BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
APRIL 12, 2012

(Approved: 4/26/2012)

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, 1:36 p.m., Thursday, April 12, 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.)

B. WELCOME NEW MEMBERS: TEDDY ESPELETA AND GENE ABBOTT

Chairman Kevin Tanaka: Okay. Good afternoon. Now call the meeting of the Board of Variances and Appeals to order. It is now 1:36 and we have a quorum of six Members. The first item on our agenda would be to welcome our two new Members. Welcome to the Board, gentlemen. I guess we can kinda go around and introduce ourselves to you. I'm Kevin Tanaka, your Chair, for at least the next ten minutes. I am a landscape architect, licensed in the State of Hawaii. Been on my own since 2007. Spent 11 years at Chris Hart and Partners. I've been on this Board – this is the start of my fifth year. If you want to introduce yourself?

Mr. Ray Shimabuku: I'm Ray Shimabuku. I am a journeyman, licensed electrician. I've been on the Board – my tenure ends in 2014.

Mr. Teddy Espeleta: My name is Teddy Espeleta. I'm with the ILWU. First time on the Board. I've been with the ILWU for ten years.

Mr. James Giroux: I'm James Giroux. I'm with the Corporation Counsel. And I'll be advising this Board. I've advised this Board for about six years now. And basically, any questions – we're gonna have orientation today, and if there's any questions, feel free to call me.

Ms. Bernice Vadla: Hi. I'm Bernice Vadla. I was in communications for 25 years. Design and building in construction all my life. I am presently a trainer and community member.

Mr. Gene Abbott: Hi. My name is Clark Abbott. I'm retired after 25 years. I owned the Paint Can on Alamaha Street in Kahului, and a storage company, and a condo cleaning firm. And I'm enjoying retirement and looking forward to this. I just got off the Board, the GRC Board.

Ms. Jacqueline Haraguchi: Hi. I'm Jackie Haraguchi. I've been in the building for over 20 years. I currently work for the Maui Contractors Association.

Mr. Bart Santiago: Teddy, Gene, welcome aboard. I'm Bart Santiago. I work for a little hotel in Wailea, Grand Wailea Resort. I'm the Director of Finance. Been on the Board for a couple of years now.

Chairman Tanaka: Trisha, do you wanna introduce yourself?

Ms. Trisha Kapua`ala: My name is Trisha Kapua`ala. I have a – this is my tenth year with the Department, about eight, nine years with this Board. And I am your staff, so any questions, anything to do with Planning, don't hesitate to call. And I'd also like to introduce Chalsey Kwon. She is in training to be a Board and Commission Secretary. She's taking the place of Tremaine today; and also, my Administrator, he's my big boss.

Mr. Aaron Shinmoto: Been here for 30-something years. Actually, this Board was with the Department of Public Works, and I was there when the Board was there also. So this is a continuation, but the staff does all the work.

Chairman Tanaka: Alrighty. So for – to Ted and Clark, any questions you do have, James – you know, don't be shy, ask the questions. James has all the answers.

Mr. Giroux: Or I'll act like I do.

Chairman Tanaka: And for our staff that – for Trisha and Aaron, they'll provide us with all the information that we need. So again, don't be afraid to ask any questions. Welcome, Chalsey.

C. ELECTION OF CHAIRPERSON AND VICE-CHAIRPERSON FOR THE 2012-2013 YEAR

Chairman Tanaka: Okay, the next item would be election of Chairperson and Vice-Chairperson. Procedurally, do I–?

Mr. Giroux: You'll take nominations. Nominations don't need seconds. And you'll vote from the order that the nominations are taken. So you just get all the nominations first, then the voting will go from the first in–

Chairman Tanaka: Yeah. okay.

After nominations were duly taken and discussion ensued, the following were elected:

Kevin Tanaka to the Office of Chairperson and Rick Tanner to the Office of Vice-Chairperson for the 2012 to 2013-year.

Chairman Tanaka: Alrighty. Chair and Vice-Chair has remained the same. Thank you very much. Orientation, I guess. So, Trisha, you'll take us through?

D. ORIENTATION

1. **County of Maui Sexual Harassment Policy**
2. **Area Variances**
3. **Use Variances**
4. **Rules of Practice and Procedure for the Board of Variances and Appeals**
5. **Title 12, Streets, Sidewalks, and Public Places, Maui County Code (MCC)**
6. **Title 16, Buildings and Construction, MCC**

7. **Title 18, Subdivisions, MCC**
8. **Title 19, Zoning, MCC**
9. **Ethics**
10. **Sunshine Law**
11. **Discussion of Boards and Commissions Booklet distributed by the Department of the Corporation Counsel**
12. **Maui County Charter**
13. **Chapter 91, Administrative Procedure, Hawaii Revised Statutes (HRS)**
14. **Chapter 92, Public Agency Meetings and Records, HRS**

Ms. Kapua`ala: First up, I'd like to introduce Mr. Allan DeLima. He is Planning's Administrative Officer, and he's gonna do the first item on the orientation agenda.

Mr. Allan DeLima: Hi. Good afternoon. As Trisha said, my name is Allan DeLima. I'm the Administrative Officer for the Planning Department. Okay, that's the most dramatic slide in the whole presentation, okay? And this is a very brief presentation and I'm a fast-talker. So please don't blink or you'll miss the whole thing.

Now, this is the first page of the County's policy on Sexual Harassment, and you should all have a copy of the policy in your packets. If you don't, please let Trisha know and we'll make sure that you do get a full copy of the policy.

Now, by definition, sexual harassment means unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct, or visual display of a sexual nature directed by an officer or employee to another officer, employee, or a private individual.

All personnel must refrain from the following conduct: making unwelcome sexual advances or request for sexual favors, making remarks of a sexual nature, using gender-based or sexually abusive language and sexual innuendos, visually displaying materials of a sexual nature, physical contact of a sexual nature, any other similar actions, which is why I can't even interject humor in this presentation because I'm in violation of the policy.

The County of Maui has a zero tolerance policy against sexual harassment, and will not condone or tolerate sexual harassment in the workplace. This policy is applicable to Board and Commission Members, as well as County officers and employees.

Now, the process for filing a complaint: an individual who feels subjected to sexual harassment should immediately make a complaint to his or her supervisor. Board or Commission Members who feels subjected to sexual harassment should make a complaint to his or her Chairperson. If the Chairperson is the alleged offender, the report should be made to the County's Equal Employment Opportunity Officer. And the County's EEOO Officer is our Director of Personnel Services.

