

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
FEBRUARY 24, 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 Randall Endo at approximately, 1:34 p.m., Thursday, February 24, 2011, 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 Endo: Good afternoon. This meeting of the Board of Variances and Appeals will now come to order. It's February 24th, 2011. Let the record reflect that it's 1:34 p.m., and we have a quorum present of five Members of the Board. For the public's information, we will be allowing public testimony as to each agenda item. We would generally prefer that you speak as the item is called, but if you need to leave early, and want to speak in advance of the agenda item coming up, you can do so. You'll be limited to three minutes and I'll be timing you for public testimony. At this time we would like to start with Item B-1.

B. PUBLIC HEARINGS

- 1. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION SOLE requesting a variance from Maui County Code, §19.24.030 to allow a church steeple to exceed the 45-foot height limit by 29-feet and 4-inches for the proposed Lahaina Latter-Day Saints Church, to be located off of Ulupono Street, Lahaina, Maui, Hawaii; TMK: (2) 4-5-010:007, 039, 040, 041 and 042 (BVAV 20100020)**

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

Ms. Kapua`ala: At this time, Board, I'd just like to show you some Google Earth images, if you could direct your attention to the smart board? This is Ulupono Street, the Lahaina Business Park Phase II. As you can see, Phase I has been built out, and this is the land as it exists today. So you can see from the staff report, the applicant has four parcels which is in the process of being consolidated. I think I'm on the wrong side of the street, it jumped, but again, the idea is to give you an idea of what the land looks like and the surrounding properties. So the Google Earth image, the satellite imagery, as you can see is not current because the rest of the street has been improved.

I also have the subdivision map that you can see, if you'd like to see the rest of the shapes of the parcels and lot sizes—4.877. So anytime I can bring these things up to you. And other than that, the applicant is here in the audience. Oh, these are the parcels right here: Lots 1, 2, 3, 4, and 5. Is that correct, Mich? Thank you.

Chairman Endo: Can the applicant introduce themselves?

Ms. Leilani Pulmano: Good afternoon, Board Members. My name is Leilani Pulmano with the planning firm of Munekiyo and Hiranaga, and we're the planning consultant for the project today. I'd like to introduce you to our project team. We have Rocky Schneider of the Church of Jesus Christ Latter-Day Saints; Arnold Wunder, the State President of LDS Church; Alvin Yoshimori of GYA Architects; and Mich Hirano of Munekiyo and Hiraga. We have a presentation, if you'd allow us.

Chairman Endo: Sure.

Ms. Pulmano: As Trish was saying earlier, we're here today requesting a height variance for the steeple of the proposed LDS Church at Lahaina Business Park. The church will be the West Maui Meeting House. The property is zoned M-1 light industrial, and churches are a permitted use within light industrial zoning districts. The maximum allowable height is 45 feet while the steeple is proposed to be approximately, 29 feet and 4 inches above the maximum height. The main church building meets the height requirement and is less than 35 feet. The variance is only required for the steeple.

Trish did a really nice job of showing you the location in the regional context in Google Earth, but we have a less technical map here. Just to orient you to the site, this is Honoapiilani Highway. Across the street here is the Cannery Mall, and this is Lahaina Gateway. You access the site through Kiawe Street and through Ulupono Street. And these are the five parcels that's consolidated into one for the project area.

I've taken some liberties to take some site photos also. And this is the site as it exists today. Behind in the background is the Kiawe Street Extension to the Lahaina Bypass. And some aerial photos of the area as it's built out today: this photo here is Opukea Condominiums, which is at the intersection of Honoapiilani and Kiawe Street. As you drive up Kiawe Street, this is the Hoonanea Condominium Complex. This commercial and office building is part of Lahaina Business Park Phase I. And this street here is Ulupono Street showing kinda the topography and also the warehouse buildings that exist there today. And these are some more site photos of the area as you're looking makai here at this photo, and as you're looking across towards the smoke stack into Lahaina.

This elevation is an elevation of the building itself showing the steeple, the top of the steeple here, and again, it's about 29 feet above the 45 feet height requirement. And the church building, the main building, is less than 35 feet tall. I also wanted to point out that in order to level the site, they had to do some substantial fill here. It's about eight feet of fill, which added to the height of the steeple.

We have three reasons, main reasons, why this variance is being requested: for symbolic expression, technical justification, and architectural justification.

In regards to a symbolic expression, the steeple is a distinguishing architectural feature of the LDS Church, and it symbolically, expresses the church teachings of the ascension to God. The purpose of the steeple is to lift your eyes towards the heaven, which connects heaven and earth. Ultimately, the steeple conveys LDS' religious message.

Strict compliance to the height requirement for M-1 light industrial at 45 feet would prevent LDS

Church from using this property. The steeple is a dominant design feature that symbolically adds importance to the building and affirms their faith. Without the steeple, it would limit their religious message. The Religious Land Use and Institutionalized Persons Act recognizes churches have a unique, functional, symbolic requirement for their building. The LDS Church steeple is an essential expression of beliefs and theological requirements.

It's important to note that the height of the steeple will not affect the character of the area. Lahaina Business Park includes a mixture of uses such as warehouses, restaurants, retail and warehouse buildings. And the church fits into this mixed use area. The height of the steeple will not impact neighboring properties, nor cause health or safety concerns.

In regards to technical justification, the church purchased five parcels and consolidated those parcels into one parcel. And as you've seen in the photos, there is some slope in their project site, and in order to create a level lot, there's about eight feet of fill, which added to the height of the steeple.

Architecturally, the design is a standard LDS Church design which has been built through the United States and in Hawaii successfully integrated into communities. And here's the – this shows the east elevation of what the church will look like.

Here's some examples of existing churches on Maui and other islands, which has the steeple as the dominant architectural feature. And I'd like to point out that the early designs of the church had the steeple mounted to the ground here. And this is the church in Pukalani. This is the church over in Wahiawa over on Oahu. And the newer designs have the steeple mounted on the roof. I also want to point that it's near by residential uses in the background there. And this is the LDS Church over on the Big Island, and the LDS Church over in Kauai. From those examples, you can see that the steeple is proportionately designed to balance with the rest of the church. Again, the steeple conveys their religious message.

In regards to the variance criteria, the unique geographical condition is the height requirement of the M-1 light industrial zoning district, which restricts the steeple from being taller than 45 feet. The proposed steeple has a functional symbolic requirement for LDS Members. Furthermore, the slope of the site required eight feet of fill and this added to the height of the steeple. The height requirement makes this practically difficult for LDS Church. The steeple represents the symbolic of their doctrine. And if the steeple is not allowed, it would prevent their use of the property. Federal Law does recognize the importance of churches to have functional symbolic features for their buildings.

A hardship is imposed by applying light industrial standards to church buildings, which are permitted in light industrial zoning districts.

In conclusion, the LDS Church has met the criteria for a variance, and request for an approval for their variance. We also want to point out that the LDS Churches with steeples exceeding height requirements are active on Maui, and there are many other LDS Churches on all islands. In addition, this Board also approved the height variance for the LDS Church Maui Lani Church last year. We're here if you have any questions.

Chairman Endo: Thank you, Ms. Pulmano. That was an excellent presentation because it was – it gave us all the pertinent information, but very succinctly so that we can try and get all of our items done today. At this time, we'd like to open it to public testimony. If you wish to testify as to this item, please come forward and sign your name on the sign-in sheet. Is there anyone here who wishes to testify to this agenda item? Alright. We have four people who have signed up. I'll be timing you and letting you know when you reach three minutes. We do have a full agenda so I apologize in advance, but I will be interrupting if you hit your three minutes. First up we have Darryl Aiwohi.

Mr. Darryl Aiwohi: Members of the Committee, good afternoon. Again, my name is Darryl Aiwohi and I come from Lahaina. When I was asked to talk about a steeple, I thought it kinda silly. I said, "Steeple? What – the steeple?" After doing some research, I found out things, which I already knew and most of us know but tend to forget. A steeple is a symbolic issue that we can identify with a special group. We know that the Catholics have their steeple. And when we see that on a church, we know it's a Catholic Church. The Protestants has their own, and so does the LDS, the Mormons. We have a specific design for our steeples. It does two things for us: it identifies us, it identifies other religion. And I tell you because of the way our world is now, we have so much visitors, and most of them are Christians, and they look for the churches that they can worship.

Now, this new church that will be built in Lahaina sits on an upgrade hill and it surely will be able to identify it from far away. And this is one of the purposes. Of course we know that under the steeple is where everything happens. But the steeple is the first contact that we, members, when we travel, we can identify these things.

Now, growing up in a little pineapple camp, I was near two churches had a nice steeple, but they had a bell and we heard it all the way growing up. Six and seven o'clock, the bell would ring. But a steeple plays a big part, and symbolism has been with us for a long time. Through biblical times, this symbolism has been.

So under that conditions, I'm really thankful that I could say these things about a steeple. And we truly – our designs are made that everything should be done right, because that chapel coming up will be with us for the next 50, 60 years, not only my generation, but others. So it'll be there. We need to make it right and hopefully, it'll be a beacon which it is.

Chairman Endo: Thank you. Any questions for Mr. Aiwohi? No? Thank you. Next we have Joseph Sadang.

Mr. Joseph Sadang: Members of the Committee, good afternoon. My name is Joseph Sadang. I was born and raised in Kahana, in Lahaina, all my life. And I'm very glad that you guys approve the church because what we have now is outdated. And when we worship, we have a lot of visitors from Mainland come over to worship with us, and then we have to open up our cultural hall, and have them sit down on the hard chair. And also, parking is very bad for us. We park in the community, and the community is very generous with us for helping us for park in their place. And with this new one, I think that will accommodate our service and our – what do you call? Our place of worship for parking and for worship. Thank you.

Chairman Endo: Thank you. Any questions? No? Thank you, Mr. Sadang. Next we have Jim

Geiger.

Mr. Jim Geiger: Chair, I'm not here on this agenda item. I'm actually here on Agenda Item E.

Chairman Endo: Oh, okay. You wanna wait, then?

Mr. Geiger: I would suggest to wait till after this item and before the . . . (inaudible) . . .

Chairman Endo: Sure.

Mr. Geiger: Thank you.

Chairman Endo: Okay, next we have Linda Langi.

Ms. Linda Langi: The Honorable Chairperson and . . . (inaudible) . . . Members of the County Council, my name is Linda Langi, and I'm from Lahaina. I was assigned to speak on how the church has blessed me and my family. There are so many ways that the church has blessed me and my family, but I will pick only three main points how it blessed me and my family, and . . . (inaudible) . . . and better our lives.

First, I call it a place of protection. During week nights like every Tuesday night, our youth, including my children use the church building like a center. They have game nights. They play volleyball, basketball. They also have achievement nights where they receive for their achievement like to better their school and sports. They also held – held plan meetings. There, they plan for their classes, their activities, their projects, their conference, and their worship. It's a way of protecting them, keep them out of trouble, and keep them straight.

Second to that I call it a place of learning. Every day, every morning, from Monday through Friday, from 6:00 to 6:45, all the high school students, including my children, come to the church, and they learn and they study from the Old Testament, New Testament, Supplement Covenant, and also from the Book of Mormon. Throughout their four years of high school, they learn from this plan, a fresh start like a spiritual . . . (inaudible) . . . to remember who they really are. That they are beautiful . . . (inaudible) . . .

And the third one, I call it a place of worship: a daily reminder of my sweet land of liberty, land that I love, land that gives me and my family freedom of . . . (inaudible) . . .

Chairman Endo: Thank you. Any questions for Ms. Langi? Thank you. Is there anyone else in the public who wishes to testify to this agenda item? Seeing no one approaching, we will close public testimony as to this particular item we're taking up right now. Does the Planning Department wish to read its recommendation or—?

