

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
JANUARY 26, 2012**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Kevin Tanaka at approximately, 1:35 p.m., Thursday, January 26, 2012, 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 Kevin Tanaka: The meeting on the Board of Variances and Appeals will now come to order. It is now 1:35 p.m.. We have a quorum of six of us here. The first item of the agenda, Francis.

B. PUBLIC HEARING

1. **RORY FRAMPTON, representing the KORTH FAMILY TRUST, requesting variances to allow the revision of the approved building plans for Building Permit No. B 2011/0328 from an enclosed connection to a covered, non-enclosed connection, between a bedroom wing and the main living, cooking, and eating areas of the residence, whereby Maui County Code (MCC), §16.08.030 requires that any habitable roof or group of habitable rooms shall be located within a dwelling and forming a single habitable unit; and a habitable room must be enclosed or partially enclosed; and MCC, §16.08.110, requires that every building be weather protected so as to provide shelter for occupants against the elements and to exclude dampness, for property located at 4446 Makena Alanui Road, Makena, Maui, Hawaii; TMK: (2) 2-1-023:011 (BVAV 20110019).**

Mr. Francis Cerizo read the agenda item into the record, and gave a power point presentation of the subject parcel and surrounding properties.

Chairman Tanaka: Mr. Frampton, do you – would you like to have a public testimony before we start your presentation?

Mr. Rory Frampton: That would be great. Thank you.

Chairman Tanaka: Finding for a public testifier. If you could come up, sign in, speak into the mic., state your name . . . (inaudible) . . .

Mr. Jim Niess: Good afternoon. I'll sign in when I'm pau here. My name is Jim Niess. My business is Maui Architectural Group. This is not my project, but this is an issue that's near and dear to my heart. So I've come to testify to these particular variance requests over and over. And I know this is an issue that the Board has visited many times in the past, and I'm hoping that this will be the last time because the Maui Chapter of the American Institute of Architects has requested that the Department revise this interpretation.

A little bit of history of this reviewing the Department's interpretation of this issue over the years; it seems apparent that in the past this was used as a means to control the proliferation of unauthorized apartments, or hotel units, TVRs, if you will, primarily in agricultural and rural zoned lands. However, fortunately, now we have the burden of enforcing these zoning issues such as, illegal rental and living units no longer lies with the Department, was transferred, shifted to the Planning Department some years ago. To aid in their efforts, the Bed & Breakfast Ordinance was passed and revised as a TVR Ordinance in front of the Council right now. The Rural Zoning Ordinance, the Agricultural Zoning Ordinance were put in place, and the Zoning and Enforcement Division was created, and staffed, and is very active right now.

All of these efforts deal with the issues of the Department's interpretation on this issue has struggled to manage all these years. In the past, this effort enjoyed really only limited success and – in restricting unauthorized use while placing a rather severe constriction on architects and their clients who want to explore creative ways to arrange living spaces, and create home designs that are based more on what the opportunities of Maui's favorable climate provides, and less on Mainland code models that dictate what a home should be.

Now, we conducted a survey of the other islands and how they interpret this issue. Personally, I've experienced on Kauai and the Big Island, none of these Counties, including Honolulu, preclude the incorporation of noncontinuous connections between residential spaces. It's also true of virtually every other Pacific island. Now, in the Big Island, they've dealt with this issue of illegal rentals and pods with a simple, single family dwelling notice that the applicant is required to sign that commits them to using their property only in a single family manner. And I will transmit this to Zoning or to Francis here, thank you, when I get back to the office.

These pod solutions or breezeways like what's presented here will be presented in where bedrooms and less active spaces are separated from the main active spaces with either inter-connecting garden pathways or covered walkways that provide a delightful exception to the Mainland style, fully enclosed, mechanically-conditioned rooms. To use the current jargon, this is a sustainable concept, and that greatly promotes natural ventilation thus, reducing dependence on air-conditioning, ceiling fans, and other energy-consuming, mechanical devices.

To my knowledge, I said this is the only Pacific island that inhibits the use of this important design tool. Mainland codes are set up to struggle against the weather: either it's too hot or its too cold. Here, at the lower elevations anyway, we have the most gentle climate certainly in the U.S., if not on the planet. We should be promoting just the opposite. We can actually live in this climate as the Hawaiians did, you know, maybe a little more clothing, but the point is simple: this ain't the Mainland. And many of our clients want to live as close to outdoors as possible; a sharp contrast to what they're used to in less favorable climates. Well-intentioned, the current system leads to one variance request after another.