And these are your options for filing a complaint: they may be filed with the Planning Director; the Deputy Planning Director; the Board or the Commission's Chairperson; the Director of Personnel Services, again, who is the County's EEOO Officer; the Hawaii Civil Rights Commission; the Federal Equal Employment Opportunity Commission. You are encouraged to first seek internal remedies before using outside agencies. We do like to keep our own house clean. Now, your

complaint may be informal, verbal or written, and unsigned allegation; or a formal written and signed allegation.

The investigation process: the investigation will be conducted in an unbiased, fair, and discrete manner. There will be all the appropriate safeguards to maintain confidentiality and protection from embarrassment that the law allows. An individual who is found after an investigation to be an offender shall receive the appropriate warning or discipline. Any disciplinary action prior to implementation will be reviewed by the Director of Personnel Services and approved by the County's EEOO Officer. There shall be no retaliation or discrimination against an individual who has made a complaint, conducted an investigation, or acted as a witness. Retaliatory conduct is illegal and constitutes a separate violation.

Well, I promised you brief. If there any questions, I'd be happy to address them. If not, thank you for your kind attention.

Chairman Tanaka: Thank you.

Ms. Kapua`ala: Okay, we're gonna take this a little out of order. Mr. Giroux, would you mind presenting the Board with your power point for the Sunshine Law?

Mr. Giroux: Hello. I'm James Giroux, again, Corporation – with Corporation Counsel. And the first topic that I'm gonna be talking about is the Sunshine Law. And you all should have a packet. It says "Open Meetings." And this is the literature coming out of the Office of Information Practices, which is the State Office that manages this law. And it's coming out of Hawaii Revised Statutes, Chapter 92, which is the complete law, if you ever want to read it and have a good night's sleep. But I think you have a full copy in here. But I'm gonna go over the highlighted parts. And in this literature, there's also interesting, hypothetical situations that come up a lot. So it kind of clarifies a lot of that legalese that if you're reading the statute itself, it wouldn't be clear, but if you look at the examples, it gets clear. And I'm gonna try to highlight some points, too, to help out, as far as interpreting this law. Also, we are required to go over this because there are legal ramifications for violating this law, and you are a Board or Commission that is governed by it.

So the first question is, what is the Sunshine Law? The Sunshine Law is Hawaii's Open Meeting Law. It governs the manner in which all State and County boards must conduct their business.

What is the general policy and intent of the Sunshine Law? The intent is to open up government process to public scrutiny and conduct business as openly as possible. The Sunshine Law is to be liberally construed in favor of open meetings. Exceptions to the Sunshine Law to be strictly construed against closed meetings. Absent a specific statutory exception, Board business cannot be discussed in secret.

Open meeting: every meeting of the Board is open to the meeting and all persons are permitted to attend. All interested persons shall have an opportunity to submit data, views, or arguments in writing on any agenda item. All interested persons shall have the opportunity to present oral testimony on any agenda item. And the Board may make reasonable time limits of oral testimony. So this is all consistent with your rules, if you look at your Administrative Rules. All of this is codified also, and consistent with your rules. The Chair controls the issue of order, which would

be the time. And as long as the Chair announces the time and that time is reasonable. And in the State of Hawaii, three minutes is usually a safe number to choose. And as long as all the testifiers get the same amount of time and are treated the same.

Another element is the notice. A written public notice at least six calendar days before the meeting is required. And it must list all the items to be considered at the meeting, and it has to have the date, and the time, the place. And no additions, once the agenda is filed, unless two-thirds vote of all Members to which the Board is entitled. And no item shall be added if it is of reasonably major importance and action thereon will affect a significant number of persons. This is important because as far as adding things to agendas, you can do that. However, first, you have to get two-thirds vote, which means you're nine people, you gotta get at least six votes to add something. Even if you vote and you add something, we still have to do the analysis: is this action you're gonna take regarding that item gonna affect the public? If it's gonna affect the public, your attorney, me, will probably warn you that it's better that we put this on the next agenda, agenda it as what the item is what our possible action is gonna be, and then we can proceed without worrying about being in violation of the law. And we always have at the end of the meetings, a Director's report, and it says "our next agenda." So that's the time where if there's a policy issue that you wanna bring up, or if there's a project that seems to have – you know, we've either talked about or we may in the future talk about, that's where we would add it to the agenda so that it becomes part of the public process.

Chairman Tanaka: James, can I ask a question? Sorry, before you move on, two-thirds of a nine-person panel is six. If we have six here, is it still two-thirds? Four out of the six?

Mr. Giroux: The scary thing about this is it says "of it's entitled," not "present." If it's the entitled, you gotta use nine as your numerator.

Chairman Tanaka: No, no, okay. I just wanted to be clear.

Mr. Giroux: Yeah, it's of entitled, and that's a good question because there are other laws that require either a two-thirds vote of present, or a majority of those present, or of those entitled. So it's a very important question to ask.

The other thing that's required is minutes. They're mandatory. And the minimum requirement that you can have in your minutes is the date, time, and place of the meeting; the Members of the Board recorded as present or absent; substance of all matters proposed, discussed, or decided; and record of any votes taken; any other information requested to be noted by Members; and a public record is to be made available within 30 days of the meeting.

You guys don't have to worry about your minutes because they're verbatim, and they're recorded, and Chalsey types them out. The only issue that arises sometimes is that whether or not we can get 'em out in 30 days. And the law just says that they have to be available in 30 days. We use a process where once Chalsey types it out, she gives it to you at the next meeting, we look at it, we adopt it, but that is not absolutely required. It's just something that we do so that the record is a little clearer, and that you have an opportunity to see what's said and see if it's accurate or not. So we just take opportunity to do that, but it's not absolutely required. And if that doesn't happen, we just let the public know that these haven't been adopted by the Board yet.

What is a meeting? By definition, meeting means the convening of a board for which a quorum is required in order to make a decision, or to deliberate toward a decision upon a matter over which the board has supervision. More than two Members of a board cannot gather to discuss board business. And there's exceptions and we'll talk about those.

So the important thing is that – well, there's a few important things in here, but the easiest way to remember this rule is that two people can talk about Board business as long those two people are not trying to get a commitment to vote, or you're not trying to sway the other person in trying to get an opinion from them. If a third person shows up in the room, do not talk about Board business.