Ms. Kapua`ala: Yes, if you like, I can read it.

Chairman Endo: Or actually, maybe, does the Board have any questions first for the applicant? Okay, yeah, why don't you read or summarize?

Ms. Kapua`ala: Well, based on the findings of fact, the Department could not find that the applicant has met any of the criteria to qualify for the variance. However, the Department does recognize that RLUIPA does apply to this applicant, not necessarily to the land, but to the applicant. And therefore, the Department would recommend that the Board find a way to approve this with the condition that – the standard conditions.

Chairman Endo: Thank you. Members? Questions? Motions? I guess I would make a quick comment. If we do approve it, we should – I would consider – or the Chair would recommend that we require the standard hold harmless and indemnity provisions, but waive any insurance requirement. That's my comment.

Ms. Rachel Ball Phillips: I'll go ahead and make a motion that we approve the variance, and adopt the Planning Department's staff report and recommendation, and that we also waive the insurance requirement.

Chairman Endo: Okay. Just to clarify, you wanna – I would think we'd wanna adopt the applicant's statement of facts and justification as the findings as opposed to the Planning Department's since they found that not all the criteria were met.

Ms. Kapua`ala: I think it's okay to adopt our background info as the facts; however, we can incorporate the applicant's justification as to the Board's reasoning why you are granting this variance.

Chairman Endo: Okay. I think that sounds right, yeah?

Ms. Phillips: Sure, that sounds good.

Chairman Endo: Okay. Is there a second?

Mr. Stephen Castro, Sr.: Second.

Chairman Endo: Okay, it's moved and seconded to grant the variance with all the standard conditions except for the insurance requirement. Discussion?

Mr. Kevin Tanaka: Yeah. Sorry. Just to disclose, for me personally, I just wanna put on record that I am a consultant to the LDS Church on their Maui Lani Project. After a discussion with Corp. Counsel, that doesn't – that would not be a conflict, and I would not need to recuse myself, but I just wanted to state it for the record.

Chairman Endo: Thank you, Member Tanaka. Any further discussion? No? If not, all those in favor of the motion, please say aye. Okay, the Chair votes aye. All those opposed say no. Nobody.

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

VOTED: To grant the variance with all the standard conditions except for the insurance requirement.

**(Assenting: R. Phillips, S. Castro, R. Shimabuku, K. Tanaka,
R. Endo.)**

(Excused: W. Kamai, B. Santiago, R. Tanner, B. Vadla)

Chairman Endo: **So the motion passes 5-0, and your variance is granted as stated.** Thank you.

Mr. Mich Hirano: Thank you very much, Board Members.

Chairman Endo: Moving on to Item B-2. Or actually, Trisha, should we notice that Item C-1 is not gonna take place today first, in case somebody's waiting to testify on that item? What is the status on that one?

Ms. Kapua`ala: Okay. The Board can still decide to proceed with— According to the rules, if the applicant does not show up, it's considered a waiver as to their right to be heard, and you can still proceed with the hearing.

Chairman Endo: Oh, okay. Is anyone here as to Item C-1, the appeal of Barbara A. Cipro? Nobody's here anyway, and we can always take it at the end. Oh, you are here?

Mr. Jack McCormack: I was asked to show up. I'm the actual Investigator who did all these inspections, all the letters, and everything. I'm not . . . (inaudible) . . . for her appeal, but more for the County on what we did . . . (inaudible) . . .

Chairman Endo: Okay.

Ms. Kapua`ala: Is Mimi here? Is Ms. Johnston here?

Chairman Endo: I saw her earlier, but she left the room.

Ms. Kapua`ala: Okay. Since we're speaking about it, the applicant received her motion to dismiss and interpreted that as a dismissal itself. So she did not take off from work and was not able to come. So she e-mailed me earlier in the week and did not receive the e-mail till last night. And my explanation was that it's just a motion. It wasn't a dismissal. So that's why she's not here today. She was gonna submit a fax or e-mail to me, but she didn't, so I have to explain for her. I don't have anything in writing. I just have a phone conversation.

Chairman Endo: We should probably just take that matter up, then, in regular order since – and Mimi might show up, too, right, to talk about it.

Ms. Kapua`ala: Okay.

Chairman Endo: Okay. So sorry, we're gonna take you in order. Okay, so moving on to Item B-2.

2. **DAVID JENKINS of CREATION DESIGN COMPANY representing KIHEI SANDS CONDOMINIUM AOA requesting the following variances: (1) from Maui County Code (MCC), §19.36A.010 to allow one (1) parking stall to be used as an ADA access aisle thereby leaving 29 parking stalls whereas 30 stalls are**

required; and (2) from MCC §16.04B.360 to delete the requirement to install a fire sprinkler system in 30 existing condominium units for the proposed addition of a 177 square foot manager's unit, for property located at 115 North Kihei Road, Maui, Hawaii; TMK: (2) 3-8-013:013 (BVAV 20110001)

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

Ms. Kapua`ala: Again, I'll show the Board a Google Earth image of the property. Okay, so the street view photos are not – they don't seem to be showing up at this time. This is the subject property, and this is the subject parking lot. If it does show up, I will definitely let you know, and I'll show you.

Chairman Endo: Try go closer. Sometimes it'll pop up, if you go closer. I guess not.

Ms. Kapua`ala: I'll keep on trying. The street view is really good. I mean, there's quite a bit of imagery that you can see the surrounding properties, and you can see into the parking lot and as well as the adjacent properties. But the staff report is also very descriptive as to what is neighboring, so I think the Board can deliberate on this. And also, the applicant has a map to show you.

Chairman Endo: Is the applicant here to introduce themselves?

Mr. David Jenkins: Good afternoon. My name is David Jenkins of Creation Design Company. I'm here as a consultant to help the Kihei Sands Condominium with two variance applications today. We have a Title 16 variance regarding fire protection and also a Title 19 variance regarding parking. The Planning Department has recommended approval on the parking variance. And I don't know. Were you gonna address that now? Should I do a presentation, I guess, now and then--?

Ms. Kapua`ala: Yes, please.

Mr. Jenkins: I'm wondering if the Board would like me to keep the parking presentation rather brief since the Planning Department is already recommending approval and has drafted conclusions on that?

Chairman Endo: Sure. It sounds like a good idea.

Mr. Jenkins: Okay. If you don't mind, I have – I'm going old style with my presentation here. So this is similar to the Google Earth image we just saw. It shows the parking lot here fronting the Kihei Sands project; and the adjacent property here, the Sugar Beach Condominium; and their ground level parking, which is adjacent to the project here. This is a vacant property here, which is currently used as a sod farm. This is the front of one of the existing buildings. This is where the addition to the Manager's office is gonna take place. It's about 177 square feet, about the size of a bedroom, a standard bedroom, in a house. And it's gonna take the place of this stairway here and this little planter area, and sort of encompass where this tool shed is and kind of create some storage, file box storage, over that office.

This is the breezeway between the two buildings on the downstairs' level, and the same at the

upstairs' level. The existing building is a cement stucco exterior. And here's the site plan of the project. This is the Sugar Beach Condominiums right next door. This is the corner of their parking lot that we saw in the Google image. And what I've done here is shown three different possible locations for fire truck access to attempt to address a fire at either one of these buildings. And then I guess we'll get to that later. For now, I just wanted to show you this as the site plan. And then when we're talking about individual points, we'll come back to this one.

This is the parking plan. This would be a good time to talk about the parking variance. Essentially, when the project was built in 1972, there were 30 stalls required. The code at that time required one stall for every unit, so there were 30 stalls required. Originally, there were 30 stalls. One eventually was lost to mis-striping along this side where right now, there's a double wide spot right here. When this side is re-striped, we'll get that one back. One was lost to a rock wall that was put in fronting the walkway between the two buildings. That's gonna come out and that stall will go back. What we're gonna be left with is 29 stalls, and we just can't get back the 30 because in the decade ensuing, you know, between 1972 and now, the Americans with Disability Act was enacted, and now we need to provide an accessible stall here. And the access aisle for that stall eats up one of the parking stalls. So I think that's in essence why the Department is recommending approval on that application or that variance request, I should say.

Here's a plan view of the – this is the existing Manager's unit. And this is the work area for the Manager and the foyer where the homeowners can come in, collect their mail, and things like that. And then this is a plan view. This is the front view of the parking lot. This is the new addition here and the rerouted stair going around it. And this is a side view elevation from the right side from Sugar Beach. The dotted line here is that existing tool shed, which sort of gets incorporated into the addition.

Here's a couple sections through the addition. This is showing the tool shed area here, so you can see what we're doing. In order to meet the Uniformed Building Code and Fire Code requirements, we not only have to do the one-hour construction on the exterior wall and the roof, which includes an inch and a quarter of Type X fire-resistive drywall on the walls and that roof, we also have to install a new wall adjacent to the existing stucco wall, which has also two layers of Type X drywall for a total of one and a quarter inches thickness. So this plan passed plan review. And all the assemblies that are called out by GA file number for all the different types of assembly, they all passed. Those are standard assembly types for this type of a fire-resistive construction. So essentially, what we've designed here is a little fire safe cocoon. It's sort of tacked onto the exterior of this stucco building.

I put the site plan back up here and perhaps now– Well, first, did you folks have any questions about the parking variance that I should maybe address separately before we get into fire? Okay, so I'll move right into fire, then.

In the Fire Department's report, which was received by the Planning Department on Friday, there were two main issues. The main thing is they said for an existing building like this, their requirements in Appendix 1-A of the Fire Code that set aside or call out minimum requirements for a fire protection for an existing building. That's with the walkways, the fire separation between units, and things like that. So it was our opinion that the existing building meets all of those requirements. The Fire Department agreed. They said in their report, we do meet those

requirements for – that are in Appendix 1-A.

They also said that because we're adding on or we're touching one of the existing buildings, we need to bring the existing buildings up to current code. Now, there are two elements, two main elements, that they're asking for in that requirement. One is sufficient fireflow from the hydrant that we have here out at the street. And we handed out an exhibit today, which is the fireflow calculations, which we had done by Engineer Neil Nishida. Those were done at the request of the Fire Department engineers, and they were accepted by the Water Department. So that's one thing the Fire Department was asking for.

The other thing is an accessible route from the fire truck to every part of the building within 150 feet. So what I've done here is shown a fire truck parking at the end of one of the parking lots, and then a 150-foot route, which would be a fireman with a fire hose reaching the end of the building. So the solid line shows how far we get with 150 feet. We get to within the last building there. From the center between the two buildings from this parking lot, we get up to the last two buildings again. Along the Sugar Beach side, we get all the way to the end of the building.

Now, this portion of the Sugar Beach property is a ground level parking lot, if you recall from the aerial photo. This area here in this corner is – there's no parking stalls here. This is a drainageway and a walkway. They have showers down here, so they have a drainage for the parking lot, as well as a concrete walkway down there to the showers and beach access. So a fire truck can pull right in there, right adjacent to our property about the middle of the western building. And from there, 150 feet gets them clear around the back of the buildings. The only thing that would be not covered is just the very back edge of this one building on the east side. And then what we're proposing, if you just add about 15%, about 20 feet, onto the end of each of these runs, they actually overlap. The reason we're proposing that is because the fireflow from the hydrant – this hydrant is on a 12-inch diameter fire line, which is capable of producing between 3,000 and 4,000 gallons per minute, depending on extenuating circumstances. The fireflow calculations that are engineered showed that the fireflow for the existing buildings and the new addition combined required 1,500 GPM in fireflow protection. So we're more than double the required fireflow for the new and existing construction combined. So what we're proposing is if we can just stretch that 150 feet just a bit. In other words, when – if the fire hose can be like 120 feet long, which would normally start cutting down on your fireflow, since we're starting with more than double the required fireflow and pressure, that should not be a problem, we're hoping, for putting out a fire at the end of the building there, the very end.

