

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MARCH 10, 2011**

(Approved: 3/24/11)

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Pro Tem William Kamai at approximately, 9:55 a.m., Thursday, March 10, 2010, at Hale Mahaolu, Hale Kupuna O Lanai Community Hall, 1144 Ilima Avenue, Lanai, Hawaii.

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

Chairman William Kamai: This meeting will now come to order. The meeting for the Board of Variances and Appeals of March 10, 2011 is now in session. Staff?

B. PUBLIC HEARING

1. **CASTLE & COOKE RESORTS, LLC requesting a variance from Maui County Code, §19.70.030(B)(6) to allow 8 buildings (7 duplexes and 1 single unit), ranging from 31.35 to 41.14 feet in height, to exceed the maximum building height requirement of 30 feet for the Palms at Manele Bay-Phase II, located off of Mauna Lei Drive, Lanai, Hawaii; TMK: (2) 4-9-017:019 (BVAV 20110003).**

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

Chairman Kamai: Let the record reflect that we did do a site visit earlier this morning with the applicant present. Will the applicant please state your name?

Mr. Clay Rumbaoa: My name is Clay Rumbaoa with Castle & Cooke.

Chairman Kamai: Would the applicant like to read the recommendation into the record?

Mr. Rumbaoa: No.

Chairman Kamai: Okay, thank you. I see that there are three people who signed up to testify on behalf of this agenda item. The first to sign up is Mr. Karl Hynes. Please, Mr. Hynes.

Mr. Karl Hynes: First of at least, I'd like to thank you for coming to Lanai. And I'd also like to apologize for my abrupt entry into the meeting. Had I been informed, I would've been there punctually, I assure you. I'd also appreciate and I don't know if this is the proper procedure, but it would be helpful for me to know if my testimony is relevant if I were to get some questions answered from the applicant. Is that proper?

Chairman Kamai: Okay, I'm gonna ask the Board Members if you would allow Mr. Hynes to ask the applicant directly, any questions. Applicant? Okay.

Mr. Hynes: Thank you. The first thing I need to know is what precipitated the need for the variance to the County Code to exceed the maximum height?

Mr. Rumbaoa: We redesigned Phase II of the Palms. And when we did that, we submitted our building permits to the County, our building plans to the County, and after further review on the plans, they deemed that the – one of the code requirement on the building height, which is the building structure and the fill had exceeded the 30-foot maximum. But prior to that, though, the original plans that were submitted before the revised plans submitted, it was approved by the Building Department. And at that time, we had about 11 structures that were exceeding the 30-foot height and it was approved the first go-around.

Mr. Hynes: So what precipitated the redesign? Why was that necessary?

Mr. Rumbaoa: It was because of the wall. We lowered the height of the wall and because of that, the depth of the individual unit pads had shrunk as designed and the fill, and therefore, we had to combine the garage and the dwelling unit. And that precipitated the requirement to resubmit the building permits.

Mr. Hynes: And what was the reason given for the need to lower the retaining wall between Phase I and Phase II?

Mr. Rumbaoa: It was – we weren't required to do that. It was already approved. It was something that Castle & Cooke decided to take on as additional safety precautions.

Mr. Hynes: And what is the safety precautions' considerations that were involved in that decision?

Mr. Rumbaoa: Initially, the back yard abutted the wall. And we thought that that was too close for occupants to be due to the height of the wall. So we lowered the wall and created that slope to create a further setback from the edge of the wall.

Mr. Hynes: So it had nothing to do with aesthetics?

Mr. Rumbaoa: It was safety.

Mr. Hynes: It was safety. Okay. And if that is a safety issue, and the site was engineered for that wall at that height, and you lowered the wall, wouldn't you eliminate the whole problem of needing the variance or most of it if you lowered the height of the grading to the same level that it was originally? In other words, if the wall's up here and the grade is here, you lower the wall five feet, if you lower the grading five feet, shouldn't be any problem, and it would reduce the need for whatever variance request you needed. I mean, it might be singular things.

Chairman Kamai: Please state your question.

Mr. Hynes: Okay, the question is, does the need for the variance disappear if the entire Phase II site is re-excavated to the maximum level of the retaining wall?

Mr. Rumbaoa: Perhaps, but we have all our infrastructure. It's already in place. So that would have to be all dug up and redone.

Mr. Hynes: But that should've been considered when you took the wall down.

Mr. Rumbaoa: It was considered, but when we took the wall down, we approached our technical and our structural engineers. And they assured us that lowering the wall with that two-to-one slope, the setback, and you have the depth of the building does not go right near the wall. The building's about 20 feet from the wall, so the surcharge pressure doesn't totally impact the wall where the wall would fail.

Mr. Hynes: Okay. And who is responsible for certifying in engineering of the safety of the homes downslope in Phases II and III?

Mr. Rumbaoa: The safety of the homes?

Mr. Hynes: Yeah, you're saying that it was a safety issue that you lowered the wall. What I'm asking is, if the wall, if there's any problems with that engineering there, who is certifying that so that--?

Mr. Rumbaoa: It was safety issues for the second and third tiers of Phase II.

Mr. Hynes: Exactly. Who's certifying that those -- that that's gonna be a safe situation for the people who are downslope because obviously, things come downhill that are going to go into Phase I?

Mr. Rumbaoa: We submitted our wall calculations to the County, and they have a special inspector to come and observe that, and review the calculation of the plans.