The next level of analysis is, what is the Board business? Is it something that may come up before you, or maybe it's something that either is on an agenda, or you know it's gonna come up on an agenda because of discussions we have had? So it's very tricky because we're on Maui, and zoning, and variances, and appeals is very broad. I mean, there's a lot of discussion that can actually go on about appeals, and projects, and things like that. But the main thing to remember is do not try – if you are talking about something that may be Board business, you're not trying to sway anybody's vote, or try to get commitment. And if there's more than two people present in that conversation, you should be asking yourself, is this something that should be done at the meeting, or done in open, or done on the record?

What is Board business? Matters over which the Board has supervision, control, jurisdiction, or advisory power, and that are before or are reasonably expected to come before the Board. And I just explained what that process is: what is reasonably expected to come before you for decision-making.

And one of the exceptions is the investigative exception. And I don't think this Board in the six years that I've been here has ever used it. I have advised boards that have used it, the General Plan Advisory Committee, which had 25 members, and had the huge documents, the General Plan to do, did create investigative boards. Some people think that it's quicker, but when you have to follow this procedure that I'll go over, sometimes it actually takes longer. Things like site visits, we usually just handle it as if it were a meeting, and we've noticed it, we get everybody, we have somebody taking notes, and we just do it as a group, and do it as an open meeting. But this is the procedure. You gotta have two or more, but less than quorum. So again, quorum is five. So four, three, two, you can have those numbers in your committee.

The scope of investigation and the scope of authority is defined at a meeting of the Board. That means that an agendized meeting, it's on the agenda that says we are going to create an investigative committee. The Board discusses who they want on the Board and they discuss the specific scope of that investigation. All findings and recommendations are presented to the Board at a meeting of the Board. So after an investigation is done, that committee does a presentation to the Board about what their findings are. Deliberation and decision-making on the matter investigated, if any, occurs only at a duly noticed meeting of the Board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the Board. So what that does it creates the necessity of having one more meeting. So what happens is, the presentation is made to the Board and the public, but no decision is made at that meeting. You agendize another meeting, and you say that decision-making will be made based on the investigative committee's report, dah, dah, dah, dah, dah, and at that meeting, you can take action.

This is the exception that is mostly used. It's my favorite, the executive meeting. It's a meeting closed to the public. A vote is taken at the open – to open the meeting of two-thirds of the Members present. Again, you see the difference. It's the Members present on this one. So two-thirds of the vote. And the main reason, this is not the only reason you can have an executive session, but this is the main reason, and the reason we use is to consult with the Board's attorney on questions and issues pertaining the Board's powers, duties, privileges, immunities, and liabilities.

So what'll happen is usually something will happen, and I will lean over to the Chair and say we might need to discuss this in executive session. And he'll say, Corporation Counsel thinks we might wanna talk about this in executive session. And then somebody can move to go into executive session to talk about said issue. If you get two-thirds vote, we go into executive session, we talk about it, and whatever our conversation is, it's confidential. If you don't get the two-thirds vote, then we try to talk about it in public, and whatever I say or whatever you say hopefully, will not expose the County to liability. So that's usually why we wanna have an executive session is because it's something that we want you to be able to do your business without fear of that what you're doing may harm the County or yourselves, expose yourselves to liability.

Sometimes people will raise issues, like they'll actually say, you know, if I don't get this, I'll sue you. Well, then we need to discuss that. We're gonna look at what are the possibilities, and what would happen. And we'll look at the possibility, risk management. Sometimes religious issues, RLUIPA, at the Federal, they're gonna say, hey, if I don't get this, you're gonna violate my religious rights. Well, then that's something we need to talk in private about, about RLUIPA, and what does that mean, and what would the process be, and again, what are your duties, privileges, immunities, and liabilities.

An important caveat is that when you go into executive session, I will state why we're going in. I will say, you know, so and so has said his project is a religious project. He's saying that if we don't give him this, it's gonna violate his religious– We will discuss what the Religious Act is of 2000. And we have to stay on that subject. We cannot then start talking substantively about that person's project. We have to keep on track about why we went into executive session. And I'll raise that if I feel that we're going astray. The reason is, is that if we go astray of that conversation, and they go to court, and they want to then see the minutes of that meeting, the Judge will review it, and he'll see whether or not we stayed within the scope of our conversation. If he feels we went outside of that scope, he can release that to the applicant, and they can use that in a lawsuit. And so we don't – we wanna avoid that because we want our conversation to be confidential.

Chairman Tanaka: Sorry, James, sorry to interrupt again. You said – okay, we know that our meeting is recorded and we have the minutes. When we go into executive session, that is not a part of public record, but it is recorded and it can be subpoenaed, I guess, but it's not public record.

Mr. Giroux: Yeah, and it's sealed. Once we go into executive session, there is minutes, but it's sealed. And that doesn't mean it's sealed forever because if somebody goes to court and tries to open it, or has a reason, the Judge will review and see if there's merits for it, then it can become public.

Chairman Tanaka: Thanks.

Mr. Giroux: And I think we've done that. We've had Commissioners review some of our executive decisions because we wanted everybody be up to speed with the legal decisions we were making.

Another exception is a contested case. A board exercising its adjudicatory functions are governed by HRS Chapter 91-8, 91-9. And what that is that if you're working in a quasi-judiciary mode where you're making decisions based on people's rights and their privileges, then it's a contested case. The problem – not the problem, the issue is, is that under the Charter, variances by our Charter require you to have a public hearing. By law, variances are contested cases. So we follow the Charter. We say that the Charter trumps because we do allow public testimony during variances, and we do due deliberation in public.

You also handle appeals. Appeals are not required by the Charter to have a public hearing. So when there's an appeal of a Director's decision, then we follow this exception, which means that if we have to have special meetings or if we hire a hearings officer, those meetings do not have to be noticed to the public. There doesn't have to be minutes published on those meetings. There will be minutes anyway because it's litigation, so both parties will have a record of what's going on, but it's only for those parties. And the public doesn't get to come and testify at those meetings, and there's no notice either. But that's because the realization that when you're working as an adjudicatory board, that puts a lot of burden on scheduling, documentation, testimony, coordinating witnesses, and so it can be a very complicated and cumbersome process when you find yourself in a – what we call a full-blown contested case where there's an intervener, where there's multiple attorneys, multiple witnesses. We don't want to have to publish that meeting and wait six days to have a meeting and such.

So to wrap this up, enforcement. What's the consequence of violating the Sunshine Law? One of them is voidability. The other one is injunction. The other one is you could found guilty of a misdemeanor. And if that happens, then removal from the Board.