This is the 23rd variance for the same issue since 2001, in my count. All these variances have been approved. There are really no health, safety issues here that the general public needs to be protected from. The Building Code doesn't require these Mainland style connections, only the somewhat taxed interpretation of the Housing Code. Now, how the interpretation was patched together from various bits of this Housing Code: this is the old Building Code before we had the Uniformed Building Code in place. And it's obsolete, it's redundant, and in conflict in many areas

with the Uniformed Building Code. We architects have requested that it be deleted as the 2006 IBC is adopted sometime this year. The Department has expressed support for this request, and this is why I'm hopeful this will be the last time the Board faces this issue.

In conclusion, I'd just like to reiterate what has been outlined earlier that these folks have gone the extra mile in responsible, sustainable design of their home. Approval of this variance request will add passive cooling, and substantially improve natural ventilation for this home without compromise to the local environment, or the public's health, safety and welfare. Thank you.

Chairman Tanaka: Thank you, Mr. Niess. I do have a question for you. Do you know when the new code shall take effect?

Mr. Niess: Well, actually, the State law requires that the code be within three years of the current date. We're just about to adopt the 2006 IBC. It's been pending for quite awhile, but the pressure's on, and I think by April. Maybe Jarvis can fill you in a little more on where we stand. But I think our information is that sometime this spring the new code will be adopted. We're working on amendments right now and whatnot.

Chairman Tanaka: Thank you. Board Members, any questions for Mr. Niess? Thank you. I appreciate you taking your time for a project that is not yours.

Mr. Niess: It's the fifth time I've been here.

Chairman Tanaka: I'll pose a question to our Corp. Counsel. Do you know where it stands or where in the process it's at now?

Mr. Giroux: Well, I know it was in our office for drafting. A couple weeks ago I believe I talked to the attorney who said that he had moved it off his desk. So that means it's probably either in a higher level in our office just for final review, or it's already been transferred down to the Building Department. I think Jarvis can fill us in.

Mr. Jarvis Chun: Okay, I'll give you the latest.

Mr. Giroux: The real deal.

Mr. Chun: The IM Committee, that Council Committee, is going to hear it next Monday. So that's the latest.

Mr. Santiago: What created the delay--2006 to 2012? Just curious.

Mr. Niess: I can address that a little bit. The State law was put in place so that we could have an even code scenario across the State. Basically, each County has its own amendments, separate amendments, to the IB or whatever code is being proposed. And it's taken this long for all the Counties to agree on a standard set of additions or amendments to the codes, and then each County has to approve. It's just things take time.

Chairman Tanaka: Thank you. Board Members, any other questions? I guess, Mr. Frampton,

proceed with your presentation.

Mr. Frampton: Thank you. I'm Rory Frampton representing the Korth Family Trust and just like to thank Jim as he leaves the room. You can see why I wanted him to testify first. I think he kinda spelled the issue out really and he had a time commitment as well. I'll just briefly go over just the location again that Francis talked about.

First, let me say the request is to modify the house. This shows it from the mauka elevation, this top figure. And the main part of the residence is situated here on the right. And then there's a bedroom wing, and it's basically a covered walkway that they want to have between the two structures. The bottom figure here is looking from the oceanside looking mauka, and you can see the bedroom wing attached by a covered walkway with no enclosures to the main portion of the dwelling. These were the plans as submitted with basically sliding glass doors connecting per the code requirement making it a waterproof connection and enclosed connection. This is the plan view showing the main body of the house connected to the bedroom wing via the lanai. This is what it looks like with the sliding glass doors as approved.

So what we're requesting that if we get the variance, this building permit has already been approved and the structure is under construction, so we would go in and modify the building permit to allow for this type of design. This photograph, kind of hard to tell with the lighting in here, but you can see the bedroom wing there, the main structure there. This is where the connection will be. They've left that open for now because it's a passageway for the cars to go to the front of the house, the construction equipment to go to front. You can see that in this photo, this is looking mauka. Better lighting here. Here's the main portion of dwelling. Here's the bedroom structure. The walkway will be here. And you can see these types of construction equipment vehicles have been using that area right now for access. So it's not critical now in terms of the timing, but once this variance is done, and once all the work to the front of the house is done, that's when they'll go in and make that connection, and hopefully, in the manner that's requested before you today.

I'm just bringing up this figure. Sorry about that. So the property location between Makena Road and Makena Alanui Road, it's right next to a 20-acre preserve, the Palauea Archaeological Preserve. Right beyond that is the Palauea Development, and that project was granted variances for this exact type of feature. Seventeen units in that project got the same type of variance that we're doing here. So it is compatible with the neighborhood and previous variances that have been granted in this area.