Mr. Hynes: So the County approved the plans as described?

Mr. Rumbaoa: Through a special inspector, through a special consultant.

Mr. Hynes: Okay, just two more questions. As far as the Board is concerned, is any consideration given to marketability of the project? I mean, is that anything that you guys even consider?

Chairman Kamai: No.

Mr. Hynes: No, okay. That makes the next question moot. So given that, I think that I would like to testify and submit my information.

Chairman Kamai: Submit what, Mr. Hynes?

Mr. Hynes: Oh, I have some prepared testimony that I'd like to read into the record.

Chairman Kamai: Mr. Hynes, I thought that was your testimony.

Mr. Hynes: The questions?

Chairman Kamai: Yes.

Mr. Hynes: The questions were the prelude so that I could understand whether what I had to say

and my testimony was relevant to your decision of granting a variance.

Chairman Kamai: Members, any objections? Members, any objections to Mr. Hynes' additional testimony after questions?

Mr. Ray Shimabuku: Mr. Chair, I do believe we have a three-minute time limit on this situation.

Mr. Hynes: I have it prepared. I can submit it to you.

Chairman Kamai: That is correct, but I thought Mr. Hynes' testimony was in lieu of the questions asked. So I'll ask the Members if they would allow Mr. Hynes' additional written testimony if the Board so objects. No objections? Continue, Mr. Hynes.

Mr. Hynes: Thank you.

Chairman Kamai: Let me remind you and all testifiers in the future that you have three minutes to bear your testimony.

Mr. Hynes: It's probably gonna take me longer than three minutes. And as I say, I had it prepared and copied so if you prefer that.

Chairman Kamai: Would you – do you have any copies you could–?

Mr. Hynes: Yes, I have 15 copies. That's what was requested.

Chairman Kamai: So at the distribution of your written testimony, were you gonna read that?

Mr. Hynes: I was, but that's – you know, I don't know wanna take your time. I think that's going to be– It's all in there, what I had to say, and some things that are obviously, at this point, irrelevant. So you can ignore the irrelevant stuff and make use of the stuff that's of value.

Chairman Kamai: Okay, being that we have Mr. Hynes' written testimony in front of us, is there anything you wish to add besides–?

Mr. Hynes: That pretty much says what I have to say.

Chairman Kamai: Members, any questions for Mr. Hynes?

Mr. Rick Tanner: I do have one question, and it's related to the questions that you had with regard to lowering the grade to match the wall. And my understanding, the purpose to lower the wall was to create that two-to-one slope creating a setback for safety issues. If the grade was lowered, then you'd be back to square one.

Mr. Rumbaoa: That's correct.

Mr. Tanner: Okay. That's my question.

Chairman Kamai: Members, any more questions for the testifier? Hearing none, thank you, Mr. Hynes. Signed up next to testify is Mr. David Green. Again, let me remind the testifiers that you have three minutes to testify.

Mr. David Green: Thank you very much for giving me the opportunity for testifying. And again, thank you very much for coming to Lanai and looking at the situation firsthand. I'll try to very brief.

Based on the plans that we have seen, that I have, my wife and I have seen, we calculated that the height of the tallest unit on the top row of the area that you saw this morning is 265 feet above the sea level. The finished floor of our house is 292 feet. So I think that's a differential of 27 feet. The 27 feet, after you left, I walked up on the fairway to look through the trees to see where the story pole was more clearly. And the red flag at the top of the story pole was higher than the grade at the 10th fairway. I just did this by eyesight, but my guess is it's about five-ish feet above the level of the 10th fairway.

And so if and when the kiawe trees that are-- Well, first of all, as we said down at the testimony earlier, the kiawe trees that are currently there would've been removed if two things had happened: if Castle & Cooke that agreed and followed through on their commitment to putting shorter trees; and secondarily, if those had been put in a way that would block our view of the gravel that we've had to look at for four years while that site has been sitting there empty. If those trees are ever removed, we will have a very clear sight of those units directly in front of us. However, today, we do have a view. We will have a view, if and when those buildings are built. Of the three buildings to the west, there's five buildings I think in total, four or five buildings in total. And the two or three on the further west will be clearly viewed from our area and will be in our view plane.

We did suggest to Castle & Cooke when we found out that they were putting in for redesign of those units that they put more single story units on the top level. And that might've eliminated the need for a variance in the first place. But as you can see from looking at the plans, they only put one single story unit on the top level, and all the rest are multi storied units.

So in bottom, our preference would be that the units would be lowered. They will not directly obliterate our view of the ocean, but they will clearly be in our view plane. And therefore, as we would prefer they be lower, we would prefer that the variance not be granted.

Chairman Kamai: Members, any questions for the testifier?

Mr. Shimabuku: Mr. Chair, I have a question. You just mentioned that you went to -- after our visit, you went to the 10th green?

Mr. Green: The 10th fairway.

Mr. Shimabuku: The 10th fairway?

Mr. Green: Yeah, I have been on the 10th green before.

Mr. Shimabuku: Okay, the 10th fairway is right adjacent to your home?

Mr. Green: Between – right – the next property, when you were at the site visit, the wall, there was a retaining ditch there, and right up there is the 10th fairway. And then our house is on the other side of the 10th fairway.

Mr. Shimabuku: Okay. And you said you mentioned that you saw the pole that was directed for the height of the home proposed for the variance?

Mr. Green: Right.