Voidability means that if somebody feels that you there was a decision made by this Board that was in violation of the Sunshine Law, they can go to court, and they can ask the Judge to void that decision. If the Judge finds that there was a violation, he can then order that decision, or your variance, or your appeal to be – not the appeal, the variance to be stricken. He can put an injunction saying that the County cannot give permits pursuant to that injunction. And the thing is, is that the Judge has to find that. It's voidability, not void automatic. It has to go through a judicial scrutiny in order for that decision to be void.

If it's an issue of having private meetings and private discussions, and it gets out of hand, the Attorney General could come in and do an investigation, and find out are there secret meetings going on? Are these decisions being made behind closed doors? If they find that that is happening, they can prosecute, take it to court, and have a Judge make a finding. And if they make a finding, you can be found guilty of a misdemeanor, which is a criminal charge. And last, but not least, is the removal from the Board because, again, it's a violation of a standard of duty that we expect from our Board Members.

And to end, I am not the Sunshine Law police. If I see a violation, I will come up to you and I will address, hey, you know, this is, from what I see, it looks like a violation. We should probably not take this – well, we should take this on the record is probably what I'll say is that let's take this conversation on the record. And that's to protect you because my job is to keep you guys out of court meaning that whatever decisions you make, I wanna make sure that it stands. Also, I don't wanna see private people who are volunteering their time get wrapped up in lawsuits that they could avoid. And a lot of times, it's just a matter of understanding that, okay, here's the line, and we don't need to cross it, but we can get the job done. And when you get the job done, we want

those decisions to stand. And if there is any questions, feel free to ask. We're gonna do ethics now?

Ms. Kapua`ala: Mr. Giroux has an ethics presentation, and then I'll go ahead and–

Chairman Tanaka: I don't think we need a break.

Ms. Kapua`ala: Okay, Mr. Giroux.

Mr. Giroux: Well, ethics, this is coming out of the Maui County Charter, Article 10, Code of Ethics. And I think there's something in the packets that we hand out that has something regarding the ethics. The main thing we wanna cover is the prohibitions. And basically, you can break it down into three prohibitions: the accepting of gifts, participating in business transactions or activities, or have a financial interest, which may tend to impair independence of judgement in the performance of your official duty, and then the failure to disclose a financial interest.

The accepting gifts, that doesn't mean you can't get Christmas presents. It means that if somebody gives you a gift, and it's out of the ordinary, ask yourself, is this person giving this to me because I'm on the Board of Variances? And even more, is it because they have something coming up in the future? You wanna avoid the appearance of impropriety. Ask yourself, what's the purpose of this gift? If it's a large gift, over two hundred dollars, something should go on in your head and say, hey, I gotta ask myself who's giving me this and why. If you have any questions about that, feel free to give me a call, and we can discuss to see what your options are, what you have to do to report, what we need to do, or even if we should just decline that gift kindly and say thank you, but no.

In Hawaii, we are familiar with gifts of aloha. Sometimes people bring food. They leave doughnuts. We're not gonna make a big deal about that because we know that is not going to change your attitude about your analysis of whether or not somebody should get a variance or not. . . . (inaudible) . . .

The last one is usually the one that I deal with a lot and it's the failure to disclose your financial interest. The thing is that a lot of people who volunteer are running businesses. And they see, oh, wait, I've done business with that person or not. If you have any doubt, just disclose. Disclose it to the Board and say, hey, I've done business with so and so in the past. And that usually covers it. However, if you are directly getting a benefit from that variance that that guy's gonna get, we're gonna have to heighten the scrutiny on that and look at to whether – see whether or not you should recuse yourself from voting and discussion. But whenever in doubt, just raise it, and then we can take care of it from there. Feel free to call me if you see something on the agenda and you think – call me. We can discuss it. We can look at the ins and the outs. And if I can't find a solution, then we can maybe get something in front of the Board of Ethics, and get a letter to make sure that you're covered, and get an opinion of whether or not that's something that would recuse you from voting. The penalties for this is, again, a fine, or you can be removed from office.

Your rules state – 12-801-23, "Whenever a Member has a conflict of interest, the effected Member shall promptly make a full disclosure of the circumstances to the Board, and refrain from participation, and discussion, and voting." So your rules are a little stricter than other Commissions, because other Commissions, it just says you can't vote, but in this one, it says you can't participate in discussions.

Mr. Santiago: I have a question. . . . (inaudible) . . . composition?

Mr. Giroux: Composition, that's usually you're appointed by the Mayor, and then you go through the Council review. And that's where it's kind of vetted out. So you mean like as far as the geographic, professions, that type of thing? Yeah, I think they just – when they're looking for community members, they want people who are familiar with the workings of different areas. I think they – you look at the composition, it's pretty broad.

When in doubt, get an advisory opinion from the Board of Ethics. And if any officer obtains an advisory opinion from the Board and acts accordingly, or acts in accordance with the opinions of the Board, the officer shall not be held liable for violating any of the provisions of this article. So that's your safe harbor. If you have any doubts, get that advisory opinion, because once that comes out, that says as long as you follow what it says, then that's your protection against liability. And if later on, somebody challenges that, or they question it, you can always point to that opinion and say, you know, we've disclosed it, it was scrutinized, and this is the decision, and the decisions that were made were in accordance to that.

If there's something that you really wanna vote on, and what happens is the agenda comes out six days before, if you don't think you can get an advisory opinion before that, you can bring it up to the Chair, and even request for a deferral in order to get that issue deferred until after your opinion is written by the Board. And then that way you can participate. Because what happens is that when you ask for an opinion of the Board, they're another board and commission. They have to meet, they have to write an opinion, and it may take a couple more weeks to get that out. But they do try to turn those over quickly, because they do understand that they also don't want to be holding up our Board business, but it is an option. And again, if there's any questions regarding that conflicts of interest, impartiality, those types of things, give me a call and we can't talk about it.

Chairman Tanaka: James, I do have one more question. Can a Board Member apply – I mean, I know he can, but present to the Board, if I needed a variance for something?

Mr. Giroux: If you personally – if it's your variance, I believe you can. It's just you cannot represent somebody else and present their variance because the Charter says that an officer or employee cannot within a year do representations for another private entity in front of the Commission that he worked for. But if it's your own – if your house needs a variance, you recuse yourself off of the Board, you can represent your own personal interest because that's your First Amendment right to access the government. I mean, just because you're on your Board doesn't mean that you cannot have due process.

Chairman Tanaka: So by that, can I be employed by somebody seeking a variance? I don't have to necessarily present. For me, specifically, as a landscape architect, I'll do some exhibits of something, a roadway, or something that they're requesting a variance from. So I got paid directly to do my work.