If you don't mind, I'll just look at my notes and make a few points from the podium. So I'm kinda old school here with my presentation with the paper and whatnot. Yeah, let me, if you don't mind, I'll just go very quickly through the Fire Department's report and just make a couple of points.

First of all, on the first criteria for the variance, the Fire Department's response, they seem to think that we're talking about an after-the-fact permit for something that was built without getting a permit. And this is not the case. There was a situation like that previous—a lanai that was enclosed on the Manager's office back in about 1973. That was turned in to the County by a previous Board President in 2008. And the Board and owners dealt with that. They tore the enclosed lanai down that was serving as the office at that point and paid the fine. And so Ernie Takitani was the Inspector and he closed the case in 2008. What we're talking about now is actually doing a proper

office with a building permit, and doing it on the front of the building where an office should actually be.

So when we applied for the building permit, as I said earlier, the plan review folks and the Water Department, they all had requirements. We met all of those requirements. And so they're all satisfied. The Fire Department's response was that we needed to provide the 150-foot access to all parts of the building and put fire sprinklers in the existing buildings.

I met with Lieutenant English of the Fire Department to ask on behalf of my clients, you know, what – could you please show me the code or show me where's the trigger in the code for putting those sprinklers in the building, an existing building, even though we're doing a – even though the addition meets all the existing code. And so not being able to get that from the Fire Department or from any engineers that we talked to, in other words, an actual – an actual wording in the Fire Code or Building Code that says that, we figured we better bring this to the Board and see if we can find relief here.

What I'd like to do today, though, is just actually focus on the two main items that the Fire Department has put in their staff report, which essentially, is the access to the building and the adequacy of the water supply. So that's stated over and over again several times in the report that if we meet those requirements, then the fire sprinklers would not be required.

Okay, that's essentially, what I have. In addition to having the President of the Board here, Mr. Steve Heller, to answer any questions you folks might have about this application or the previous situation with the previous office, we also have a former President of the Board, Robert Powell, here, if you have any questions for him. We also have our Attorney, Martin Luna, present. And we're hoping that he might be able to make a brief statement after the Fire Department states their case?

Chairman Endo: Sure.

Mr. Jenkins: Okay. Thank you.

Chairman Endo: Okay, at this time, let's take public testimony as to this agenda item. Is there anyone wishes to testify, if you could come forward? I have a sign-up sheet here. I guess Jim Geiger would be the first person or is this also not the right item?

Mr. Geiger: Not the right item.

Chairman Endo: Did you wanna just testify anyway and you get it over with 'cause you gotta go, or—?

Mr. Geiger: No, why don't I take it up after, rather than . . . (inaudible) . . . ?

Chairman Endo: Okay. Trisha, do we have any letters in support or opposition on file?

Ms. Kapua`ala: Yes, we have one on file. It wasn't noted in the staff report, but there is one from the Judge Family. It was given to you. Am I correct—Judge?

Chairman Endo: Yes, that's from the Judge Family Limited Partnership. I guess the Sugar Beach Resort is right next to this project?

Unidentified Speaker of the Audience: Yes . . . (inaudible) . . .

Chairman Endo: And for the record, Mr. Judge, Jim Judge, on behalf of his partnership states that they have no objection to the variance. Okay, we have one person who signed up to testify, and his name is Robert Powell. Mr. Powell, you have three minutes.

Mr. Robert Powell: Thank you, Mr. Chairman, and Members of the Board. I was asked to come in because I was the second Manager of Kihei Sands. Kihei Sands took occupancy in 1973. At that time, Sugar Beach hadn't been built yet – Judges Beyond the Reef. None of the buildings were along that strip except for Maalaea Surf and I think Kihei Kai. When we took over as Managers, my wife and I, there were very few people in a rental program. Most of the units were occupied by live-in owners or people on a long term lease most of those working for Woolworth's. As the business grew, we started taking – they formed a rental program, and we just ran out of space. The Board asked me to come up with some way to do an office. I drew up plans, brought them in to the Planning Department. The Plan Checker at that time, and I'm sorry, I don't have his name, he said that the office was gonna be too small. At that time, it had to be at least 100 square feet or larger. And it was less than 80 square feet. He said his experience in the County of Maui, and he stated he had been here for 15 years in the Planning Department, was that no structure that he was aware of had ever been torn down because it didn't have a permit, if it met code. So we built it to code other than a building permit for size. And it went along for 34 years without any problems until someone filed a complaint, a formal complaint. That's my presentation. Any questions?

Chairman Endo: Any questions for Mr. Powell? Thank you. Okay, is there anyone else in the public who wishes to testify as to this agenda item? Seeing no one stepping forward, we will close public testimony on this item. And there's both analyses from the Planning, as well as from the Fire Department. Is that correct?

Ms. Kapua`ala: Yes, with a recommendation for approval is from the Planning Department only. No recommendation from the Fire Department.

Chairman Endo: The recommendation from Planning is as to the entire variance or only part of it?

Ms. Kapua`ala: For the Title 19 portion of the variance—the parking.

Chairman Endo: I see. Okay. Do you want to read it in the record or shall we just waive that?

Ms. Kapua`ala: If the applicant wouldn't mind waiving it, the reading of the Planning's recommendation into the record, then we can just—?

Chairman Endo: Is that okay with the applicant?

Mr. Steve Heller: That's fine.

Chairman Endo: His applicant said it's okay. For the record, just to summarize it, it recommends

approval of the variance insofar as the parking is concerned.

Ms. Kapua`ala: Yes. And whatever action the Board takes as far as the Department of Fire's – the Fire Code variance, if we could have the Board come up with justification and facts to help the Department draft the findings of fact and conclusions of law, decision and order.

Chairman Endo: Okay. Shall we have—? I see Lieutenant English is here. Perhaps he should provide his comments on the matter.

Mr. Scott English: Good afternoon, Board. My name's Lieutenant Scott English with the Fire Prevention Office. Basically on this project, the applicant applied for a building permit at the end of April of '010. Upon reviewing the plan, a letter was generated to the applicant, this was Mr. David Jenkins, on May 24th denying the permit for the following reasons: no fire truck access to be within 150 feet of all exterior walls of the buildings; no fire sprinklers for this existing three-story building; and I still needed additional information for the fireflow for the building.

We did have a meeting sometime after this letter was written. I rewrote another letter in September 20th to the applicant basically, requesting the same items, and one note that if the building was protected with fire sprinklers, the access for the 150-foot would be waived because the code allows that. As for the third item for the fireflow for the building, I received the fireflow calculations from Engineer Neil Nishida on Tuesday. I think they sent it to the Water Department, but never submitted it to the Fire Department. As far as the fireflow, the hydrant and water supply on the street has the required fireflow for this building, so that item is taken care of.

And once again, Item No. 1, the fire truck access, the Uniformed Fire Code, Appendix 1-A, requires that building undergoing renovation or alteration to comply with current codes. We said Chapter 9, which is water supply access; Chapter 10, the fire protection would be sprinklers, standpipe; and Chapter 12 would be exiting.

So like I said, the building – the plans submitted, the existing building do not comply with Fire Department access. That walls of the building exceeds the 150-foot requirement. Our code today requires any three-story apartment building to be provided with fire sprinklers. So in addition to this building, even though it's first story, which is part of a three-story building, requires this building to be brought up to fire sprinklers.

Mr. Tanaka: I have a question.

Chairman Endo: Okay.

Mr. Tanaka: Lieutenant, if you can grab a mic., and take a look at the site plan that the applicant is showing us? Just your interpretation or feeling of what was described, you see the three orange boxes representing an actual fire truck, and it's 150 feet, now does that comply with what – is what the applicant stated, do you agree with what you see?

Mr. English: The plan that was submitted to the Fire Department, like I said, this does not count as a fire lane because it's less than 20 feet wide. The fire lane is actually on the – I'm gonna say south end or in front of Building – Building 2? Building 1 is the one that has the addition. Building 2 is–

Okay, so this would be the actual fire lane because this is a 20-foot wide road. This entry here is less than 20 feet so it's substandard for the fire lane. Even though – if I did put a fire truck in this location, the measurement I got from here to back here was 192 feet, beyond the 150 feet. And the measurement I got from here back to this side was over 200 feet.

Mr. Tanaka: And actually making use of the next property's parking lot, is that something that you consider in your – yeah, I mean, logically, yeah, if it's closer there, so your truck will probably pull into there. But is that something that you consider as – when making your measurements.

Mr. English: We can allow that if they get an easement from the other property dedicated as a fire lane to – for this property. I'm not sure if – from where this proposed truck's gonna be, I need to get within 150 feet of a hydrant, be within 150 feet of a hydrant. So that measurement, I cannot determine right now, because right now, the hydrant is here. It's well within 150 feet, if our trucks are to get to here. This route to here is, I would say over 150 feet.

Mr. Tanaka: Okay, thank you.

Chairman: Okay. Thank you, Lieutenant English. Does the applicant want to provide further information on the fire issue?

Mr. Martin Luna: We've been asking for a specific provision that gives them this authority to make this requirement, but we haven't had that provision—a citation. And interestingly enough, we're aware of three projects in which additions were made, and none of the other units had to put in sprinklers, only that new or renovated addition. One was in the Mana Kai, the penthouse, and that's six stories, not just three stories. The other was Hui – Kihei Hui Aloha or something like that down south at Mana Kai. And only one unit that was renovated was – required to be sprinklered. So there's some exception to that. I don't think it's a hundred percent requirement.

And I think the best example for us is the County Building. You have the ninth floor having been renovated. The whole floor was renovated. The other floors were not required to put in sprinklers, only the ninth floor. So when you – when Lieutenant English comes up here and says this is required, maybe that's required, but we haven't seen that specific provision. That's why we're here. We're not – we understand that he's doing his job. We understand that their objective is for safety, and we're all for safety. Everybody's for safety. But if it's a requirement, then let us know what that provision is. But when we see these other exceptions, I mean, that's – we gotta know why those are accepted and why our – what is that? A bedroom and a half addition requires sprinklers for 30 – a sprinkler system for 30 old units – or built in 1972, which have not had a problem for what? Thirty-eight years? And we're providing a – we've shown that we've concerned about safety by making it available for – just by 20 feet that we're short of 150 feet. And as far as the volume of water that's available, that makes up more that compensates, I think, for the 20 feet. We cannot get a mechanical engineer to come and testify on our behalf because they deal a lot with the Fire Department. So what we've been provided is information from the – some of the people that we know. And the information we have is that the – having the volume of water more than double that's required should compensate for that short 20 feet. Thank you.

Chairman Endo: Thank you, Mr. Luna. Any questions for him on that regard? Okay. Mr. English, do you want to add anything on the issues?

Mr. English: Just a few comments on what was just brought up. As far as the County Building, yes, the ninth floor was finally sprinklered. We have – unfortunately, the County had to get a budget to sprinkler the rest. We are in process of doing it in two phases as far as getting the rest of the building sprinklered. Other facilities or condominium units that did additions or lost – have provided sprinklers in the individual units in the Kapalua area. That's the individual units to meet this requirement. If we're gonna allow this, this individual unit to be sprinklered, then we need to separate it further more from the rest of the units. Like I said, the Fire Code requires three stories or more in height to be sprinklered. This building has – it's considered a three-story building. The other building that was sprinklered was only because of – the other one that was provided sprinklers, the sprinkler, because of lack of access, not because of the three stories. And they sprinklered the individual units in one condo unit out of six less than one roof. One of the units was sprinklered in a couple different permit applications.