The – originally, we turned in a variance for Title 19 as well, for the Zoning Code, 'cause there's – some of these variances that people have been granted before that actually had to ask a variance from Title 19 because the Planning Department interpreted their code in a manner which would not allow for this type of structure. They've since revised their interpretation just fairly recently. So if you see in some of my – the books that you might've gotten from me, we had the sections on Title 19 scratched out, and that was because Planning has revised their interpretation. They felt they could do it internally and that they could interpret the code to allow for these types of structures. So that's about all I have. I again, I thank Jim Niess for his historical perspective on the matter. And if the Board does see to it that they would be recommending approval of this variance, I would like to comment on any conditions. We haven't seen any of the conditions that would be proposed. Thank you very much.

Chairman Tanaka: Mr. Frampton, just to clarify, it is – that was glass doors that was on the original building, approved building permit, and you are simply removing the glass doors? It's still a covered walkway?

Mr. Frampton: Yes, it would still be a covered walkway.

Chairman Tanaka: Board Members, any questions for Mr. Frampton?

Ms. Bernice Vadla: Okay, I'm a little confused. It was already designed as a connected unit in the original—?

Mr. Frampton: Yes, it was designed as a connected unit with the enclosed walkway, and that's how they got the building permit. And they've started construction based on those plans. I was hired to help them obtain a variance so that they could modify their plans.

Ms. Vadla: To put the breezeway in?

Mr. Frampton: To put the breezeway.

Ms. Vadla: Okay, I just walked by that this morning on my morning walk, so yeah. There's not going to be any other like kitchens or anything in that bedroom area?

Mr. Frampton: No, the plans show two bedrooms, and a recreational room, and I believe a bathroom.

Ms. Vadla: Oh, okay.

Mr. Frampton: No kitchen. They wouldn't be allowed a second kitchen.

Chairman Tanaka: Jarvis, question for you. As far as what has been stated and what we have in front of us, because so many things refer to a definition of something or a – is there anything as far as you're concerned, you would not argue one way or another? I just want to make sure that what has been stated and what it seems that I understand is in fact.

Mr. Chun: I believe the facts or the testimony addresses – is addressed correctly.

Chairman Tanaka: Thank you.

Mr. Frampton: I just would note that on page 9 of your staff report, one of the last sentences of the report, the Department does note that they currently have a draft proposal to delete these provisions of the Housing Code. So in the staff report itself, they do make mention that this is something they foresee happening. When I did speak with Ralph Nagamine, he told me – he said, you know, these changes are coming down. They should be happening in a couple months. Should be no later than April, but your client has an option of either trusting us, and waiting, and it might be an extended wait; or going ahead and pursuing the variance yourself. I checked with him a few weeks before when Planning made their change and their interpretation, and he felt that they needed a code revision. They couldn't do it internally like Planning did. So that was the latest I

heard from the Administrator. Thank you.

Chairman Tanaka: Board Members, any questions? Any discussion regarding this? Otherwise, I'll entertain a motion.

Mr. Santiago: I'd make a motion. I make a motion to grant the variance based on the justification submitted by Mr. Frampton, and with a hold harmless provision.

Mr. Ray Shimabuku: I second.

Chairman Tanaka: Okay, it has been moved and seconded. Any discussion?

Ms. Vadla: Do you think it would be a good idea for us to put that single family dwelling solution Chapter 25 that we just reviewed as part—?

Chairman Tanaka: If you would like to make that as an additional comment to—

Mr. Cerizo: That's Planning Department's . . . (inaudible) . . .

Ms. Vadla: Is that something—?

Chairman Tanaka: Francis, is that something that—

Mr. Cerizo: I'm sorry. What's the question?

Chairman Tanaka: Adding the—

Ms. Vadla: Adding that single family dwelling notice they adopted from the Big Island?

Mr. Cerizo: If that's something that you'd like us to — this is their form, but if you want us to have them write something similar to this, we would have no objection.

Chairman Tanaka: Okay, before we continue this discussion, let me ask that to James because it's not a Maui County ordinance.

Mr. Santiago: I feel that's rather punitive . . . (inaudible) . . . providing that restriction to the variance when we granted 23 previous. It doesn't seem equitable.

Mr. Giroux: Not on the policy issue, but on the legal issue, I read the form, and basically what it looks like it's doing is it's just trying to make sure that that extra little unit isn't used as a separate apartment or as a TVR. Right now, we do have the TVR Ordinance that's in progress, and Zoning and Enforcement would actually look at that as part of their procedures. It would just be an added notice to the applicant that, you know, if later they rented out to somebody else, and they put a hot plate or whatever that it is going to be a problem with the Department. That that unit is going to be seen to be as part of the whole complex, and it's not to be separated out, and then add another kitchen or anything, which is the law as it is anyway. It's just an added warning. If it was put as, you know, unilateral or something like that, it would go — the variance is going to run with the land

anyway.