Mr. Giroux: I think it would be very important to have disclosure. And that would probably raise the level of recusal. So it's not that you can't do it, it's just that you have to follow the procedures in order to protect yourself, ethically.

Chairman Tanaka: Okay, thanks.

Ms. Kapua`ala: Okay, thank you very much, James. I'll take the mic. from here, and we'll invite James back to close the show. So feel free to ask questions at any time, something that you wanna clarify, or new Members, no need to be shame. This is my presentation on what are variances and appeals. So first, we're gonna go over variances. We'll discuss your authority; what are area variances and use variances; as well as the titles that you have authority over, which are Titles 12, 16, 18, and 19, which are administered by the Department of Public Works, as well as the Department of Planning. We'll also go over the appeals. The authority, again, is the Maui County Charter. We'll go over the standards of appeal, as well as procedures.

Now, first of all, variances. Your authority comes from the Maui County Charter, first of all, which authorizes the Board to hear and determine applications for variances from the strict application of any zoning, subdivision, or building ordinances. Now, again, that's Public Works and Planning. So any variance from the codes that they administer.

The Maui County Code says that the Board of Variances and Appeals shall comply with the general plan and community plan provisions of the County. How many of you guys know about the general plans or community plans? There's one for every district: Kihei/Makena, Wailuku/Kahului, Paia/Haiku, Upcountry, Lahaina. And that's done usually in committees held in this very room, as well as adopted by Council.

The Board shall not grant an application for a variance which requests a use which does not conform to the applicable community plan designation for the subject property. So every property has three levels of zoning. First all, it's zoned by the State as either urban, agricultural, rural, or conservation. The County goes ahead and zones that property, which gives you standards by which you have the authority to grant variances from. And there's also the community plan which again was adopted by Council. Council does these community plan designations as the overall guidance of what they'd like to see that property be used as if it's not being used as that already. So we're talking a single family designation, public/quasi-public, business. There's many community plan designations. You'll get to know about them. If there is any conflict, it is our job, as the Planning Department, to help guide you towards not being in conflict. We'll raise the issue. So don't worry about reading the community plan documents. We'll do that for you.

The Board may grant a variance if it finds that due to the particular physical surrounding, shape, or topographical condition of a property, compliance to the provisions of this chapter would result in hardship to the owner which is not mere inconvenience or economic hardship on the applicant. I underlined those phrases right there because they're very important. We're gonna go more into it as the presentation goes on.

So there's two types of variances: one, area variances; two, use variances. Area variances are having to do with the structure itself: a building located in the setback, a building may be too high, the amount of kitchens you're allowed in a single family dwelling. Use variances pertain to how you can use your property. Within each zone, you're allowed a certain amount of permitted uses. Everything that's outside of that either needs a Planning Commission review and approval, County Council review and approval, or they have an option of going for the variance.

So let's go over area variances first. Area variances may be granted based on practical difficulty which is generally considered a less serious deviation from the zoning standards. The greater the deviation from what is allowed the more scrutiny should be given.

This is a Kamehameha School building. The Board has granted three – it actually held three public hearings for Kamehameha School since 2002, and granted variances for seven buildings to exceed the height limit of 35 feet. Within the public/quasi-public district, 35 feet is the limit. And they have variances to allow the learning center, cafeteria, gym, the outdoor stadium, the football stadium or they also use it for soccer, the lights, the faculty building, the arts and communication and science building. They all have a height variance that range from 38 feet and in the case of the stadium lights, it's 98 feet. So again, 35 feet is the limit. They needed a variance to get those buildings, as well as parking. They were required 1,739 stalls. The Board let them have 952. So in this case, Kamehameha School is surrounded by gulches. And they're the only public/quasi-public zoning within the mauka area. Of course, you got Kekaulike makai, but the Board granted all their variances, all their requests.

So let's go over practical difficulty. What is practical difficulty? The Department of Corporation Counsel gave us some guidance, and there are five criteria to consider which balances the need, the harm, and the alternative solution. These five criteria are not substitutes for variance standards which are mandated by Maui County Code, as well as your rules. They are simply additional guidance.

So this is the five criteria of practical difficulty: how substantial is the variance in relation to the requirements. In other words, the – well, for example, the percentage of deviation from the Maui County Code standards. We give that to you in our staff report.

No. 2, if the variance is allowed, the effect of the increased population density thus produced on available governmental facilities. Speaking of government facilities: the Maui Memorial Medical Center wanted to do an expansion, phase one expansion. So you might be familiar with the way the building is now, but that is actually 30 – no, I'm sorry, 51 feet above the requirement of 30 feet. They're actually located in a residential district, which a hospital can be, but rather than changing the zoning, they went for a variance instead, and the Board granted it.

So no. 3 of the five criteria: whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to the adjoining properties created.

Four, whether the difficulty can be obviated by some method feasible for the applicant to pursue other than a variance.

The Board should be looking at every way to obviate the variance. It should not be the most convenient method of solving your issue. It's supposed to be the most difficult. It might be the fastest way because it would take too long to go to Council. Council applications generally take about a year. So the staff would try to present that to you especially, Planning. How can this difficulty be solved–this hardship be solved in a way other than the granting of a variance? It could be moving a building. And that's something that you would have to consider.

And the last one: whether in view of the manner in which the difficulty arose and in consideration of all of the above factors, the interest of justice will be served by allowing the variance.

This is an area variance pertaining to the height of a wall. In the agricultural district, if the wall is in the setback, it must be four feet. This gentleman who is a contractor actually built the wall eight to ten feet – oh, no, maybe not ten, six to eight feet high, and asked for a variance. The Board denied it, and he had to cut it down because the Board didn't feel that he met the criteria for the

granting of a variance. That's what his house looks like today.

On to use variances. Use variances may be granted based on unnecessary hardship, which is generally subject to a higher level of scrutiny than that of area variances.

This is the Kapalua Bay Course. So right here is a stealth Verizon Wireless monopole, which they're supposed to be flying a flag on, which part of the variance conditions. So they asked for a 60-foot pole. Thirty-five feet is the maximum height. I don't know. Who was here in 2005? Nobody? Because I don't know if the Board did a good job with this one because this use is not permitted within a golf course district. And the Board is supposed to consider whether this use is – if the lot can't be used as a golf course, they could allow the variance. I'll go more into this. We'll come back to that later.

Here we go. Here are the three elements of unnecessary hardship: one, the land cannot yield a reasonable return if used only for purposes allowed in that zone; two, the plight of the owner is due to unique circumstances and not to general conditions of the neighborhood, which may reflect unreasonableness of the Zoning Ordinance itself; and three, the use to be authorized by the variance will not alter the essential character of the locality.

