, it's like we're trying to decide jurisdiction. What is our jurisdiction? And in looking at it, I almost have to speak in parables because when you're talking in jurisdiction to lay people, it's, well, where is the line? You can't see a line. You have to understand that there's a line somewhere. And where do we draw it? And I think that's very important. And when you have an older child, and you have a younger child, and you spank the older child for something the younger child did, and then you find out that you've actually spanked the neighbor's child, you've lost jurisdiction. And heaven forbid, we've seen it happen. And so we have to understand this. We have to understand what are we looking at, what is the decision that we are reviewing, and why are we doing it, and are we going to apply the standards within our rules to do it.

There's been a lot of discussion about the SMA law. There's been a lot of discussion about the Supreme Court. And if you look at the reasoning, it's all fine. It's all based on solid, legal analysis. The problem is, is are we spanking the neighbor's child? Something we should avoid.

We speak of venue. We speak of jurisdiction. We speak of authority. And we have to understand that if the County has problems, then the County needs to take care of those problems using the proper venue. We need to understand the jurisdiction and the powers that appellate bodies have. And we also have to use a very sharp knife to understand how do we get to the decision that we

need to get to. And I think it's very important in this decision to look at what was filed as the appeal, what was the question asked of this body, and to stick to it.

I don't think you throw out SMA law. I don't think you throw out the Supreme Court's decision on how subdivisions are to be administered. But you also have to understand what was the question asked. And if this Body was not asked to withdraw the subdivision, does it have the authority to withdraw the subdivision? And we have to be clear about what our authority is. That's not to say that the petitioner might not to go around this mountain one more time. Maybe twice, maybe three times being that the State is going to decide what it's gonna do with its roadways, and what's Water's gonna decide with its production and distribution, and that sort of thing. But in a point in time, has a Director made a decision, and is that decision wrong or right? And if that target moves on us, we don't have to move. That target stays the same. It was filed. We have to make a decision on it. We dispose of it and the County decides how to clean up. And then it goes on, and tries to not make the same mistake over and over and over agin.

So we're given a very difficult task. And we need to look at all of the documents provided. We need to look at all of the arguments. And we need to weigh them very carefully as to what is going to be our decision based on what we were asked and how are we going to answer.

Chairman Endo: Thank you, Mr. Giroux. I think that if it's okay with the Board, I'd like to make my comments now. I think that it's a very important issue to rule upon, the SMA decision. But the powers, if I think I understood our Deputy Corporation Counsel's guidance is we can't go beyond our powers. We're gonna try and– We're a Board of limited powers. And we can only decide what's actually been appealed, and we just rule on the appeal. So I'd almost wanna ask that parties to just stipulate – to make it part of the appeal, then we could rule on it, but I don't think they're gonna stipulate to add it to the appeal. So I was thinking it's kind of a waste of all of our taxpayers' money because they did all this work. They argued it. They got this ruling. And there might be not any real decision on it, because they're gonna say we can't rule on the issue. But actually, when you think about it, it still would have a lot of beneficial effect because they've gone on their own. The Department of Public Works has been proactive, and we should commend them for looking at Judge McConnell's proposed findings of fact. And they've actually acted on it already on their own for future projects and everything. So it hasn't been a waste of our resources and all of this effort of doing their thing. So in a way, it's okay even if we rule on a jurisdictional issue I think. I don't think we've wasted the resources of our Hearings Officer and the Counsel. But just to summarize, I would be voting that there is no jurisdiction of this Board to rule upon the SMA issue as a grounds for invalidating the two subdivisions' preliminary approvals because it's not properly before the Board, and we have no power to act on those. But that's just my personal opinion, of course. So I'll open it up for other Members to discuss the matter.

Ms. Rachel Ball Phillips: Yeah, I've listened carefully to all the testimony and reviewed all the information. And I think the Appellant has made their case clear. And would it be appropriate to make a motion at this time?

Chairman Endo: Sure.

Mr. Kamai: I'd like to–

Chairman Endo: You can still discuss after the motion's been made.

Mr. Kamai: Okay. Go ahead.

Ms. Phillips: That the Director of Public Works did erroneously apply the ordinance in revising conditions after the time period had passed. And I'd like to make a motion that we adopt Makila Lands' proposed findings of fact, conclusions of law, decision and order, and direct the Director of Public Works to rescind the additional conditions and process the subdivision applications.
Chairman Endo: Okay, just to make that perfectly clear, are you saying that we'd adopt the Hearings Officer's recommended report with the modifications suggested by the Appellant or just use their proposed findings?

Ms. Phillips: I guess I would like to use their finding because they're actually – so that's actually two different things.