Mr. Shimabuku: But then the testimony down at the site you said that you wouldn't – you weren't able to see the pipe?

Mr. Green: We couldn't see the pole clearly from our house, so I couldn't tell exactly because the kiawe trees are in the way and the pole was only about that big around. It's hard to pick it out. So I went to the edge of the fairway and looked through the trees to see where it was.

Mr. Shimabuku: Okay, thank you.

Chairman Kamai: Members, any more questions for the testifier? Hearing none, thank you, Mr. Green. Signed up next to testify is Mr. Archie Nahigian.

Mr. Archie Nahigian: Good morning. I'd like to echo the sentiments of the others in welcoming you to Lanai. And we're happy to have you here. We like visitors here. I was not aware there was gonna be a site visit or I would've been happy to join in that there as well.

I submitted on February 14th, a letter and attachments to the record. Primarily, my concern is about the County and as taxpayers granting to Castle & Cooke any additional economic benefits until they have complied with existing agreements they have with the County. The one I am particularly aware is the one at Miki Basin where in 2000, the County granted Castle & Cooke a conditional zoning to develop 14 acres on a condition that within five years, by statute, that they subdivide and sell half of that land to the public. As of today, my knowledge is Castle & Cooke is using most, if not all of that 13.9 acres, has not subdivided or sold one square foot to the public. According to Castle & Cooke's own documents which I included in my submission, what the County did in 2000, conferred upon Castle & Cooke an economic benefit in excess of one million dollars by the increase of value in that property by the conditional zoning. My question would be to all of you, is how in earth would you even consider conferring additional economic benefit which any variance gives any applicant, Castle & Cooke or anyone else, unless until they have complied with all existing agreements they have with the County? I have nothing to add beyond that to my letter, but I wanted to make myself available in case any of you had any questions.

Chairman Kamai: Thank you. Members, any questions for the testifier? Hearing none, thank you, Mr. Nahigian. At this time, would the applicant like to make his case?

Mr. Rumbaoa: Good morning, Board Members. Again, welcome to Lanai. My name is Clay Rumbaoa. I'm with Castle & Cooke Resorts, the applicant for this project.

This is a recap from our visit earlier. The Palms, the overall Palms Phase I and Phase II consists

– originally consists of 38 units. Phase I, which is already complete sits on 5.4 acres of land and they have 16 units, eight buildings. Phase II where this variance is why we're here originally consisted of 22 units and sits on seven acres of land.

And I want to go over the first justification item as part of the variance process. And Justification No. 1, I wanted to read that question before I go into the reasoning. The question for no. 1 is, there is an exceptional, unique, unusual physical or geographical condition existing on the property which is not generally prevalent in the neighborhood or surrounding area, and the use sought to be authorized by the variance will not alter the essential character of the neighborhood. So there's three items I'd like to provide to answer that justification.

One is the permit process that Castle & Cooke went through back – starting back in 2003 to present, we followed all the County requirements, submitted our conceptual design plans, and they were approved. And I'll go into detail on that. The second item is the proximity of the site to the Class AA waters. As part of one of our – as part of the requirement for building permits, the County required us to collect all runoff and silt into a storage system to prevent it from contaminating those waters. And that required us to bury these storm chambers, as they're called, and . . . (inaudible) . . . the fill that you see out there. And the third item is the self-imposed safety issue that we decided to implement as part of this project.

And now to go back to the first item that I mentioned, and – it's a chronology of the entitlement paper that was submitted, and I passed it out to– You should have a handout dated April 21st. It was a letter to Mr. Clayton Yoshida that I provided where he asked for a chronology of events that occurred.

Towards the middle of that first page, in July 1, 2003, Ordinance 3137 was established to create the Project District Boundary Amendment, and granted the Project District Phase II, and SMA approval. So that approval allowed us to move forward and prepare conceptual plans for the project. Back in 2004, Project District Phase III approval was granted for the original 38 units for the site. And once we got the Phase III approved, we prepared detailed plans and drawings that were submitted back – again, back in 2004, and the grading permit was granted. And within those design plans, we submitted the plan profiles of all the buildings with the fill heights, and all the drainage requirements that were mandated by the County. And that was approved. And back when we submitted those design plans, 11 of those buildings had exceeded the 30-foot height limit and we were approved for that. So that allowed us to go ahead and start the site work, which is about 80% complete. We installed all the drainage storm chambers on Phase I and the Phase II level, all the sewer lines, gravity sewer lines, electrical, water, and the communication system.

Then again later in 2004, we were granted the building permits. And we started to again, construct Phase I, which was completed 2007. And when that was completed, we moved on to the second tier where we initially had built the first three homes at the end of the cul-de-sac. We built the framework. And at that time, as we saw the construction progressing, and we saw the wall height, and the proximity of the back yard to the wall, we felt that it was probably – we needed to implement another safety measure to that project. So what we did was we decided to lower the wall to a certain level that would not compromise the integrity of the wall and the fill. And that would also minimize or create no site – further site grading because it was pretty much complete.

So we lowered the wall approximately, five feet on average. And we created a two-to-one so that way it would create a further setback from the wall. And we would – in addition to that, we would also provide a railing along the wall, which will be lower than the finished floor so that potential residents wouldn't see that railing. And on that sloped area, we will plant in some vegetation to mitigate the view of that railing. So that actually is the third item for the safety issue, the third item for the uniqueness of that site. And the second item that I mentioned was the requirement of the County for us to install these underground storm chambers to collect runoff to protect the Class AA waters that are adjacent to the site. And again to recap, the first item was all of our building plans were approved by the County Building Department and Planning Department back in 2004 even when 11 of those buildings were – exceeded the minimum 30-foot height limit.