So let's go take this one-by-one because there's important points that you guys must consider. And this is not just for use variances, actually. The higher level of scrutiny goes to use variances, but you can use this for area variances as well.

So first of all, reasonable return. The land cannot yield a reasonable return if used only for purposes allowed in that zone. We should've gone back to that golf course because can that land yield a reasonable return if used only for the purposes allowed in that zone? Kapalua Bay Course, you think that it would shut down if it didn't have Verizon Wireless' monopole?

This property actually is a variance that was granted last year – I'm sorry, two years ago–the Hecht Subdivision. It's a two-lot subdivision that asked for a variance from road-widening, paving, and the installation of fire hydrants along several miles because it's a huge lot. And what the Board did was they granted the variance because it required the installation of stand pipes at a different width. And they also said that no dwelling could be erected on the large lot unless all of the road improvements that they asked the variances for were installed. And I researched this today. They have withdrawn their application for subdivision.

This is just an aerial view of their lot. They said that they had a bamboo farm, and they were using it as a bamboo farm, and if I don't get this subdivision, then I don't know if I can have housing for my workers, and I might lose my lot kinda deal.

Reasonable return, so still the first element. Look at the permitted uses as determined by the Zoning Ordinance. This criteria is met if none of the uses would allow the landowner to get a reasonable return. Reasonable return does not mean maximum return. In other words, it's not the most desired use of the land. It means a reasonable use of the land. So that's something that you must consider. If the Board finds that the Zoning Ordinance prevents reasonable return of the land, the variance is thus used to prevent what would amount of confiscation of property or regulatory taking due to the application of the Zoning Ordinance. The unreasonableness of a Zoning Ordinance itself should not be mistaken as an unreasonable use of land. So if you think that that Zoning Ordinance is unreasonable, the proper way to remedy that is to take it back to Council,

because there's a problem in the ordinance. Variances run with the land and specific pieces of land taken on a case-by-case basis. So that's your job to weigh the facts.

Use variances – oh, we're still on reasonable return. It's the applicant's or landowner's burden to prove that the land cannot yield a reasonable return. According to the Department of Corporation Counsel, here are five types of evidence that can be considered: the initial purchase, price of the property, the market value of the property, expenses for maintenance, the amount of mortgage of the property, the annual income. Also, failure to sell the property for a permitted use after vigorous effort to sell is also evidence that the land will not bring a reasonable return.

Okay, the second element: no. 2, the plight of the owner is due to unique circumstances and not to general conditions of the neighborhood, which may reflect unreasonableness of the Zoning Ordinance itself.

Here's a perfect example. This is the Sandhills at Maui Lani. This is the Old Sandhills and this is the new Sandhills. And when this project district came up– Let me back up. Here's the history: Public Works approved grading plans, grading permits. And they were doing this for many years independent of Planning. So when they mass graded this lot by hundreds of feet, that actually was in conflict with Planning's ordinance pertaining to height. So when Planning was approving building permits across Maui County, they were not considering the mass grading that was being done by Public Works' approval. We would just take heights from the finished grade. And there was a lawsuit. Some of the residents within the old Sandhills sued the County because now, this mass grading took place, and 30-foot holes were gonna go on top of that completely blocking the view that they've enjoyed for years. And so to avoid the lawsuit, and actually, a private consultant contacted me on how should they best package a variance application for multiple landowners. These poor people were calling the Department. I bought a lot and now I just found out I can't build on it. My husband's gonna kill me, you know? I pushed him to buy this lot. They were just devastated. So what Council did was to avoid the lawsuit, they actually amended Planning's definition for height specifically stating that height shall mean original grade or finished grade, whichever is lower, unless you got a project district approval dated X, Y, and Z. And if you look into that, it basically applies to this.

Mr. Giroux: And also, Trish, just as information, when that case was in circuit court, the now retired Judge August, in his order specifically, warned this Body that if we were going to take this up as a variance that we should be very, very cautious because if 30 people are coming in for a variance, that is a red flag that it is an ordinance problem and not a geographical problem. And that if we were going to look at the variances, we would have to look at them as property-by-property specific to see if it met the criteria for a variance.

Ms. Kapua`ala: Thank you very much, James. I forgot all about that. There were judgements, and summary judgements, and it went back and forth for a while, so finally, we got closure on that.

Okay, so element no. 2, unique circumstances. The focus must be on the features of the land, not on the circumstances of the owner. And the reason for this is because variances run with the land. Personal situations of the present landowner should not be a consideration. Financial hardship should not be considered evidence for the granting of a variance. That's very important because I would say 90% of the time, people come here because of the financial hardship. It's too much money to move my house. I bought it this way. I didn't do it. I can't afford to cut off my building. And they'll go on and on to pull on your heart strings, and it works sometimes. I've seen it

sometimes. So you cannot consider financial hardship because then what that implies is that someone who can afford it doesn't qualify for a variance, but someone who can't afford it is perfect for this Board. And that shouldn't be a consideration. No matter who owns the land the variance stays. And if you base it off of personal circumstances, the variance would no longer apply once a new owner comes there and can afford it.

I don't know what that was. Oh, that was Sandhills, yes.

So the third element in unnecessary hardship: the use to be authorized by the variance will not alter the essential character of the locality. This is consideration is important to prevent a use variance which results in an intrusive, incompatible use. The Board must not only consider the applicant's interest, but they must also protect the interest of the neighboring community.
This again was that subdivision where it didn't quite make sense to pave this road or to widen the streets for future sidewalks, curbs, and gutters. The Board granted this variance because it, in fact, cultivated the preservation of the essential character of this neighborhood.

So here are the titles which you have authority over. This is a Public Works' title: Title 12, Street, Sidewalks, and Public Places. You have in front of you the list of criteria. And you'll notice that it uses much of the language that we just went over talking about exceptional, peculiarity of – oh, this one says business, not land. Public Works is very – heavily stresses the health and safety – health, safety, and welfare of the public. So that's very important. The granting of the permit for the exception or variance would not adversely affect the rights of adjacent property owners or tenants. In variances, we are very concerned with the immediate neighborhood, adjacent properties. So those are the properties that get notice that a variance is being applied for. It's not like a Planning Commission or Council when you do a 500-foot radius, and notify everybody within the area. It's just the immediate adjacent. The strict application will work unnecessary hardship and practical difficulty.

Title 16, Building and Construction. Much of the same language again. Any questions, please feel free to ask. I'm just gonna go through 'em slowly.