Mr. Castro: Lieutenant English, I have a question. If the hydrant is double that capacity for the water, since the hydrant exceeds it, the water pressure coming through there, wouldn't additional hoses solve that problem?

Mr. English: Basically what happens is this 150-foot fire excess fire requirement is based on how the truck is loaded. So basically, our quick attack line for structure fires is only 150 feet long. The hoses come in 50 or 100-foot length. So we're going to 200 feet, the amount of water we need to get another 50 feet on a pipe friction loss, so the hose is an inch and three-quarter hose. So the longer the hose, the more friction loss we get, the less water we get at the end. But basically, the 150-foot rule is designed to how the . . . (inaudible) . . . standards for – fire trucks are loaded. Yes, the water supply in this area is ample. Like I said, double the amount that's needed for this building. Our truck's capable of only pumping 1,500 gallons a minute. A second truck will need to be coming in to provide the excess water.

Mr. Castro: Is that the only hydrant that's in the area?

Mr. English: I looked at the water map last week. There's other hydrants there, but as far as the exact location, I cannot give you that. But all the hydrants on that North Kihei Street is off the 12-inch water main.

Chairman Endo: Any further questions? Thanks, Lieutenant. Any other questions for any of the applicants or its consultants? I have one question, I guess. So is the applicant proposing to put a sprinkler in the addition or not at all?

Mr. Jenkins: That was not required by the plan review process thus far, but the applicant is not opposed to doing that.

Mr. Tanaka: Lieutenant, one more question. Sorry. You know – well, in a perfect world, every building built, whether – whenever it was built would meet your '97 Fire Code, but it's not a perfect world. So in cases like this, I mean, you see the dilemma of the applicant where all they're doing is something in a 100 square feet, something very tiny. But to say that okay, well, you have to add into and retrofit into 30 units, I mean, that's a tremendous undertaking, tremendous cost. If the addition were sprinklered, does that – what is the word I'm looking for? Does that satisfy you? I guess satisfied would be 30 units sprinklered, but how much of a difference does that make, I

mean, in your mind in how you're looking at this?

Mr. English: Yeah, if that building is sprinklered, I mean, it would be better off, but just for that unit. It may give the rest of the building owners a false hope that one building is sprinklered. The way the code reads, Appendix 1-A, is – a building undergoing renovation, alteration, or change of use shall comply. And like I said, the other units that we allowed just to sprinkler the units were buildings that did not meet the access only. It was two-story condo units. It did not meet the access only, and they sprinklered their units. And it was only six under units under one roof. Like I said, when the building was built in the '70s, it was built to the proper code. Codes change throughout the year, and we've been adopting Appendix 1-A since the last two Fire Codes. And basically, to retrofit the buildings, anything over 75 feet is sprinklered now for hotel and condominium units. They got smoke detectors in units that didn't comply from the '70s. And we've hitting buildings that do not have proper exiting, and that's a retrofit section of the code. For this building, I – if you guys can do a partial variance for the code where the code – I'm stuck with saying the building undergoing a renovation shall comply with Article 9, 10, and 12, not just – that building, that's – I can only enforce what the code says. If this Body wants to tweak the code a little to this, allow that, then it's up to you folks.

Mr. Tanaka: But, I mean, you see our difficulty in that something where it's worded that any renovation – well, if a 150 square foot and little addition versus renovating the entire building or an entire wing, you know, that's a really big difference.

Mr. English: Yeah, on other cases, other buildings that undergoing renovation, if they stay within their walls, I do not enforce today's code, the new code. Once they go outside the walls, whether they close a lanai, add a loft, add more square footage to the building, I enforce. There's a lot of older condos that's being rebuilt. And if they're footprint is 2,000 square feet and they come out with 2,000 square feet, change kitchen and do everything, upgrade everything, I don't enforce the new code. But that's just upgrading, maintenance, of the building. For something like this, yes, 177 feet is a small addition, but what if the next person says 500 square feet?

Mr. Tanaka: Yeah, where do you draw the line? Yeah.

Mr. English: Where do you draw the line? Yeah.

Mr. Tanaka: Yeah, I mean, because that's my – personally, my dilemma. We've seen it before and we'll see it again come up before this Board where in our minds, we say, well, it's just a tiny, little addition, but then again, too, I'm not a firefighter.

Mr. Ray Shimabuku: I guess I have a comment. I guess in this particular addition, they not really tying into another unit. They just adding to the front side of the building to create that office space. Am I correct?

Mr. English: The office space is tied into Apartment 15-A. So 15-A now has a bedroom, and then the office extension, and I think a small storage that is accessible from the outside, outside of the unit. So the unit is getting larger.

Mr. Shimabuku: So the unit is getting larger, but your comment was that if it was all inside of one

unit, then you would have no problem.

Mr. English: If they didn't add, stay within the footprint of their walls, I wouldn't have a problem. So if they renovated Unit 15-A, new bathroom, new shower, make it to a one-bedroom instead of two bedrooms, and it stayed within the walls, I wouldn't have a problem with that. It's when they go outside the walls. So that new area needs to comply with today's code not the '72 code, and that new area is attached to the rest of the building.

Unidentified Speaker: . . . (inaudible) . . .

Chairman Endo: You wouldn't have a problem if you took Unit A-15 and just changed that actual unit into an office, if you didn't actually expand the building. That's what you were saying, right?

Mr. English: Correct.

Chairman Endo: So if you converted a bedroom to an office, that would be okay, probably.

Mr. Jenkins: . . . (inaudible) . . .

Chairman Endo: If you're gonna speak, please come up to the mic., because we're recording.

Mr. Jenkins: Sorry. Just speaking on behalf of the applicant, the reason they can't do that is that's a one bedroom unit already. And so they can't really – if you use the bedroom as the office, then the Manager and his wife have to sleep on the couch together. But also again, for the record, I spoke with the applicant, and they're not having a problem with sprinklering or sprinkling the addition.

Mr. Shimabuku: I guess I have one other question for Lieutenant. There seems to be a discrepancy on the footage with the picture that they provided, the applicant provided, and your description on the back of the building. I know in this site plan, they talk about being 20 feet short, but on your calculations, you're talking into the 200 feet range. How important is that differences in measurements from the site plan and your conclusion?

Mr. English: I mean, once the building exceeds 150 feet, it's another length of hose—50 feet or – most times it's just a 50-foot hose. On the – when I measured down the middle, I got 207 feet to the back. So that would be actually two lengths of hose which the friction loss is great. We're not gonna get the required water flow out of that nozzle by having a hundred feet more friction loss. Like I said, he has the same site plan scaled to 1/16ths which was submitted for the permit. And, I mean, I have my plans marked up similar to his, and my measurements are a little different. He said it's 20 feet short. Basically, I put the fire truck in that area. I go from fire truck back to fire truck. And if it's over 300 feet, we're beyond the 150 feet. And I think that measurement came up to almost close to 400 feet.

Mr. Jenkins: Just for the record, the applicant had lost their existing plans in the meantime from 1972 until now, and we needed the existing floor plans for the permit submittals. So I went out and measured the entire site. And the buildings are only about 150 feet long. So if you're parked at the front of the building, 150 feet is gonna get you to the back of the building.

Mr. Shimabuku: Okay, so you're saying that your plan that you have and the plan that he has is the same?

Mr. Jenkins: Yeah, they should be exactly the – they're exactly the same plan, just oriented differently for presentation for the hearing. And it should be the same scale.

Mr. Shimabuku: That was one of my concerns– the safety of the people in the back where you have that 20-foot shortage for the 150 feet mark, as claimed by the applicant. As far as sprinkling the whole building, that would be a hardship thing, but having to require them to put sprinklers in the new addition place might not be a bad idea at all, which the applicant is willing to do–what he had mentioned. So, yeah, it is a tough one for me as far as trying to decide what to do. I wanna make sure safety is a big issue. That's one of my main concerns in this situation.

Mr. Castro: Lieutenant, one more question. There's a swimming pool up in the front. Could that be utilized? There's an existing pool up in the front.

Mr. English: No, because our trucks – if we had to . . . (inaudible) . . . out of that swimming pool, our suction hose is only 20 feet long. So basically, our trucks need to drive right up to that swimming pool and utilize the water. And as far as like the 150-foot requirement, like I say, God forbid there's no fire there, but if there's a fire there, what would happen is our guys would extend that hose as much as can, charge the line, and if it doesn't reach, shut down, extend, recharge. We're losing time. And like I said, if a fire starts, the longer we take, the more extensive that fire gets.

Chairman Endo: If there's a discrepancy as far as the scaling of the distances on the map, we can take a short break, and have Members go and look at the plan up close, if you like.

Mr. Jenkins: I can state also, for the record, I was there at the site dragging a 300-foot tape measure around pretending I was a fireman, and parking the truck here, and running the tape around. So these are all – these represent measurements where, you know, I started the tape in the parking lot, and I ran down the side of the building, and I got just around the edge of the building. So that's how it's represented on the plans. So those are actual field measurements. If there is any discrepancy on the plans, that's another story, but these represent real, actual, field measurements as of yesterday.

Mr. Tanaka: Well, in my mind, I mean, just for discussing this thing about the actual distance, the difference between a 170-foot that one person measured and then 195 feet that another person measures doesn't make a difference. It's one more length of hose. So whether it be five feet off or 35 feet, it's still one more length of hose as far as the Fire Department is concerned.

Chairman Endo: Okay, does any Member wanna make a motion? You folks need a break? Okay, we'll take a five-minute recess. We'll come back in five minutes.

(A recess was then taken at 2:55 p.m., and the meeting reconvened at 3:03 p.m.)

Chairman Endo: Okay, this meeting is back in session. Because we might not make a decision today, I'm gonna ask the Planning Department to remind us of our timelines and what would happen if we don't get a vote either way today. We would have, I believe, by rule, a certain

limitation of time within which we can act otherwise, the variance would be automatically approved. Is that correct?

Ms. Kapua`ala: Well, I think if we close the public hearing, the time limit would start. Is that correct, James? 12-801-16.

Mr. James Giroux: I was hoping you were gonna nail this one, Trish.

Ms. Kapua`ala: 12-801-22(d), "The Board shall render a decision on a variance within 60 days of a close of public hearing otherwise, the variance shall be deemed granted." Should we close the public hearing today, and I don't think it has been closed yet, the Board would have to make a decision by Monday, April 25th. So that would be the April 14th hearing date, which we're scheduled to—

Chairman Endo: Well, we did close public testimony as to this agenda item, so I think our 60 days starts already. Of course, we are close, we could always ask the applicant to waive their rights on that one, if we needed another hearing date. So that was just for background. So we'll go back now and try and see if we can resolve this matter one way or the other. Mr. Luna, you wanted to say something?

Mr. Luna: Yeah, I guess in trying to work something out, I know the dilemma that you have. The examples I gave at the end of my talk earlier were about the units that had been renovated and only those units were being required to be sprinkled. And I know – that's why I wanted to find out for sure what Lieutenant English had said and what you stated that if it didn't increase the area, then that would be okay just to allow the sprinkler within that one unit that's being renovated, which I guess what has happened before, right? But in this case, we do need to expand the – to have an office. And it's not a large expansion, so what we're proposing is not just sprinkling the area of the office, but the entire unit to which it is – will be next to. And then at least that somewhat follows their precedent of restoration, and allowing that unit to be sprinkled, and not the rest of the other units. But I know Mr. Tanaka's worried about where do you draw the line. Maybe you can draw the line with the number of square feet on this project. Thank you.

Chairman Endo: Well, I think another solution would be if you made it only 120 feet and call it a shed, then you wouldn't need a building permit.

Mr. Tanaka: I have a question. I have a question for the applicant. Have you looked into the possibility – you know, in your main waterline servicing the 30 units, how large that line is?

Mr. Jenkins: The line on the highway?