And in terms of the second part of that Justification 1, in terms of the alter of the neighborhood, as you can see in the packet, Exhibit E.2, our setbacks from the property line for a multi family designation exceeds the minimum setbacks. And the architecture of the second and third phase homes, even though we combine the garage and the dwelling unit, it is still consistent with the first tier that was built. So we show that there's no deviation from the character of that neighborhood.

On Justification 2, the response from County staff, I believe, agreed with our initial justifications, so I won't go through that. And Justification 2, just to read in the record it says that, "Strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property." And as you see in your packet, I believe that the County agreed with our justification and approved that portion.

Question 3 or Justification 3, which is related to Justification 1, so my response would be similar to what I said, but I'll just read the third justification. It says that, "The conditions creating a hardship were not the result of previous action by the applicant." So what we stated is we proceeded with our project with the approvals of the County. So what was out there was based on the plans that were reviewed by the County staff in the Building Department, Planning Department, and we moved forward with that.

And I forgot to ask Trisha. There was one – we received a letter from a homeowner down at Manele Palms Phase I. He wasn't able to – he's not able to be here, and if I could ask Trisha to please read that into the record, please? And I gave you all a copy of that too.

Chairman Kamai: Could you please, Trish?

Ms. Kapua`ala: To whom it may concern at Maui County and members of the Board of Variances and Appeals:

I am an owner of 34B Uhaloa Place in the Palms at Manele Phase I development on the island of Lanai. I am writing in response to the information I received in the mail from Castle & Cooke LLC regarding the planning and proposed construction of the Palms at Manele Phase II development seeking a variance from Maui County Building Height Code 19.70.030(B)(6).

I strongly encourage you to approve this variance request. This project is both tasteful and beautiful, and will help growth and job opportunities on the island of

Lanai. I cannot emphasize enough how important it is for you to approve the applicant's variance request for this project which will be built directly behind my home.

Regards, Shane Busch, Owner of 34B Uhaloa Place.

Dated March 8, 2011.

Mr. Rumbaoa: And again, just to recap before I end my testimony is again, the uniqueness of the site again is that we proceeded with the project, the construction of the project, based on all the approvals we received from the County even when 11 of the buildings were exceeding the 30-foot height limit. The requirement of the special storm chambers water retention system that was required due to the proximity to the Class AA waters, and the self-imposed safety issue that we took on to provide more safety for future residents. So for that, we humbly request that the Board approve our variance in moving forward. Thank you.

Chairman Kamai: Members, any questions for the applicant?

Mr. Bart Santiago: Yeah, I have a question for Mr. Rumbaoa. This table here on page 2, it's two pages, page 2, the comment says, "2006 approved heights," total heights. I counted nine over 30. The total heights to the left in bold also, when was this approved? There's 11 in that column.

Mr. Rumbaoa: The overall table hasn't been approved. That's why we're here today.

Mr. Santiago: You kept referring to 11 that had been approved over 30 feet. So when I look at the 2006, there's nine.

Mr. Rumbaoa: Right. What happened— Because— Actually, I don't know if I mentioned that the original plan had 22 units. So this revised redesign, we actually came in with 19 units. So the density is less.

Mr. Santiago: . . . (inaudible) . . . nine, then?

Mr. Rumbaoa: That's correct. Right. So we eliminated three units on this redesign.

Mr. Santiago: So could you explain to me why the requested new heights have increased to what was approved three years ago? In some cases, anywhere from a half foot to 11 feet.

Mr. Rumbaoa: Well, the — because we decreased the number of units. Some of those we had converted from a single story to two-story. So that's why you saw the ten-foot increase. The fill height is the same, but the building—

Mr. Santiago: So that in essence, the entitlements that were received previously really does not apply to what your — to the new plans because you modified the building heights and changed it anywhere from half a foot to 12 feet.

Mr. Rumbaoa: The building permits, correct.

Mr. Santiago: The building permits.

Mr. Rumbaoa: The building permits. The Phase III was granted, but the building permits has yet to be granted.

Mr. Santiago: I guess my question is, the initial approval in 2006, those were building permits that were granted?

Mr. Rumbaoa: Right, it was the whole gambit, yeah.

Mr. Santiago: So the new heights that are now being proposed or recommended have not been approved. And so are these being tied to the old permits that were approved previously, and that the variance should be granted based on the approved permits previously? But in essence, they're new heights.

Mr. Rumbaoa: That's correct. Yeah. So we're trying to obtain building permits, new building permits.

Mr. Santiago: Okay. Thank you.

Chairman Kamai: Members, any more questions for the testifier? I have a question for the applicant. Have any of the homeowners or testifiers seen this conceptual drawing of the build-out?

Mr. Rumbaoa: I'm not sure. I don't know. I'm not sure.

Chairman Kamai: Would the applicant mind showing Mr. Green and Mr. Hynes?

Mr. Santiago: I do have a question on this representation. Is this representative of the new heights?

Mr. Rumbaoa: No, I'm sorry. This is from the original approval. So this does not reflect the new heights or the less – the three less units.

Chairman Kamai: Members, any more questions for the applicant?