Subdivisions is that there are special geographical or physical circumstances or conditions affecting the property that are not common to all properties in the area. This sounds a lot like Title 19.

The last one has to do with interim zoning. Subdivisions cannot be granted for property zoned interim. There's a lot of interim properties in Maui still. And actually, Council wants the opportunity to change that zoning if you wanna do anything on that zoning, on that land. So you can't grant variances in the interim district – oh, no, you can't grant subdivisions in the interim district.

Finally, this is probably the strictest one because it's the most difficult one. This one you'll notice does not necessarily focus on health, safety, and welfare. This is Planning code pertaining to variances. And what we look first for is the exceptional uniqueness of the property, and how that directly causes a hardship, which is not mere economic hardship or it's not an inconvenience.
Within the interim district, there's only these two and you have find all two. Just like all the rest, you have to find all three, or all four, or all five. If you find these two in the interim district, what that means is that you can grant the variance. And then that means that your decision becomes a recommendation for Council's approval. So Council will go ahead and have a second public hearing, and your recommendation for approval or denial then becomes a consideration for Council action. The Council may override any action of the Board and either grant or deny relief as the

case may be by an affirmative vote of at least five of its Members.

Mr. Giroux: Trish, I think for that one it's so unique. We had one property. It was a County property where we're gonna do grease to diesel. And they actually found out that it was zoned interim, not ag. So instead of getting a special use permit, they had to get a permit. They came through us. We gave our decision, and then Council reviewed it, and then acted on it in accordance to that law. So you shouldn't see too many of them, but there are situations where that'll happen.

Mr. Santiago: . . . (inaudible) . . . of a parcel that's designated as . . . (inaudible) . . . ? The Kula Lodge was an interim zoning and I think that was from the 1950's or whenever, however long it was. So why the interim zoning when it's been in place for years and years and years?

Mr. Shinmoto: When they made the zoning ordinances, there's certain areas. Hopefully, they're gonna come back to– So when you look at interim zoning, it's real broad, the uses: homes all the way to ag. They didn't really know where to place them at that time. To this day, they don't know. That was supposed to be a temporary thing. . . . (inaudible) . . . So slowly, they're trying to get rid of it, but this is gonna be a long time.

Ms. Vadla: Is there a lot out here?

Mr. Shinmoto: Yes, there's a lot. Upcountry–

Ms. Kapua`ala: All of Hana.

Mr. Shinmoto: And one more thing, just to show the importance of the Board, you gotta look at these criteria very carefully because a previous Board, that HGEA Building there, that's a variance. The Board approved the variance, but it – the zoning got changed since, but I believe it was residential zoned. And how they approved it, I don't know, but that's the kinda thing that can happen. That's the power of this Board. You can approve uses that's very different from what the community wants. So that looks like a business area now, but back then, it was a residential area. . . . (inaudible) . . .

Chairman Tanaka: Trish, the walls that you were showing at Launiupoko, that was an application for a variance from Title 19.

Ms. Kapua`ala: Correct.

Chairman Tanaka: Correct. I just wanted to explain to our new Board Members that she showed the pictures of the guy cutting down the wall. So something that – you know, it's such a small thing. I think the maximum allowable height was four feet. The guy built it five and a half to six and a half feet or something like that. And if you drove through, and if you didn't know about Title 19, if you didn't know the rules, nobody would ever had thought about anything. So even though in some cases it can be something that you think to yourself, gee, what's the big deal? It's a foot and a half, you know, two feet of wall that looks nice, that looks fine, there are still – we need to justify the variances.

Ms. Kapua`ala: Yeah, justification is very important. You are a very important Board, and all of your decisions could potential be appealed to the Second Circuit Court. And the judge who was trained in law will go ahead and look at your minutes, your written decision, and what facts are on the

record that you used to base your decision on. So that's the point of trying to train you properly to avoid that going back and forth between you and a Second Circuit Court judge. So I'll go into a little bit more on that at the conclusion of this presentation. Right before we do that, let's go into appeals. I'll speak about the authority, the standards, and procedures.

Your authority again, first comes through the Charter. The Charter authorizes you to hear or determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, and building ordinances. So again, those are the Planning Director, the Director of Public Works. Whenever it has to do with a subdivision now you're opening it up to the Water Director, the Parks Director, Fire, yes, or anything to do with a building permit, Fire, thank you. The Board is also authorized to hear and determine appeals from decisions made by the Parks Director pertaining to ocean recreation activity permits. And since the adoption of this, no permits have been appealed yet so they must be doing their job wonderfully. James is praying because someone called the Mayor's Office last week and they might potential appeal an ORAP, what they call an ORAP permit.

Here are the standards: the Board may grant an appeal if it finds one of the following. And just one, so it's not like variances. Variances is you have to find all of the criteria exists. In an appeal, you only have to find either that the subject decision and order was based on an erroneous finding of material fact or erroneously applied to law. Two, that the subject or decision or order was arbitrary or capricious in its application. Or three, that the decision or order was a manifest abuse of discretion. Any questions on that? It's a lot of jargon.

Are we making you nervous, Teddy? I see your face throughout this whole thing. You're used to, yeah?

Mr. Shinmoto: You guys need a break or–?

Ms. Kapua`ala: I'm almost pau. We can break before James.

Procedures, upon being given a notice of appeal, the Board shall conduct a contested case hearing. James will go a little bit more into this. Basically, it's a mini court like a trial. But what you're probably used to seeing on T.V. is a criminal trial. This is a civil law trial. The burden of evidence in a criminal court is, James, it's called beyond–

Mr. Giroux: Beyond a reasonable doubt.

Ms. Kapua`ala: Thank you. Beyond a reasonable doubt, which means 99.9% sure that the evidence shows that this is the decision. In civil law, the words they use is a "preponderance of evidence." And what that means it's basically, 51%. You are more on the side of one decision than the other because of the facts, the evidence shows that you can grant the evidence.

In contested case hearings, the Board may act as the hearings officer, or appoint a hearings officer to conduct the contested case. In order to provide expedited relief, appeals of notice of violations must be heard by the Board. So that basically means that you could hear it yourself if you think it's simple enough for you to handle something that can be taken cared of in one day. You meet from 1:30. We usually break about 4:00, 4:30 at the very latest. Sometimes we do schedule subsequent meetings or special meetings to hear certain cases because we think we can handle it. If not, we send it to a hearings officer, which we have a list. These are retired judges, attorneys who are

seasoned in practicing this type of law. They're two hundred dollars an hour. We pay for that. The County goes ahead and pays for that on behalf of the Board. We also sometimes will hire a court reporter to take minutes, and we pay per page depending upon how long the contested case went. Sometimes we ask Chalsey or Tremaine to sit in, and they'll go ahead and type the minutes for you. So those are scenarios of how a contested case would go except for the case of a notice of violation. If someone receives a notice of violation, we want swift justice. So you hear it yourself, because the other way is a long process.