Mr. Tanaka: After the meter, yeah.

Mr. Jenkins: After the meter, I believe – I don't know, actually. I think it's a one and a half-inch meter.

Mr. Tanaka: So that could service a fairly sizable line itself. Now, my question would be with that information, and to Lieutenant English, would that be able – would they be able to put in a couple

of stand pipes in a couple of locations that would supplement the fact that – that 150-foot distance?

Mr. English: As far as if they put like a stand pipe or wet hose cabinets, that would be like a Class 2 Stand Pipe, that would require to flow a minimum of a hundred gallons a minute. Inch and a half, if they put – lay all the way to the back, that would be cutting it pretty close, yeah. If you're looking to put in maybe a dry stand pipe that we can pump water to the back, which we did – previous Administrations allowed, we can do something. You guys may allow something like that as far as – a fixed instead of sprinkling. It's up to this – your Board. But basically, put a . . . (inaudible) . . . in the front, run a four-inch to the back, put a hose hookup to the back, tie into the hydrant, we pump water from the front to the back, and then we have a fire truck pretty much parked in the back serving water. And we reduce the friction loss because we have a big line underground in the back.

Mr. Tanaka: Yeah, and then the cost, I would imagine that that would be a–

Mr. Shimabuku: So that would take care of the access for the firemen in the back to take care of the fire in the back.

Mr. Tanaka: You just carry the hose in the back there.

Mr. Shimabuku: But the next question would be, would that be feasible for the applicant as far as doing all that work.

Mr. Tanaka: Well, I'm thinking out loud here. In comparison to renovating 30 units and sprinkling 30 units versus one trench right up the middle of the property to the back side.

Mr. English: Like right now, for this building, the addition is not existing, so it doesn't have a permit. It's not like other applicants that did after-the-fact, and now we're stuck with trying to figure out something. This permit was not issued yet, so I don't think so the building is built. On other units that we allowed to sprinkler individual units, each unit had its own source that we could tap into the sprinkler, the individual unit. On this complex, it sounds like we have one meter serving all the units. So if you were to sprinkler just that, there's too big of a demand. The sprinklers might not work if everybody using water. They probably have to bring a separate supply if you sprinkle the whole building or just the individual, whichever you guys determine to do.

Chairman Endo: So, Lieutenant English, just to recap what you just said, if they ran a new – it would have to be a brand-new line to go on the whole length of the property to create a dry stand pipe on the makai end of the property? Is that what you were saying?

Mr. English: Correct. Current code, if this building was four stories, it would have a dry stand pipe system. And that buys us the distance. Basically, all we do is we carry a hundred-foot bundle right to the stairs. We pump water. We pressurize the whole stairwell and we get our water through the stairs. The system is there in place. Three story buildings do not require it. It's four stories that it kicks in.

Mr. Castro: Quick question. The property over here, does this have a sprinkler system?

Mr. English: I do not think so.

Mr. Castro: Are there any wet stand pipes on the outside?

Mr. English: I think if it's more than four stories, there's at least dry stand pipes. Some of the older units do have the hose cabinets within the units – I mean, within the hallways, yes.

Mr. Castro: Thank you.

Chairman Endo: Does the applicant want to comment on any of this?

Mr. Jenkins: I think our counsel actually proposed what our applicant is thinking at the moment.

Chairman Endo: Just to put a sprinkler in the entire Manager's unit?

Mr. Jenkins: Right, and the addition.

Chairman Endo: I think Lieutenant English said even if you just did that, you might need a separate line for that sprinkler.

Mr. Jenkins: For that one unit, I think we probably could get it off of the domestic line. Another option is to put a storage tank. For just one unit, you could do a – like these are – that's a common for a residential tank. I think Lieutenant English is aware of that that you can do it with a storage tank, not a charged source, but you can have a storage tank and a pump that is used quite often in small residential situations. But for that one unit, if the existing water meter and the supply line coming from the meter is sufficient, we might be able to do that one unit just right off of the supply line. The other – see, if they do all the units, you'd have to go clear across the highway, go to the 12-inch main that's on the other side of the highway, bring it across the highway, and then through the whole parking lot. That's a big part of the expense.

The applicant was just mentioning another option they'd be willing to do is remove that connection door between the addition and the existing Manager's unit. And then it's just a self-contained – like I was calling it before, a little cocoon. Well, the cocoon wouldn't even have a door connecting it to the unit. And then we could just sprinkle just that outside unit.

Another thing to mention, too, that door is – that's the most serious fire door. I mean, I saw the contractor's budget. It's a several thousand-dollar door with sort of the souped up Cadillac version of your garage door that has a self close around it, and it's a one-hour door. This is the super duper one with the steel frame, and steel door, and full-proof self-closer unit.

Chairman Endo: You're talking about the door between the bedroom and the work area?

Mr. Jenkins: Right, connecting the existing Manager's unit to the Manager's office.

Chairman Endo: Okay, I think we have a pretty good understanding of the issues. Does any Member wish to make a motion? If we get no motion, then we would have to automatically defer the matter to another meeting date. I guess I have a question while we're thinking about it. Lieutenant English, the applicant said that they could not find the statutory requirement for having to put the sprinkler in. And I think you keep referring to some appendix or something. Is that –

what is your understanding as to the source of the legal requirement for the sprinkling of the building?

Mr. English: Okay, yeah, so Appendix 1-A requires a building undergoing renovation, alteration, to comply with certain sections of this code. It would be Article 10. Article 10 covers water supply and access. Article 10 – I'm sorry, that was Article 9 covers water supply and access. Article 10 covers fire protection. It would be sprinklers, stand pipe systems, fire alarms. And Article 12 was exiting.

Under Section 10, 1003.2.9, it reads, "Group R Division, an automatic sprinkler system shall be installed throughout every apartment house three stories or more in height, or containing 16 units." That's for the sprinklers, the three stories requirement for the sprinklers are. So after the adoption of the ADA Code in 1996, any three-story apartment buildings were sprinklered. And 1980 was the first code that requires that.

Mr. Luna: What was the citation? 10--?

Mr. English: 1003.2.9.

Chairman Endo: So that's their requirement for the modern Fire Code present day as far as three stories requiring sprinklers?

Mr. English: Correct.

Chairman Endo: What about the--? I think they were asking about the trigger from the renovation or the -- sorry, the addition, whether the addition triggers the compliance for the entire building.

Mr. English: Yeah, that would come under the section that they wanna have a variance, 16.40.36(b), I think it is. And that accounts for adopted 1-A of the Fire Code, which is the life safety requirements for existing buildings other than high rise. And Section 1.1 of that section is, "The purpose of Appendix 1.1 is to provide a reasonable safe . . . (inaudible) . . . degree of safety to persons occupying existing buildings by providing for alterations to such existing buildings which do not comply with the minimum requirements of the Building Code." And then out of the Fire Protection Handbook, it -- application, manner, or define Section 1.1, which address . . . (inaudible) . . . "For jurisdiction that adopting Appendix 1-A, the Uniformed Fire Code is the intent of Section 1.1 that these provisions be used and minimum fire safety requirements for existing buildings where the applicant requires of the Uniformed Building Code, Articles 9, 10, and 12 of the Uniformed Fire Code be enforced to new buildings or those undergoing renovation or a change in use of occupancy."

Chairman Endo: Thank you. Okay, Members, anyone wants to make a motion to grant or deny the variance request? No? Okay, then, in that case, we will have to defer the matter to a next meeting.

Mr. Luna: May we request a deferral to the next meeting? And if we can have the citations that Lieutenant English provided to you folks, then we can take a look at that and see what our status is.

Chairman Endo: Okay. So you can either wait for the minutes or maybe right after the meeting, you

could just make some notes.

Mr. Luna: Yeah, I had a hard time following that. So if it's specifically provided to us, then we can check that out.

Chairman Endo: Lieutenant, is that okay? Can you give him the citations? Thanks. Okay, so, Trish, what date should we go to?

Ms. Kapua`ala: How about--? The next meeting is on Lanai, so the next meeting after that, which is March 24th is quite full. You have two variance requests, the Makila Appeal D&O, as well as a request for an amendment for a condition of a previously approved variance. If the Board wishes, we can put it to that agenda? Add it to that agenda? Or on April 14th, where we lose Randy and Bill, we have one variance scheduled as well as the orientation for new Members. So we'll be having two new Members join us.

Chairman Endo: Well, if we're going to -- and the deadline was late April? Or was it--? Or early April?

Ms. Kapua`ala: April 14th, in order to comply with the -- unless you do a special meeting.

Mr. Tanaka: But Randall's not gonna be here in April, so we gotta put it in March. Let's do everything in March.

Chairman Endo: Is the deadline the deadline for the D&O to be written and signed, or is it the deadline for the Board to just take action?

Mr. Giroux: I believe the language is "render a decision."

Chairman Endo: Okay. So if we defer this matter to the first April meeting, we will be within our 60-day deadline?

Ms. Kapua`ala: Yes.

Chairman Endo: Okay. Is the first meeting in April objectionable to the Fire Department or the applicant? We're thinking of deferring it to the first meeting in April, which is April 14th.

Ms. Kapua`ala: And again, Mr. Luna, you'll lose the Chair. We'll have two new Members at that time.

Mr. Luna: . . . (inaudible) . . .

Chairman Endo: The March date is very full, though, so if we went with the March date--?

Ms. Kapua`ala: You would potentially, be pushed to April anyways.

Chairman Endo: Unless you wanna try for the April date and then see, because sometimes some of the matters resolve themselves.

Mr. Luna: . . . (inaudible) . . . try for the March date.

Ms. Kapua`ala: Try for the March date?

Mr. Luna: Yeah.

Ms. Kapua`ala: Again, we have two variances and two requests for review and possible deliberation for two – a previous appeal and a previous variance.

Chairman Endo: Okay, so we'll try for the March – what was the date again?

Ms. Kapua`ala: March 24th.

Chairman Endo: March 24th date, but we'll allow the applicant to contact the Planning Department and see how the agenda's adjusting by that time as it gets closer. And then if you wanna move yourself back to April, then you can just do that. Is that okay?

Mr. Luna: Yes.

Ms. Kapua`ala: Unless you fly to Lanai.

Chairman Endo: Oh, yeah, you can just fly to Lanai. We have a short agenda on Lanai.

Mr. Luna: In April 14th, you mean?

Ms. Kapua`ala: On March 10th, we'll be on Lanai, and we can take up your item.

Mr. Luna: You wanna go Lanai? We can go, Scott.

Chairman Endo: Okay, so we'll do that. We'll do the March date as first choice, and then with the option to go to April. Alright.

Mr. Tanaka: But just one suggestion to the applicant, to investigate those options that I had brought up. I mean, that's – we all realize that a sprinkler system in existing building is a huge cost, whereas bringing in a transmission line from something existing may be a very reasonable cost. I'm sure Lieutenant English will assist you in that.

Mr. Jenkins: Just to clarify, you're talking about the dry stand pipe?

Mr. Tanaka: Yeah, whatever options, whether it be a charged line or a dry line.

Mr. Jenkins: Right. We've been discussing that with the Captain, but I'm not sure if that's satisfactory to the Fire Department.

Mr. English: See, right now, the – I think like Member Shimabuku said, the dry stand pipe will take care of the access issue. We allowed that before, but we have the problem with the three-story sprinkler requirement.

Mr. Tanaka: But, even in your mind, that would be a tremendous—

Mr. English: Yeah, that would help tremendously, if there's a fire in the area.

Mr. Tanaka: As well as in my mind, anyway. So that's why I'm bringing that up to investigate that anyway.

Chairman Endo: So in other words, I guess Member Tanaka and some other people might be willing to grant a variance for no sprinkler if there was an additional stand pipe at the makai end of the property. I guess that's what he's saying.