Mr. Shimabuku: I guess I have a question. In regards to the old heights and the – well, this is the old – you said this is the old.

Mr. Rumbaoa: Yeah, that's correct, it's the old.

Mr. Shimabuku: Now, in reference to the new heights, it wouldn't be a whole lot more than what we see already here. It may be more than a foot or two at the most?

Mr. Santiago: There's one building that went from 21 to 32 ½ feet.

Mr. Shimabuku: Besides the one story one that converted to the two.

Mr. Rumbaoa: That's correct.

Mr. Shimabuku: The two-story already shown in this elevation drawing, you're probably gonna add like maybe two feet at the most.

Mr. Rumbaoa: I would say that the two stories will probably stay the same, plus or minus a foot. And then as I mentioned, we had converted some of the single stories to two stories. So we'll probably be at the same level as—

Mr. Shimabuku: All about the same level.

Mr. Rumbaoa: Yes, right. It's not gonna be anything higher than what you see here.

Mr. Shimabuku: So it wouldn't drastically change the height of the upper level, actually.

Mr. Rumbaoa: No. I mean, as you can see on the upper level, there's one, two, there's about four two stories there.

Mr. Shimabuku: Okay. Thank you.

Mr. Santiago: How many units were converted from single to two-story?

Mr. Rumbaoa: Five.

Unidentified Member in the Audience: Are these new because it didn't have courtyards . . . (inaudible) . . . ? It's not anything new?

Mr. Rumbaoa: That's correct. That's the original plan.

Unidentified Member in the Audience: . . . (inaudible) . . .

Mr. Rumbaoa: It was . . . (inaudible) . . . back then.

Chairman Kamai: Members, any more questions?

Mr. Tanner: One question, Chair. Based on the written testimony by Mr. Hynes, it goes into detail about the difference between the one story and two-story, and the values, and the ability to resale, and things like that. He kinda makes the comment about saving Castle & Cooke from themselves. What's your position on that and the reason that Castle & Cooke wants to do the two stories as opposed to the one story?

Mr. Rumbaoa: To – again, to – instead of having a real uniformed look of all single stories, we wanted to have a mixture of two and singles. And there was some economic impact to it also. Like I said, we cut back three units, three buildings, or three units. And adding a – converting a single to a two-story obviously, we can sell that for a little bit more.

Mr. Hynes: Not in this market.

Unidentified Member in the Audience: They don't sell.

Mr. Rumbaoa: Eventually, when we do build.

Mr. Tanner: Yeah, that answers my question.

Chairman Kamai: Members, any more questions for the applicant? I got a question for Mr. Hynes. So Mr. Hynes, are you familiar with this?

Mr. Hynes: This is the first time I've seen it. It seems to be a dated rendering. I don't know. Is there any questions you had for me specifically? I'm not sure how it's relevant to what you're proposing at this point.

Chairman Kamai: You said you own a unit.

Mr. Hynes: Yes, right in the middle.

Chairman Kamai: Right in the middle. My question is, but you knew that they were going to be eventually a build out that looks—?

Mr. Hynes: Correct, yes, yes. And our concern was when we first moved in there, there was no landscaping. It was just the bare wall. That's why I wanted you guys to go down and just see it because it's a rather imposing wall. And if you add five feet to it, it was even more imposing. What I don't understand from an engineering standpoint, although not being an engineer familiar with physics, if you lower that, I don't understand how lowering the retaining wall that was designed to retain the area, if you lower it and then slope it, you know, rather severely that that's gonna change it. And there's still all that dirt and more mass behind it. And then if you put two stories on top of that, it's gonna push down even more. So early on, we had some considerations. And we spoke. I spoke personally with Mr. Rumbaoa. Had him come down and assure my wife that they were going to grade the thing back so that it would be less of an imposition as to looking directly into our foyer and our living space. And so that by moving them back, it made sense that they would have a better view plane and not see our – you know, have our roofs interfere with that. So that made sense. But my understanding was that the grading would come down as well. I don't understand how it's a safety issue. We were told by many, many people within the company that it was an aesthetic issue. When Mr. Murdock saw it, that was it. That wall's coming down. So that's why I wanted to make sure what Mr. Rumbaoa had to say about what the purpose of it was because as far as I know, it was not a safety issue. And so we did know that there was gonna be packing behind this. We don't have any objection to that. The main thing is like I say, the safety issue for us because we are downslope of that area.

The other thing is an economic consideration. I am a licensed broker in the State and have been involved. I didn't buy here to invest. Bought here to live on Lanai. And love it. We have a great time. The concern I have is that if they're putting more units that are essentially, unsaleable, that's going to be a problem as well, as well as the safety issues for us. That was a consideration. I didn't know if that entered into your concerns or not, so I hope I answered your question.

Chairman Kamai: You did. Thank you.

Mr. Shimabuku: Mr. Chair, I have a question for Mr. Hynes. Being that you live on the bottom, and

this variance is in response to the height limitation, what's your take on the height situation? You had mentioned you're concerned about the aesthetics of the wall and the slope at the top of the wall.

Mr. Hynes: Well, not the aesthetics. They've done a great job of landscaping the wall. That was part of the settlement basically, when the apartment owners' association took over the fiduciary responsibilities. All that stuff was not in. Part of our negotiating with Castle & Cooke was that that all be handled. They did a great job of basically, hiding the wall. The concern was – the safety concern was whether that wall was gonna come down because we're familiar with the flood situations that have happened here and that type of thing. So it was a concern when you reduce the wall, the retaining wall that's supposed to protect us, five feet that you wouldn't also reduce the level of the grading.