The only caution I can say is that if the law changes in the future, is that some type of restriction that the law would anticipate anyway, or is that an added restriction that you would be adding because the person just so happen they get a variance four months before the law changed? So that's just for an analysis purpose.

Chairman Tanaka: Thank you. So with that said, Bernice, would you still like to have that as part of the—?

Ms. Vadla: Well, I think since they're going to be going over this again, you know, in a month or a week— Was it a week or so?

Chairman Tanaka: Yeah, because I would hesitate to add something that's not—

Ms. Vadla: That's fine. I'll delete that.

Chairman Tanaka: So we have a motion and a second. Any other discussion? With that, I'll call for a vote to approve with the only condition of the hold harmless agreement.

Mr. Cerizo: Okay, does that include insurance or no insurance?

Chairman Tanaka: At this point, no.

Mr. Cerizo: Thank you.

Chairman Tanaka: All those in favor, please say "Aye." Any opposed?

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

VOTED: To approve with a hold harmless agreement.

**(Assenting: B. Santiago, R. Shimabuku, R. Phillips, B. Vadla,
J. Haraguchi, P. De Ponte.)**

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

Chairman Tanaka: **Motion carries, variance is approved.** Thank you very much.

Mr. Frampton: Thank you very much. I appreciate it.

C. APPROVAL OF THE DECEMBER 27, 2011 MEETING MINUTES

Mr. Shimabuku: I make the motion to approve.

Chairman Tanaka: It has been so moved.

Ms. Vadla: Second

Chairman Tanaka: And seconded. All those in favor, please say "Aye." Any opposed?

It was moved by Mr. Shimabuku, seconded by Ms. Vadla, then

VOTED: To approve the minutes of December 27, 2011.

**(Assenting: R. Shimabuku, B. Vadla, B. Santiago, R. Phillips,
J. Haraguchi, P. De Ponte.)**

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

Chairman Tanaka: **Minutes have been approved.** Before we get to the next item, maybe I should've said this before we approved the minutes, I did have a discussion item I wanted to question. Because a portion of the last minutes went into executive session from our discussions, I wanted to make sure that those Members who were not here has the opportunity to read what was stated. I believe Tremaine, Francis, correct me if I'm wrong, Tremaine said that a copy would be available to read. It will not be available to disburse.

Mr. Cerizo: That's my understanding.

Chairman Tanaka: Yeah. Do we have that copy here today?

Ms. Chalsey Kwon: She only made three . . . (inaudible) . . .

Chairman Tanaka: Oh, okay. Yeah. So just for the Board Members, I'd like to ask them if they could read through it before they leave today. Okay, sorry. Next item, Director's report. Francis.

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Mr. Cerizo: As far as contested cases, we have no new status to give today.

Chairman Tanaka: Oh, okay.

E. NEXT MEETING DATE: February 9, 2012, Thursday

Chairman Tanaka: Our next meeting is scheduled for February 9th. Do we know what we have on that date?

Ms. Kwon: BVA Rules and Amendments.

Chairman Tanaka: Members, any discussion?

Mr. Shimabuku: Yeah, I won't be here on that meeting. I'll be out of town.

Chairman Tanaka: Anything else? James, do you have anything to add to—?

Mr. Giroux: Just a heads up. Francis, what's the amendments that were looking at? I know some crossed my desk about six months ago so—

Mr. Cerizo: I apologize. I don't have any information on the amendments.

Mr. Giroux: I was just wondering if it's the time – because we just were talking about the time issues, you know, because of the automatic approval process and that. I was just wondering, because I know I worked on some order to show cause amendments and then there was some time— Nothing?

Mr. Cerizo: We will send you the staff reports within a week so you can read the full amendments.

Chairman Tanaka: Okay, so there is nothing else? Meeting adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:04 p.m.

Respectfully submitted by,



CHALSEY R. K. KWON
Secretary I

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Chairman
Rachel Ball Phillips
Bernice Vadla
Ray Shimabuku
Bart Santiago
Jacqueline Haraguchi
Patrick De Ponte

Members Excused:

Rick Tanner, Vice-Chairman
Stephen Castro

Others:

Francis Cerizo, Planner VI, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel
Jarvis Chun, Supervising Land Use and Building Plans Examiner, Department of Public Works