Mr. Jenkins: So my applicant asked me is anyone willing to make that motion today.

Mr. Tanaka: I guess we could. No, but – no, I don't think—

Chairman Endo: Okay, well, if the applicant is interested in having that as their condition, then we can talk about it. Well, let's ask the Members just informally how does that sound. We'll just take a quick poll. Okay, we've an informal poll, and it looks like you would get a favorable voting if you want that as a condition, then you don't have to come back again.

Unidentified Speaker: I'm sorry?

Chairman Endo: We took an informal poll, and most likely your variance will be granted if you are amendable to that condition to add a stand pipe.

Unidentified Speaker: I believe that we are ready to accept that condition.

Chairman Endo: Okay. In that case, the Chair would request that somebody make a motion to grant the variance with the condition that the applicant add a stand pipe on the makai end of the property.

Mr. Tanaka: So, I would move—

Mr. Luna: I was just going ask if instead of saying the "makai end," maybe "makai portions" so that there's some leeway. "End" might be all the way to the high water mark so—

Chairman Endo: Oh, okay. So the makai half of the property?

Mr. Luna: Yeah, that would be great.

Mr. Shimabuku: Mr. Chair, can we get a comment from Lieutenant English on that clarification for the makai?

Chairman Endo: Okay. Lieutenant English, if they put the stand pipe right in the middle of the building, would that be a big difference in terms of improving fire protection?

Mr. English: Basically, we would probably require it in the area that is a little away from the building.

In case the building's on fire, we want that area to be clear to set up our fire hose. So preferably run it – a fire pass is the makai side of the building that the code allows.

Mr. Tanaka: Yeah, in the pool deck area.

Mr. English: Yeah, because basically, it's probably all cement. There's nothing that's gonna be burning around there, and it's a safer area.

Mr. Tanaka: Yeah, that's one – I mean, that's what I was kinda thinking anyway so that you could actually, somewhere in that pool deck, hook up your hose pipe, and go actually back around the other sides of the building. So that 150 feet would be overlapping.

Mr. English: I mean, if you guys do adopt that portion of the variance, put the language in that dry stand pipe should be installed to the application approved by the Fire Department. And then we can work with the applicant as far as the exact location we need it to be done.

Chairman Endo: Mr. Jenkins, does that sound good to you?

Mr. Jenkins: Yes, that sounds good.

Chairman Endo: Okay. Do you wanna make that motion?

Mr. Tanaka: Okay. Let me try this again, then. So I would move to approve the variance. Is it two separate?

Chairman Endo: No, one variance.

Mr. Tanaka: One variance for both the parking lot stall requirement, as well as the deletion to install a fire sprinkler system with the condition that the applicant, working with the Fire Department, will meet the Fire Department's requirement as far as the location of the newly installed dry stand pipe.

Chairman Endo: Alright. Is there a second?

Mr. Shimabuku: I second it.

Chairman Endo: Okay, it's been moved and seconded to grant the variance. Yes, Trisha?

Ms. Kapua`ala: Would the Board like to add a hold harmless agreement and insurance requirement?

Mr. Tanaka: With the typical hold harmless agreement to protect the County. I'll leave it at that.

Chairman Endo: Okay. Is there a second to that?

Mr. Shimabuku: Second.

Chairman Endo: Okay. So by friendly amendment, the motion is amended to include the standard

provisions in our rules requiring the hold harmless and indemnity provisions, but there was no addition of an insurance requirement. Okay. And just to clarify again, the main condition is that the applicant would add a stand pipe in the makai section of the property somewhere after consulting and in accordance with the needs of the Fire Department. Discussion? Okay, all those in favor of the motion, please say aye. Okay, the Chair votes aye.

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

VOTED: To grant the variance to include the standard provisions requiring the hold harmless and indemnity provisions without the addition of an insurance requirement, and with the main condition that the applicant would add a stand pipe in the makai section of the property somewhere after consulting and in accordance with the needs of the Fire Department.

(Assenting: K. Tanaka, R. Shimabuku, R. Phillips, S. Castro, R. Endo.)

(Excused: W. Kamai, B. Santiago, R. Tanner, B. Vadla)

Chairman Endo: **The motion passes and the variance is granted as stated earlier.** Thank you.

Mr. Luna: Thank you very much.

Chairman Endo: Moving on. We're running out of time. Moving to Item C-1.

C. APPEALS

1. **BARBARA A. CIPRO appealing the Department of Public Works' decision to request the payment of \$5,978.33 for the County's removal of obstructions from a sidewalk/shoulder area whereas every property owner whose land abuts or adjoins a County street shall continually maintain and keep clean in a reasonable safe and passable condition the sidewalk or shoulder areas which abut or adjoin the owner's property, for 2597 Lioholo Place, Kihei, Maui, Hawaii; TMK: (2) 3-9-013:009 (BVAA 2010006)**

- a. **Determine a Hearing Officer**
- b. **Director, Department of Public Works, County of Maui's Motion to Dismiss Appeal; Exhibits A & B; Certificate of Service**

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

Ms. Mary Blaine Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, appearing on behalf of the Director of the Department of Public Works. I have had no response from Ms. Cipro to the motion to dismiss. It's before the Board this afternoon. But I would like to provide a copy of the code section because I think it will help clarify my motion.

Chairman Endo: Okay, for the record, is Barbara Cipro in the room? Let the record reflect that no one has stepped forward. Mr. Geiger, is this the item you wanted to provide public testimony on?

Mr. Geiger: No . . . (inaudible) . . . take me out of order.

Chairman Endo: So now you want to—?

Mr. Geiger: Well, before you started this item, I was hoping to take me—

Ms. Johnston: I think it'll be very brief. There's a three-page motion.

Chairman Endo: You sure?

Ms. Johnston: Okay.

Chairman Endo: Oh, okay.

Ms. Johnston: He can wait. It was on the agenda originally for the appointment of a hearings officer – a hearings officer or appropriate. We've asked for the Board to hear it directly to save the cost, but the motion is a motion to dismiss this appeal because there's no jurisdiction in the Board. And I cited to Chapter 12.02 of the Maui County Code. I thought I had attached the copies as an exhibit. This section of the code doesn't provide for an appeal to the Board. At the very bottom, Section 12.02.060 says that violations shall be subject to the section of 19.530.030, which is the enforcement provision. It does provide for an appeal, but in this case, there were no penalties or fines assessed. There's simply a request to recover the amount of the clearance of the property. 12.02.030 provides for the cost share shall be charged to and against such property owner, and shall be collected from the property owner. There is a right of appeal – I mean, there's a right to enforce in the district court, which is no doubt what we'll have to do to try to collect the amounts it cost the County to remove the hedge.

I have attached to the motion, correspondence with Ms. Cipro starting in March of 2005. So the code section provides 20 days' notice they can go in. They provided five years' notice and nothing was done. I'll just point out also that in one of her letters, my Post-it came off, Ms. Cipro claimed— Page 8 of Exhibit A is a letter dated October 9, 2006 to the then Director of Public Works, Milton Arakawa, saying it'll cost her more than \$5,000 to clear it. And the bill to her for the clearance did – is a little bit over \$5,000. It's just under \$6,000. So I'm asking the Board to dismiss the appeal on the basis that you don't have any jurisdiction to hear an appeal on this matter. That whatever comes out will be decided by the district court. If you have any questions, I'd be happy to answer them.

Mr. Giroux: Looking at the face of Chapter 12.02 regarding cleaning and maintaining sidewalks, the manner of interpretation of looking at these separate ways of enforcement, one being the County going and doing the work and cleaning, and then requiring payment for said work, and then having an action in district court, comparing that to Section 12.02.060, whereas the procedure for somebody getting a fine for not cleaning their portions of the public areas would be under your jurisdiction. Under the law of construction that if – there's two distinct separate ways of clarifying the appellate procedure. You have to go by the face of the document or the law, which would be

first of all, in order to appeal, the fine amount – or not fine amount, but the cost of cleaning the property would be in district court. Then the district court would have a primary jurisdiction over that decision-making process, whereas if this was done by the violation and fine procedures, then the jurisdiction would be clearly within the Board of Variances and Appeals. So I think the County is correct in this assessment that the Board of Variances and Appeals doesn't have appellate jurisdiction over the demand for monies for cleaning the public area in accordance to 12.02.

And if you see – if you look at 12.02.030, it states clearly that the owner shall be – it says, "And the cost thereof shall be charged to and against such property owner and shall be collected from such property owner, if not immediately paid, by action in the district court." So the idea of immediacy is a preeminent in that paragraph in that there's no intermediary appeal process anticipated within the County code. So after all that coughing, I would have to concur with the Corporation Counsel and her analysis of the procedures in this case.

Mr. Tanaka: So this should not be before us? What she received was a bill, not a fine?

Ms. Johnston: Correct.

Mr. Shimabuku: All what we're looking for is this to be dismissed from the BVA back to, I guess, district court?

Mr. Giroux: Yeah, there would be an action filed under district court for the collection of those fees.

Ms. Kapua`ala: Excuse me, Mr. Chair, James, in the interest of the applicant, would it be procedurally okay to maybe defer? Because what's gonna happen is she's gonna lose \$550 in filing fees. We cannot return it to her unless the appeal is granted. That's by code. So if she is indeed gonna receive a notice of violation in the near future, then we can take it up at that time?

Ms. Johnston: I don't think that there's any intention to serve her with a notice of violation.

Ms. Kapua`ala: It would be just going to district court?

Ms. Johnston: Yeah.

Ms. Kapua`ala: I see.

Ms. Johnston: Probably what I'll do is if the court grants the motion, I'll send her a copy with a final demand letter giving her a chance to come in and pay it before we go to district court.

Mr. Tanaka: But you're saying that she paid a \$550 fee to be here today, but because of what you had explained, that's why she's not here today?

Ms. Kapua`ala: Yes, 19.530 specifically states that it's a non-refundable filing fee unless an appeal is granted. So I guess the Department will – we never had this happen before where it would impact someone so negatively. I think we'll probably have a discussion about it.

Chairman Endo: I guess the Chair would like to make two – ask two questions. The first one is that

as I read this section of the County code that was cited by Ms. Johnston, it seems to me that it's saying that if the property owner doesn't pay, then it's the – the County then collects it by action in the district court. So it doesn't say anything about if there's any appeal as to the legality of the action of the County that Ms. Cipro cannot file an appeal with the BVA. So that's my first question to Mr. Giroux.

And the second question would be whether or not we need to defer the matter because she – apparently, according to Trish, she thought she already lost, so that's why she didn't show up. So in a way, she's not here. I mean, it's still her responsibility to show up, but as a matter of being a little bit helpful to a pro se appellant, we can defer the matter and hear it with her present, and maybe she could give more – tell her side of the story. That's my two comments.

Mr. Giroux, do you have any comment on my reading of that section? I guess you're saying because the County has to go to district court, everybody has to go to district court. So you're reading into that one statement in the code?

Ms. Johnston: Well, it's just a collection of a debt. She's been given a bill just as if the County gave her a bill for something else. Property tax, if you don't pay it – I guess you have an appeal process there, but she'll have in district court, the ability to challenge the validity of what was done, and the amount of what was done. And then she's made some claims. There was some damage to property. She can bring those all up in district court. It just saves – you know, it's a very practical way to approach it. It saves having to go through this, the BVA process, and then there's an appeal to go to court. And probably, if you want to defer the motion to dismiss, that's fine, but I'll probably go ahead and file the action in court. There's nothing to keep – there's nothing that stays – we're not required to get a decision from this Body before we go to court. So that's why I think that adds to the argument that there's no jurisdiction.