Mr. Shimabuku: So you're pretty much more concerned with the weight of the two stories?

Mr. Hynes: Yeah, from an engineering standpoint, I don't understand that. It just doesn't make any sense to me that if that was engineered that way to protect us, and you reduce it by five feet, how we're more safe. I don't get that. It seems like we're at more risk. If you lower it, then that's not a problem. We expected those units to be there. And would prefer, from a property value point of view to see the project built out. You know, having the weeds and all that kinda stuff doesn't do anything for our property values as we've seen. We bought in at the top of the market. And as I said, we didn't buy an investment. We bought to live here. The people that have come in since us have enjoyed a 60% discount as recently as last month. And that was, like I say, on two-story units that they couldn't sell.

Mr. Shimabuku: Okay. Another thing, as far as the runoff from the rain, I'm sure that you are already had witnessed some of the storms. How did the storm drains and all this infrastructure that was put in by Castle & Cooke handled that rain?

Mr. Hynes: Not well especially, with– We've been here – we've lived on the island since 2007. The drought has been prolonged. With the rains happening in December and since then, they've been substantial even in Manele, my courtyard floods. So the drains that are in position there, I don't know whether it's a problem further down or whether it's the capacity that the drainage systems that they put in the courtyard are ineffective, but the courtyard floods.

Mr. Shimabuku: And the water comes from the side or from directly from the back–?

Mr. Hynes: From the roof, from the– No, it doesn't come down the road or anything. It's not coming from anywhere other than my roofs. It doesn't drain out the way it's supposed to.

Mr. Shimabuku: Okay. And it doesn't come down from the wall that the properties–?

Mr. Hynes: Not that I'm aware of, no. I haven't seen any problem with that.

Mr. Tanner: I have a question for Mr. Hynes, Chair. My understanding the safety concerns by Castle & Cooke were for the new homes. They made the change based on the safety concerns for the new level, not for the lower level, correct?

Mr. Rumbaoa: Correct.

Mr. Tanner: Have you had an engineer look at it from your perspective in the homes below and advise you that you should be concerned? That this change has made some type of a significant difference as far as your safety concern is?

Mr. Hynes: Well, one of the homeowners is involved in the bridge-building on Oahu and various other – in water treatment plants and that type of thing has voiced the same concern because personally, I sold him the condo, and he's two doors down. But we were given the assurance, as I say, from Mr. Rumbaoa giving us site visits and explaining to my wife in detail what was expected. We fully expected it would be much lower and graded significantly different from what he's projecting at this point on the – as far as the project's concerned. We thought that, okay, they took the wall down. And we were assured that when the new permits were granted that everything would be lowered down and graded back, and protecting us as well. So yes, we voiced those concerns since 2007.

Mr. Tanner: Do you have anything in writing of the assurances of the grading?

Mr. Hynes: Writing is really difficult to get. As I said, I've met with Mr. Rumbaoa at least twice on the site myself and he met with my wife once as well.

Mr. Tanner: So your neighbor in the condo that is an engineer and a bridge builder, did he put anything in writing as far as his engineering concerns?

Mr. Hynes: That, I would have to check. I know there was some discussion with regard to the AOA considerations. When he purchased, we were in negotiations with Castle & Cooke to take care of the punch list. I was the initial – the inaugural President of the AOA and basically, created a punch list for Castle & Cooke to follow, and things that they need to care of before we would – because they still owned the majority of the units. And once they made a few sales, then once the 70 or whatever it was, 55 or 75% maximum had been reached, then we took over the fiduciary responsibility, and they did complete most of those things. But this has been one of those things that's been an ongoing thing because we were always requesting that we be shown the plans, that we knew what was going to happen, and what the new project, the redesign, was gonna look like. We haven't gotten anywhere and actually, we've even requested plans for our own as-builts, and they are not available, and were told that the Maui County in their moving around the office, have lost them as well. So we don't even have as-builts for our units.

Chairman Kamai: Members, any more questions for Mr. Hynes? Hearing none, thank you, Mr. Hynes. I have a question for Mr. Green.

Mr. Green: Yes, sir?

Chairman Kamai: Mr. Green, have you seen this conceptual drawing of the build out?

Mr. Green: Just now. I have not seen it before. I did note that there were several more – four single story units there in that plan. And I think I mentioned that I had asked Castle & Cooke or suggested to Castle & Cooke when we found out they were gonna do the redesign to make all the

units on the top-level single story. And so I'm pretty disappointed that not only did they not keep the same number of units, the single story, they eliminated three, and they're now virtually all but one, double story.

Chairman Kamai: So you had no idea that a build out of this magnitude was in front of your property?

Mr. Green: Oh, no, no. We've known since we bought the lot that there was going to be units there. So that's not a surprise. I have never seen that drawing. And in fact, I've never seen any site drawings of what the Phase II, what you're referring to as Phase II. I've never seen any drawings of what Phase II is supposed to look like. I just know from conversations with a gentleman named John Shimizu who was the Director of Engineering for Castle & Cooke onsite at the time that Phase I was built that they were about equally divided between single story and multi story, two-story, on the top level. And that's when I had the discussions also with him about taking the kiawe trees, and etc., etc. And that's when I asked and suggested to them that they put primarily single story units on the top level, and he said he would take that into consideration. He's no longer with Castle & Cooke. Hasn't been for a couple years, I guess. So I don't think any – as Mr. Hynes said, I'm not aware of anyone that's a homeowner in that area ever having seen any specific plans for Phase II before. We've known something – I mean, you cannot miss if you were to look at the back of our house, you cannot miss the gravel yard out in front of us. So we know something is gonna be built there. We just didn't know exactly what or the specifics of exactly what.