Chairman Endo: Let's ask Mr. Geiger. What's the difference between doing it those two ways?

Mr. Geiger: Actually I think you end up the same place.

Chairman Endo: Okay.

Ms. Lovell: Actually, if I can just say a word?

Chairman Endo: Sure.

Ms. Lovell: We opposed or had exceptions to a number of the proposed findings and conclusions that were submitted by Makila. And I don't know if you've seen those, but the Judge saw those when he did his. So whatever you do, I'm not sure that it would be appropriate to just take Makila's findings of fact and conclusions of law without at least looking at the County's exceptions to those and allowing me to argue those, if that's the direction you wanted to go.

Mr. Geiger: If I may? . . . (inaudible) . . .

Judge McConnell: Mr. Geiger's got the kitchen sink in his– I would recommend that you'd go the way he's willing to do which is mine, plus his changes . . . (inaudible) . . . Otherwise, you gotta go back and . . . (inaudible) . . .

Chairman Endo: With that in mind, which way do you–? it's your motion. So I'm just asking–

Ms. Phillips: Yeah, sure. I'm fine going that way. So if I can amend the motion to adopt the Hearings Officer's proposed findings of fact and conclusions of law as amended by the changes listed in Makila's exceptions.

Chairman Endo: Okay. Is there a second?

Mr. Tanner: I'll second.

Chairman Endo: Okay, it's been moved and seconded. Discussion? Discussion? No further discussion? Okay, all those in favor of the motion, please say aye. Opposed?

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

VOTED: To adopt the Hearings Officer's proposed findings of fact and conclusions of law as amended by the changes listed in Makila's exceptions.

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

Chairman Endo: **The motion carries as stated.**

Mr. Geiger: Thank you very much.

Chairman Endo: Okay.

Ms. Kapua`ala: Mr. Chair, could we ask Mr. Geiger to prepare the – or submit–?

Mr. Geiger: I'd be happy to . . . (inaudible) . . .

Ms. Kapua`ala: Yes, thank you.

Chairman Endo: Okay.

C. APPROVAL OF THE SEPTEMBER 9, 2010 MEETING MINUTES

Chairman Endo: Okay, Members, it's not on the agenda, but we would like to approve both the August 26, 2010 and September 9, 2010 meeting minutes.

Mr. Kamai: So moved.

Chairman Endo: It's been so moved. Second?

Mr. Tanaka: So second.

Chairman Endo: Okay, it's been moved and seconded to approve both the August 26 and September 9, 2010 meeting minutes. Discussion? Hearing none, all those in favor, please say aye. Opposed, please say no.

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

VOTED: To the August 26 and September 9, 2010 meeting minutes.

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

Chairman Endo: **Motion is carried and the minutes of both of those meetings are approved.** Moving on to the Director's Report on BVA contested cases.

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: There is no change, unless you'd like me to discuss anything you see here.

Chairman Endo: I do notice that we have very nice letterhead now with all of our names on it. It's very, very fancy. I wanna thank the Department for that.

Ms. Kapua`ala: You're welcome.

Chairman Endo: Okay, moving on. Our next meeting– I'm sorry, were there questions?

Mr. Tanaka: I have a question regarding one of the items. Just out of curiosity, Victor Campos, the parties have settled and – oh, and will appear, sorry. Okay.

Chairman Endo: Other questions? Member Tanner?

Mr. Tanner: Actually backing up to the minutes, we approved two minutes. Are both of them in the last send-out because I only find one?

Chairman Endo: No. The other one was sent out in a prior Board packet.

Mr. Tanner: It was a prior packet. Okay. I thought so. Alright.

Chairman Endo: Okay. Any further questions on the status report on contested case hearings? Hearing none, our next meeting is October 14, Thursday on Lanai.

E. NEXT MEETING DATE: October 14, 2010, Thursday, Island of Lanai

Chairman Endo: And at this time, I'd like to recommend that Member Kamai be acting Chair for that meeting.

Mr. Kamai: You guys not coming?

Mr. Tanaka: So second.

Chairman Endo: Is there any–? I just couldn't make it. That's all. I really wanted to go, actually. Who is going, by the way? Do you have quorum?

Ms. Tremaine Balberdi: I have a quorum. I have six Members.

Chairman Endo: Okay. If there's no further business of the Board, this meeting is adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:28 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Kevin Tanaka, Vice-Chairman
William Kamai
Rachel Ball Phillips
Bernice Vadla
Rick Tanner

Members Excused:

Ray Shimabuku
Steven Castro, Sr.
Bart Santiago, Jr.

Others:

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