Mr. Giroux: Yeah, normally, in administrative law, what the courts wants to happen is that you would exhaust all your administrative rights before you get into circuit court. But the problem is that within 12.02, basically the County's gonna get to the circuit court before you hear the appeal. So she's gonna – if the circuit court rules that she has to pay the fine–

Chairman Endo: District.

Mr. Giroux: District court says she has to pay a fine, and then you guys hear an appeal later, it's gonna be – it's not gonna make any sense. You're – she's basically gonna be paying the \$500 to come over here, being told by the court to pay the \$1,500, and then you're gonna be telling her that she didn't have to pay the \$1,500. And then she's gonna go to circuit court and say you guys said that she didn't have to pay it, but they already made an order. So now the court's gonna have to – I mean, that's not how administrative law is supposed to work. You're supposed to look at the most efficient procedures that are no gonna be onerous upon the public or the County. And then the County code, this immediate action in district court is the swiftest way to deal this discrepancy of are they gonna pay or are they not gonna pay. If there wasn't this truncated action, if it was just as you see it in the violation, the violation – it would make sense. They'd come here first. We'd say, is it reasonable or if it's not reasonable. And then if they lose, then they go to the – yeah, the circuit court would be the jurisdiction.

So on its face, we have to look at it, what – you know, how is this gonna play out logically, when somebody has to – you know, has a debate about what a cost is or what a fine should be. So the district court would be the appropriate place for her to show that it was unreasonable, it wasn't my property, it wasn't my responsibility, it wasn't my – you know, she would have her whole due process preserved. It just wouldn't be in an administrative fashion.

Chairman Endo: I guess another way of looking at it is to say that there's no decision that she's appealing in here. There's no written decision cited. I guess the decision to issue the–

Mr. Giroux: Well, the decision to send . . . (inaudible) . . . to clear the yard, I mean, that's a decision.

Ms. Johnston: Her notice of appeal says that she's appealing the County would like me to pay for removal of the hedge, so she's challenging the bill and for a variety of reasons that she enumerates in there.

Mr. Giroux: And the statute clearly says that the district court is the venue to declare that.

Mr. Tanaka: So it would be – wouldn't even be doing her a favor by deferring.

Ms. Johnston: Well, I suppose in response to Trisha's question, if the \$550 was for the appeal, if she didn't have a right to appeal, it probably – the money should be returned to her.

Mr. Tanaka: It was a stated "non-refundable fee."

Ms. Kapua`ala: It does, but I just got word from my supervisor that we could probably go ahead and return it back.

Chairman Endo: Yeah, if you could say that she shouldn't have filed an appeal, she didn't have no right to appeal an appeal, so everything was an error, then you can refund the money.

Ms. Johnston: Yeah, and she didn't know, and she's pro se. And I don't think it would be a problem giving her a break in that.

Chairman Endo: Okay, well, that's not for us to decide—the filing fee. Okay, anyone—?

Mr. Tanaka: Move to dismiss.

Chairman Endo: So you're moving to grant the motion to dismiss.

Ms. Phillips: Second.

Chairman Endo: Okay, it's been moved and seconded to grant the motion to dismiss filed by the County. Discussion? All those in favor, please say aye. Okay, the Chair votes aye.

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

VOTED: To grant the motion to dismiss filed by the County.

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

Chairman Endo: **The motion is granted, and the appeal is dismissed.**

Ms. Johnston: Thank you.

Chairman Endo: And now we will hear from public testimony, Jim Geiger, as to Agenda Item—

Mr. Geiger: It would be Item E, your honor.

Chairman Endo: Item E, Director's report.

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Mr. Geiger: Thank you. My name is Jim Geiger and I will try to keep it short here today. I'm here because 33 months ago, my clients filed two appeals – four appeals, actually. Twenty months ago, we completed the hearings on those appeals. A year ago, the hearing officer issued the proposed findings, proposed conclusions, the decision and order. Five months ago, this Board went ahead and acted, but as of today, we don't have, 142 days they were submitted to the Planning Department, any findings or conclusions. And I didn't hear until earlier today that we actually have a hearing date at which you will act on those.

Our concern is that two of the six Board Members who heard our appeal are leaving the Board at the end of March. And so we don't want to have to go through the whole process again of having a Board, a new Board, review everything. We don't want to have to go through the new process of arguing whether or not the Board can act if two Board Members are gone. My client, who has been very patient to this day, has two subdivisions that are ready to go, had been ready to go, and should've gone more than two years ago, and we're sitting and waiting. So we want, and what I'm here for today is to get before the Board, the final findings, the final conclusions, and the final decision and order so that we can proceed. And that's why I'm here. The appeals I'm talking about are 2008-3, 2008-4, 2008-5, and 2008-6. I don't know whose desk the proposed findings have been on. I don't care whose desk they've been on. I want them before the Board so we can be done with this. And that's what I have to say. Thank you.

Chairman Endo: Any questions?

Mr. Tanaka: Which—? Refresh our memories, sorry.

Mr. Geiger: It was the appeal – the Makila Land Company appealed four subdivisions – conditions that were imposed on preliminary subdivisions 18 months to 20 months after they were granted. We had a contested case on that. There were two makai subdivisions, two mauka subdivisions. Had a hearing officer appointed. We had the hearing officer provide a report. We took exceptions

to some of the proposed findings and conclusions. We supported some of the proposed findings and conclusions. And what this Board did was approved the hearing officer's report, but amending it to include those exceptions that we made to reflect the changes to the hearing officer's findings and conclusions pursuant to our exceptions. That's what happened. It was September 23rd. On October 5th, the hard copy of the proposed findings were submitted to Planning along with an editable copy. And we're here. That's 140-some days ago, and we're here. We just wanna get this done.

Mr. Tanaka: So it's just a clerical thing?

Chairman Endo: Well, it's the finalization of the documents so that we can sign them, Trisha?

Ms. Kapua`ala: Yeah, well, I don't know how to explain this. We could just go ahead and issue the D&O and have you sign it. It's ready to go. We wanted the County Corporation Counsel to provide – to look it over before we issue. And after several months had passed, we asked if we should maybe put it before the Board again before we issued it, and that was believed to be the best decision.

Chairman Endo: So there's no deadline? There was no 60-day deadline for getting that out or anything? It was only for making the decision?

Mr. Geiger: Yeah, there is no – well, I'm not sure there's a deadline for making your decision in this particular appeal either, but there is no deadline for you to sign the final. But the difficulty is that if it is not done while two of the six are on the Board, there may be an argument that it has to be re-reviewed by the new Board.

Ms. Kapua`ala: We can go ahead and issue.

Chairman Endo: Yeah, I think we cannot officially – well, it's not on the agenda, or I guess it is just a clerical matter.

Mr. Giroux: Yeah, it's a contested case. Normally – well, as far as how these are reviewed, there's no real guidance within the rules. And so what we try to do is follow closely to Chapter 91 procedures as we can to make sure that everybody gets to look at it, gets to comment. And then when there's not attorneys involved, what happens is staff usually just drafts the order, and then just Randy sees it, and then he signs it. But because of the litigation and litigants involved, then it creates a whole other level of scrutiny about if everybody's happy with the document, and back and forth, and that kinda stuff.

Ms. Kapua`ala: Right. Let me clarify also. So typically, the prevailing party would draft the D&O and submit it to our Department. And by that time, it was signed off by the opposing party, the other party. So both parties signed off on it. We would just need Randy's signature. In this case, we couldn't get a – the County hasn't signed off. So it's not a document that both parties agree with.

Mr. Geiger: And I would disagree that both parties have to agree. I mean, you folks – procedure sets forth that if there are any issues with things that are submitted to you, the other side has an obligation to say what those issues are. And you've adopted a – you made a motion. You acted.

And I would suggest that this Board needs to follow its order, the motion that it passed. And so that if it's gonna vary from that motion, then I would have a problem with it, because if you're going to make additional changes, then we should've had – that should've all been brought up in your discussion before you adopted the motion in the first place.

Chairman Endo: Yeah, I think I tend to agree with Mr. Geiger that it's kind of – it's unfair to the parties to delay the filing of the – or the issuance of the order. So the Chair would recommend that we just sign it and get it over with.

Ms. Kapua`ala: Okay.

Chairman Endo: Because the parties can always appeal if they want to. They have their rights, so we should just move forward.

Mr. Tanaka: I have a question. Trish, the Corporation Counsel that reviews the decision and order, is the – is it whoever represented the County, or is it a separate person?

Ms. Kapua`ala: Who represented the County.

Chairman Endo: Yeah, because every time the County doesn't like the decision, they could just hold it indefinitely and win by not taking – by enactment, basically.

Mr. Tanaka: So I'm just curious why is it that it's – you said 142 days.

Chairman Endo: Oh. Oh, go ahead.

Ms. Jane Lovell: Good afternoon, ladies and gentlemen. I had no idea we were going to be having this discussion today, but I did get a copy of this proposed decision to review. And I don't believe that it accurately reflects what the intent of the Body was. I asked what the procedure was for bringing that to your attention. And I was told that at least one mechanism would be if it was scheduled for your review at an open meeting, then at least I could come in and say I think that this paragraph doesn't belong in there. So I'm not trying to hold up anything, but I do think that the order, as drafted by Mr. Geiger, is very true and correct in many respects, but there are certain paragraphs that I think are just surplus, extra, kind of gilding the lily. So I'm more than willing for you guys to hear it at your soonest convenience, but I would like the opportunity to at least bring to the Board's attention before you sign what I think is wrong with it. Apparently, there's no particular procedure for doing that other than having it heard by the Board in open session. There doesn't seem to be a provision for like taking exceptions or putting something in, in writing. So anyway, that was the procedure that was recommended because it would go to you on in open–

Mr. Tanaka: So – I mean, if Mr. Geiger was not here at this date, we still wouldn't have known about the delay. I guess I'm–

Ms. Lovell: I assumed that it was at some point put on your agenda. I mean, I–

Chairman Endo: No, normally, we'd just sign it. There wouldn't be any more Board meetings. So I think you'd have to like file a motion or something to get it back in front of us or something.

Mr. Geiger: I . . . (inaudible) . . . I presume it would be a provision . . . (inaudible) . . . but I'm not certain of that, but I would disagree with Ms. Lovell. Your rules provide that you can take exception or you can file support, and then you have a period of time to respond to either the exception or the support. So they've had their opportunity, if they felt that something we were asking for was inappropriate or as they say "gilding the lily." They chose to do nothing. And so to come in now, it's like let's see how many times we get to reargue what we've lost before. And that's my problem with trying to open it up again for another hearing.

Ms. Lovell: Just to make it clear, I'm not at all arguing about the result, the actual decision and order. You guys were very clear in what you did. I don't disagree with that at all. It's literally, the form of the order. And I thought that it was going to be scheduled for some – has it been scheduled?

Ms. Kapua`ala: Yes, we put it on our calendar, but you have not been notified, and I apologize. It's on the March 24th – no, yes, March 24th agenda, and you will get proper notice.

I'd like to make a correction into the record, I think what you're talking about is for proposed findings.

Mr. Geiger: No, no. Within the procedure when you come before the Board after the hearing officer, there's a . . . (inaudible) . . . where you file support, you file exceptions.

Ms. Kapua`ala: Right.

Mr. Geiger: And then the other side gets a ten-day period to file a reply.

Ms. Kapua`ala: But they made a decision on that proposed recommendations and exceptions and support.

Mr. Geiger: But my exceptions, they had an opportunity to come in and object to, and they chose to do nothing. That's my point. That's why it's all brought up at one time as opposed to this piecemeal approach when you bring it up now, and then you bring it up again, if you don't like some of the exceptions that you folks granted. And that's the difficulty that I'm having with what's being requested.