Mr. Shimabuku: Mr. Chair, I have a question for Mr. Green. Mr. Green, is your home a one story or two-story home?

Mr. Green: One story.

Mr. Shimabuku: One story. Thank you.

Chairman Kamai: Members, any more questions for Mr. Green? Hearing none, thank you.

Mr. Green: Thank you very much.

Chairman Kamai: At this time, Members, the Chair would entertain a motion. Mr. Shimabuku: Mr. Chair, not to make a – entertain a motion or make a motion, but I have maybe a question for Corporation Counsel. In regards to Mr. Hynes' testimony, is it something that we can leave out of our consideration because it seems like it's something that's not pertaining to the variance itself as far as the height is concerned?

Mr. James Giroux: If you could clarify what aspects of his testimony because it's about three pages so—

Mr. Shimabuku: His testimony is more concerned – it seems like a concern of the structure of the wall and of the home itself with the weight of the two-story. And I don't know how it plays with the height of – what the variance is about. Would that – is that something different? I'm trying to figure out exactly before any motion is made.

Mr. Giroux: Yeah, maybe I can address that. As far as any evidence of— This is a Body of finding of facts and conclusions of law. So the weight that you would give to testimony is dependent on your evaluation of it. What you would be looking at is that under the Criteria 1, 2, and 3, if there's any possibility that that would fit into your analysis into that area. And under 12-801-71, your standards for comprehensive zoning, you would look at Section 1 as far as is there – does it give any weight to the exceptional unique physical or geographic condition. Looking at the property going to the site visit, I guess, there would be some tangential relationship to the fact that there is a massive wall there geographically, I guess, that's either manmade, or it was there, or it had to be made because of the geographic contour of the property. So I guess you could say there might be some relevance, but that's for the finder of fact to decide.

And if you look to Criteria 2 where there would be strict compliance with the applicable provisions of the title would prevent reasonable use of this property, I guess part of his testimony is going to the fact that you could – since you have a huge wall there, you could do whatever you wanted with the height. You could raise it higher. You could raise it lower. You can do whatever need be. However, the testimony from the applicant is that by changing the height now, they've already installed the infrastructure. And then that would lead you to Criteria No. 3 is that the conditions creating the hardship were not the result of the previous actions of the applicant. I'll leave that up to you to decide if you see that as part of your analysis.

So the weight that you give it, is up to you. It's just that you would work through it. I don't wanna give you the conclusion, but just as far as your analysis, that's how you would work through the three steps.

Mr. Shimabuku: I think that helps as far as what I'm trying to figure out a little bit.

Mr. Giroux: I know it's difficult. There's three pages of testimony so—

Chairman Kamai: Members, any further discussion?

Mr. Santiago: I got a question for Mr. Rumbaoa. If you were to re-grade the Phase II back to where it needed to be to reduce the recommended height back to what was approved previously, what would be the cost? With the infrastructure in place, what would be the cost?

Mr. Rumbaoa: Well, as you saw with all the stand pipes, all those utilities would have to be lowered. The cost would probably be – I would say, the millions, yeah, to lower those. And then we have to lower the – potentially, lower the corresponding utilities the same depth as it's lowered. And as I mentioned at the site visit, the sewer line ties into a gravity feed to the main road, which is at natural grade. So to lower that, and you end up with the sewer line being lower, you have to pump it up.

Mr. Santiago: Now, the ten million-dollar cost of infrastructure improvements, is that for Phase II and III?

Mr. Rumbaoa: That's Phase – yeah, the whole overall Phase I and Phase – all three tiers. And we're about – as I mentioned, we're about 80% complete on that.

Chairman Kamai: Again, Members, the Chair would entertain a motion at this time. A quick

question for the applicant: so your initial building plan approval was for the existing grade right now?

Mr. Rumbaoa: Correct, the grading permit was granted based on the existing grade that you saw.

Mr. Santiago: So the increased height of the buildings is the result of the additional setback and having to connect the garage to the building? Is that what – is that the reason why we're increasing heights?

Mr. Rumbaoa: No, no. The original building permits that were approved, as I mentioned, 11 of them had already exceeded the 30-foot maximum building height. So when we went in and did the redesign, some of those – obviously, those 11 based on County review, they flagged it that they exceeded. And we had converted some of the single story to two stories, so that added to that amount.

Mr. Santiago: I guess my question is if they were already two stories, why are they going up another two feet?

Mr. Rumbaoa: There's some – as the wall came down and we created that slope, there's some slight grading that we had to kinda take into consideration. And also, because we eliminated three units, we had to look at the grading, the drainage. So there was some increase there to make sure we got the slope.

Mr. Santiago: But it's the same grade that was there, so if it was approved at 37, why is it now 39?

Mr. Rumbaoa: Again, when we looked at the site grading for the site, and believe it or not, eliminating those units at the end did impact it a little bit. So that's the reason why those slight increases.