Ms. Lovell: It's just I don't see anything in the rules that allows an opposing party to either approve as to form or to disagree as to form the way it is in court. I'm not in any way, shape, or form disagreeing with the final decision. It's just the wording of the document. And I just – I have to defer to your counsel, I guess, with whom I'm not allowed to speak about this because we have an ethical wall between us. But that is my concern is the written form of the order. It's not the ultimate decision.

Chairman Endo: Okay, I guess the thing is that– Oh, go ahead.

Mr. Giroux: Yeah, I was asked by Trish in this – a situation where there was trouble with the order. And I said, well, if we're having trouble, the staff is having trouble with the order, then they need to bring it to the Board so that it can be clarified, because technically, the staff is going to present

something to the Chair, and they're not clear about what's in the wording. I didn't realize it was going to take 145 days or the timeframe. I thought that would be done immediately and be brought to the Board so that the Board could see the language and what staff was having problems with, and that that could be clarified quickly. I didn't realize that still until today that both parties were never notified that there was even a hearing date. And that's what's disturbing is that the timing of this, if there's a problem, the timeliness needs to – there's no reason for this of not to have been cleared four months ago when that question was brought to me. And my advice is under the auspices that it was going to happen quickly, not that all the parties would show up today and not know that there's a hearing date in another month. That's not exactly how my legal advice was being dispensed because that is a situation where in the drafting of these orders, the actual conclusion might be correct, but somewhere in-between there's a fuzzy line. And if there's any fuzzy lines, the Board needs to just make a ruling and say, no, that's exactly what we meant, and we'd like to document, and move it along. It's supposed to happen that fast. So I understand the objection because it's not in the procedure. It's in the timing I think that really concerns me.

Mr. Tanaka: Because – I mean, I had to ask the question, what was it? And five months ago, that's a while where if it was five weeks ago, we would still have it fresh in our mind. And I do agree with the fact that if this were to come back before us in April when we would lose our Chair and another Member, that would be very difficult. So what is our solution?

Mr. Giroux: I believe staff may have a draft in your office?

Ms. Kapua`ala: Yes.

Mr. Geiger: I'm presuming it's what I provided to you back in October. That's fine. Let's sign it. Let's go.

Mr. Giroux: So we would leave it in Randy's hands to look it over and to say that meets the intent of the ruling. And then if Randy has a problem with it, then we'll – it's scheduled on a hearing date.

Ms. Lovell: Maybe I could just propose this, and maybe this will make it faster for everybody, because I really don't want to hold this up any longer. If I could just note for the record, and we're on the record, that I have no difficulty whatsoever with the ultimate conclusions of this written document—findings of fact, conclusions of law, and decision and order, but that I do have a concern about the accuracy of Finding of Fact 13-D, and Conclusion of Law 17, 18, 19, 23, 26, 29, 30, and 34. So if I could just make that record, then I'm happy to have the Chair look at this. If he believes it accurately reflects what the Board did, then we're through. It's just my objection as to form is as to that one particular finding of fact and those particular conclusions of law.

Chairman Endo: So, 13-D, and then 17—?

Ms. Lovell: Conclusion of Law 17, 18, 19, 23, 26, 29, 30, and 34.

Chairman Endo: Okay. And then let me ask this question just to clarify because it has been a while since that meeting, but I kind of recall. I mean, we had two sets of proposed findings of facts. We adopted the County's versions, but changed by the exceptions of the—?

Ms. Lovell: Actually, I think you adopted the hearing officer–

Chairman Endo: Oh, the hearing officer's.

Ms. Lovell: The County didn't take any exceptions to the hearing officer's report. We said we would just go with it. It was mostly against us, but we could live with it. The Board, however, thought that it should include more or exceptions or whatever that Mr. Geiger had made in his papers. So it was up to him to draft this thing, which he did, and then give it back to you to sign. But I think somebody, whether it's your counsel, your Chair, somebody needs to go through it and figure out is this what we meant to adopt. As I say, the ultimate conclusions are fine. It's just the form. I think there are paragraphs in there that just don't belong.

Chairman Endo: Okay.

Mr. Geiger: If I may? What you did, and I'm reading through your minutes of September 23rd approved in October, "Adopt the hearing officer's proposed findings of fact and conclusions of law as amended by the changes listed in Makila's exceptions." And each one of those items in our exceptions, we excepted to his failure to include our proposed findings and our proposed conclusions. And each one of those proposed findings and conclusions to which we made an exception to was added into the document that was provided October 5th. And now, the County is saying, no, we don't want those proposed ones in there. We want you to take them out again. The problem is that they had the opportunity back April 13th of last year within ten days to come to you and say, "No, we don't want those proposed findings and here's why," but they didn't do that. And so now they're trying to come and say, "We don't care what you said here. You've got to take these things out because they're not necessary." That's not what you voted on. That wasn't your intent. And if they wanted to do that, they should've done it a long, long time ago, over a year ago.

Chairman Endo: Okay, so my question then is to Corporation Counsel. I understand that you don't – or you object to certain provisions as you stated, but are you agreeing that from a technical drafting perspective that Mr. Geiger followed the instructions as he recited them and followed them correctly in terms of how to change the hearing officer's report and incorporate his exceptions?

Ms. Lovell: I think that's the problem. I think it was a very broad statement, and it wasn't very particular. And so therefore, I don't know if the Board meant to incorporate each and every item that's found its way now into this final decision or not. As I say, I just wanted an opportunity to state my objections. This is the first time I've had the opportunity to state any objections to this document. And I don't wanna hold things up any more, so if you want to go ahead and look it over, and either sign it or not sign it, that's fine with me, but we did not have an opportunity before seeing this document to make any objections as to form.

Mr. Tanaka: I have a question for you.

Mr. Geiger: If I may? Two things: one, to refresh your memory, the motion originally was to just adopt our proposed findings and conclusions. And then, Ms. Lovell said, "Well, we opposed a number of those, and we don't think you should do that." So then the motion was changed by this Board to use the hearing officer's, but adopt strictly those exceptions that we have in our – exceptions that we filed with you. So that's what we did. We followed exactly what you did. And

this argument that's being made now—well, I didn't know what was going in there—that's not really accurate because it was all set forth in the stuff that was provided before you heard it. I'm sorry. Did you have a question?

Mr. Tanaka: Ms. Lovell, procedurally, when you read the order, and you have some things that – you have some things you disagree with, so you let Planning Department know that there – you're not comfortable with it. But wouldn't it be – wouldn't you also notify the applicant that, okay, we see it, but we disagree with this, so we're gonna move – we wanna take it back to the Board?

Ms. Lovell: I agree. That would be good procedure, but I was told that the procedure would be just present it to you in open session, and then I could say whatever I wanted to say in open session. I think part of the problem is your rules don't even cover how you deal with an objection as to form.

Chairman Endo: I think that's true. I don't think there's anything as to approval about form of an order.

Mr. Giroux: No, it's just that the complication between the day that we have a report from a hearing officer that is accompanied by exceptions, and then a ruling that basically, cuts, and chops in pieces, and piecemeal that. And then when you adopt that, you're not visually given that final document. And that's basically, when somebody's told, okay, do that, do that document, then there might be another procedure of serving – you know, having that order served on the opposing party so that they can make objections, and blah, blah, blah to that. And then you can go and look at those exceptions again. You know, it can go on and on and on until in ad nauseam. And that's how we get our billable hours. I'm just– But without written procedures, basically the system is just trying to be as fair as it can. I agree with Mr. Geiger—this is a huge glitch. Whatever we can do to expedite this, I think we should. And so Randy's gonna take the hit. But I think we need to move this along quickly. This is really out of control.

Chairman Endo: Yeah, I'm not even sure procedurally if you can move to reconsider or anything at this point. I think maybe you're just left with your appeal rights at this point already.

Ms. Lovell: I think that's true. I just wanted to go on record sometime somehow. If this is it, I'm not sure that this is strictly legal for us to even be doing this now because it's on the agenda. But in any event, at least I have a written record of what I think is wrong with this. Whether it's just for the Board to decide altogether or for just the Chair, I leave that up to you.

Chairman Endo: Okay, so should I just review it and—?

Mr. Giroux: I think so. And in the future I think when we do have a formal contested case like this, what we might wanna do is when we have in front of us, the report of the hearing officer, we have the exceptions, you might wanna put off your decision-making to a later date, and have both parties do proposed findings of fact based on the proposed decision. And then that way, the parties would at least know that they can at least have one day to come in, and it would be on a posted date. It's not gonna fall in the cracks of five months of– If they wanna fight about the wording, and the order, and blah, blah, blah, they at least get one more crack at it, and then we can adopt something that day.

Ms. Lovell: Yeah, that would be helpful.

Chairman Endo: I guess that's how they do it at the LUC, right?

Mr. Giroux: Yeah, but – and the confusion is you haven't made an order so both parties are actually making incongruous findings, which makes it sometimes even more confusing. So if one party thinks he's gonna win, and the other party thinks they're gonna win, their findings are gonna be completely different than the other party's findings. At least when you make this order, the other party has kinda said, okay, you won, now, give us the document that we wanna look at. And then again, you see the problem is that the other side says, well, yeah, they won, but that's not the wording that we agree to. And so–

Mr. Geiger: And I guess the point is it's not really for the parties to agree to wording. I mean, you have made a motion. You've approved a certain set of action, and all we're asking you to do is follow that action.

Chairman Endo: Yeah, I think I would have to agree that even though maybe we're not as precise as we wanted to do, and maybe Ms. Lovell's correct that we did something that we didn't intend or whatever, but the fact is that we actually – we did take action, and then at this point all we're doing is writing up the action we took, and so I think that's where we're at. So I think we should just look it over and sign it, if it matches what the decision was on that hearing date.

Ms. Giroux: So Trish can just–

Ms. Kapua`ala: Yeah, I can have it ready for you to come in and take a look at it, or I can e-mail it to you as Mr. Geiger did give me the Word document.

Chairman Endo: Yeah, why don't you e-mail it?

Ms. Kapua`ala: Okay.

Chairman Endo: Alright? Thank you.

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

Chairman Endo: That's okay. How very interesting. Okay. We're running out of time. Shall we skip–? Do we have any status update? No? Okay.

D. APPROVAL OF THE FEBRUARY 10, 2011 MEETING MINUTES

Chairman Endo: Can we have a motion to approve the February 10, 2011 meeting minutes?

Mr. Castro: So moved.

Mr. Tanaka: So seconded.

Chairman Endo: Okay, moved and seconded. All those in favor, please say aye. The Chair votes

aye.

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

VOTED: To approve the February 10, 2011 meeting minutes.

**(Assenting: S. Castro, K. Tanaka, R. Phillips, R. Shimabuku,
R. Endo.)**

(Excused: W. Kamai, B. Santiago, R. Tanner, B. Vadla)

Chairman Endo: The meeting minutes are approved.

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

F. NEXT MEETING DATE: March 10, 2011 on the Island of Lanai

Chairman Endo: The next meeting is March 10 on Lanai. I most likely cannot make it. You folks can?

Mr. Castro: . . . (inaudible) . . . on Oahu.

Chairman Endo: You'll be on Oahu.

Mr. Francis Cerizo: Okay, a reminder—we'll be leaving here about 5:30, so if you wanna get a ride, be here at 5:20. We'll leave at 5:30 sharp. Otherwise, we'll meet you at the ferry at 6:45. I think you board before that. Board at 6:30 and the ferry leaves at 6:45.

Chairman Endo: Alright. No further business, this meeting is adjourned.

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 4:18 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Board of Variances and Appeals
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Randall Endo, Chairman
Kevin Tanaka, Vice-Chairman
Rachel Ball Phillips
Ray Shimabuku
Steven Castro, Sr.

Members Excused:

William Kamai
Bart Santiago, Jr.
Rick Tanner
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