Chairman Kamai: So you lowered the number of units that were initially approved?

Mr. Rumbaoa: Right, 22 on the Phase II, 22 down to 19 units. So up top, we eliminated one unit, and in the middle, we eliminated two units.

Chairman Kamai: So had you stuck to your original building design and plan approvals, you would have—

Mr. Rumbaoa: We should – we would've been done by now.

Chairman Kamai: Been done. Members, any comments?

Mr. Tanner: Mr. Chairman, I would make a motion that the request for a variance be granted based on the written documentation given by Castle & Cooke meeting the three criteria.

Chairman Kamai: The motion is before the floor. Members, any second to the motion? It's been moved and seconded by Mr. Tanner and Member Phillips. Discussion on the motion? Hearing no discussion, all those – let me correct myself, Mr. Tanner, is there any amendment regarding the hold harmless agreement for the County that you'd like to amend to the main motion?

Mr. Tanner: I would ask that the hold harmless agreement be in place without the insurance.

Chairman Kamai: And that dollar value would be—? Staff?

Ms. Kapua`ala: I believe Mr. Tanner said without the insurance.

Mr. Giroux: Can I comment on that? I just want to for historical context is that we've had similar issues like this on Maui which have created litigation of the County of Maui. The last demand I saw was for 500 million dollars. I have great concerns about not having any insurance on this type of variance being that there's mass grading, there's a concern about downhill safety, issues regarding site views. So I just want to put that on the table, and ask the Board to take that into consideration because the County is currently in litigation on similar matters.

Mr. Tanner: Would Counsel have a recommendation?

Mr. Giroux: I'm not a Risk Manager, but looking historically, I don't think the million dollars would cover it. I know that the applicant probably has insurance capable of carrying its liability because it is in the industry of development. But I think if you went up to ten that they probably already have that insurance in place.

Mr. Santiago: I would suggest or add that it be per occurrence level where it's two and a half or five million per occurrence based on the valuation of the properties per space that the insurance should be able to cover it per occurrence. Maybe a two and a half million-dollar valuation per occurrence on a C.O.I.

Mr. Tanner: I would accept that.

Chairman Kamai: Okay, so—

Mr. Hynes: Excuse me, Mr. Chair. Would it proper for me to ask a question at this point?

Chairman Kamai: Members, any objections?

Mr. Hynes: One of the concerns I had is giving the weight to the contention that this project was approved erroneously prior. You know, the heights were already there and they were over the 30-foot requirement anyway. And there seems to be some weight given to the fact that this has been permitted prior when this should be a new situation. Just propagating the mistake the Planning Commission made prior doesn't seem like a good idea to me.

Chairman Kamai: Members, would you take Mr. Hynes' question into consideration in your decision-making?

Mr. Hynes: Thank you.

Chairman Kamai: Thank you, Mr. Hynes. So again, Mr. Santiago, could you restate your motion, please, regarding the insurance?

Mr. Santiago: I think it would be prudent to tie into the variance approval, an insurance clause, certificate of insurance, naming the Count an additional-covered party.

Mr. Giroux: Yeah, that would be your Standard Condition No. 2 under 12-801-76.1

Mr. Santiago: And as far as the level, I would recommend a two and a half million-dollar single occurrence for any damage that occurs where the parties that are affected to be covered.

Chairman Kamai: Okay. Mr. Santiago made a motion for additional coverage. Is there a second to that motion?

Mr. Shimabuku: I'll second it.

Chairman Kamai: It's been moved and seconded by Mr. Shimabuku to amend the insurance clause to the main motion. All those in favor of the amendment by Mr. Santiago for the insurance clause to the main motion, signify by saying aye. The Chair votes aye.

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

VOTED: To amend the main motion to include an insurance clause of a two and a half million-dollar single occurrence for any damage that occurs where the parties that are affected to be covered.

(Assenting: B. Santiago, R. Shimabuku, R. Phillips, R. Tanner, W. Kamai.)

(Excused: R. Endo, K. Tanaka, S. Castro, B. Vadla)

Chairman Kamai: **The motion is granted regarding the extra insurance clause added to the main motion.** The main motion is before the Members regarding the approval of this variance made by Mr. Tanner, seconded by Member Phillips. All those in favor of the approving this variance, signify by saying aye. All those opposed? The Chair votes aye.

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

VOTED: To grant the variance request based on the written documentation given by Castle & Cooke meeting the three criteria as amended.

(Assenting: B. Santiago, R. Shimabuku, R. Phillips, R. Tanner, W. Kamai.)

(Excused: R. Endo, K. Tanaka, S. Castro, B. Vadla)

Chairman Kamai: **Your variance is granted.**

Mr. Rumbaoa: Thank you.

Chairman Kamai: Staff, any agenda items?

Ms. Kapua`ala: No.

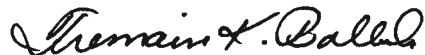
Chairman Kamai: Hearing none, this meeting for the Board of Variances and Appeals for March 10th is adjourned. Thank you. Thank you for your testimony.

C. NEXT MEETING DATE: March 24, 2011, Thursday

D. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 11:00 a.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

William Kamai, Chairman Pro Tem
Bart Santiago, Jr.
Rick Tanner
Rachel Ball Phillips
Ray Shimabuku

Members Excused:

Randall Endo, Chairman
Kevin Tanaka, Vice-Chairman
Steven Castro, Sr.
Bernice Vadla

Others:

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