The BVA rules provide the framework for pre-hearing, hearing, and post hearing procedures. Whether the Board conducts the contested case hearing or remands it to a hearings officer, the Board is still the final authority in granting or denying appeals. So the hearings officer will go ahead and have the contested case for you, and give you a written report saying what he thinks the findings are, the conclusions are, and your decision should be, and you go ahead and make your final ruling on it. You could overturn the hearings officer's recommendation, or you could adopt it, or you could modify it, or you could send it back to the hearings officer to hear it again.

Should a party, in other words an appellant or appellee, be aggrieved by the Board's decision, the party may appeal to the circuit court of the second judicial circuit–I didn't write that right–within 30 days. So the time clock starts once the written decision and order is served. The Second Circuit Court may affirm, remand, or reverse the decision of the Board. What that basically means is they can agree with you and uphold your decision, remand it back to you for further deliberation, or reverse it and make your decision null and void. Aggrieved parties of the Second Circuit Court decision may appeal to the Hawaii State Supreme Court. So this is why your decision and order is very important, that written decision and order.

The Board has 60 days from the close of the public hearing to make a decision on the application unless the Board allows an intervention. And what that means is a person applies for a variance, or an organization, a company applies for a variance, and somebody intervenes. They feel that they have property rights or their rights are being infringed on because of this variance request, and they want to enter this case as a party. That's different from being just a normal testifier that I object to this variance. When you're a party, you have rights to – that your interests be promoted. And so if the Board allows an intervention, what happens is that goes to a contested case hearing like an appeal. It'll go straight to that whole appeal process where you could hear it yourself, or you could send it to hearings officer. But in the end, you still have the final authority, always. So this time limit only applies if there's not an intervention. If there is an intervention, this time limit goes away.

The second reason why this 60 days does not apply is if you request the application be submitted to an agency or any type of community organization for comments. And also, this happens often: if the applicant requests a deferral or fails to appear. Rarely do they fail to appear, but a lot of deferrals are being asked for nowadays.

Mr. Santiago: That brings to mind, the case of Maui Land and Pine, the Pulelehua Development. And they appealed to – what was it? The parks and whatever they needed to develop. Did that case ever get–?

Ms. Kapua`ala: You know, that never–

Mr. Santiago: They never showed.

Ms. Kapua`ala: The last time I spoke to them, they weren't moving. Yeah, the appeal is still in your queue, you know. They could pick it up at any time.

Mr. Santiago: Okay. It didn't go away.

Ms. Kapua`ala: No, that didn't go away. If they find the money to do the development, yeah, they can just pick up the appeal and say, let's get this going.

Decisions from appeals have no time limit. So once you receive your evidence, the court – I'm sorry, the contested case is concluded, or say even the hearings officer brings back their report to you, there is no time limit for appeals for making a decision. And again, James touched on it. It's because it's not a public meeting. It's a private meeting.

So the Board may grant or deny appeals, period. There's no conditions to that. You either grant the appeal or you deny the appeal. Sometimes you can grant parts of an appeal and modify it that way, but you can't say, I grant your appeal provided that you do X, Y, and Z. That's not something that we encourage the Board to do. The Board may deny or grant variances with conditions.

Standard conditions according to the BVA rules include the execution and recordation of a hold harmless agreement. What that does is it protects the County just in case there is any death, or injury, or lawsuit that arises out of your decision to grant a variance. That hold harmless agreement is signed off by the Mayor, as well as Mr. Giroux, and recorded with the Bureau of Conveyances, and will forever show up on a title report that this variance exists.

And the BVA rules also provides for – it says you may grant this condition: an insurance requirement naming the County of Maui as an additional insured in the amount of one million dollars. And that's just a suggestion. That's just a standard number. The Board has upped it. The Board has lowered it. The Board has waived that altogether.

Mr. Santiago: Under the insurance requirement, the actual Board itself is additional insured also in the County of Maui?

Ms. Kapua`ala: Mr. Giroux?

Mr. Giroux: No, it's the County as a whole, so as being officers and an agency of the County, we have – yeah, it's everybody. It's one of those rare occasions where we just say "County."

Ms. Kapua`ala: Thankfully, we have a Finance Director on our Board. So when it comes to liability, he's in there.

Any decision of the Board shall set forth in writing by way of a findings of fact and conclusions that a decision is being made. I can't stress this enough because I'm usually the one tasked with drafting the final decision and order. And if nothing was discussed other than I find that they are unique, I think they have a hardship, it wasn't their fault, that's all conclusionary evidence, but I need to know the means to the end, the reasons why, because if anyone was to appeal this decision and order, and take it to the Second Circuit Court, the judge is gonna take a look at the facts and the conclusions, and say, "Where is it? Where's the beef? You have your conclusion. What was the law that founded your decision or the facts?"

Mr. Giroux: And, yeah, the blend of facts and law, sometimes the law can be the fact, sometimes the fact can be the law. So it's just a matter of when you look at your criteria, and it says, you know, has unique topographical, say why. It's unique topographical because it's on a hilly region of Maui in Makawao where it's impossible to build a house on 500 square feet. To put the why, that becomes the law, because it's impracticable to build the house on that piece of property. So blend the facts with the law in your conversation, and that helps you to get to the conclusion.

Ms. Kapua`ala: So that's it for me. Are there any questions? I'd be happy to help.

Chairman Tanaka: You can always ask anyone any question at any time. Thank you, Trisha.

Ms. Kapua`ala: My pleasure. I kinda went over contested cases. Do you think you wanna expound upon that with your presentation or–?

Mr. Giroux: Yeah, I can go a little bit. I think we wanted to take a break and then I just have a short . . . (inaudible) . . .

Chairman Tanaka: Okay, so let's break for five minutes.

(A recess was then taken at approximately, 3:08 p.m., and the meeting reconvened at 3:14 p.m.)

Chairman Tanaka: Okay, we're back in order. James, take it away.

Mr. Giroux: Welcome back. This is gonna be real quick. It's just because we talked so much about contested cases, I made up a special slide here.

Basically, your contested cases are governed by Hawaii Statutes, Chapter 21 – or 91. And it's pretty extensive reading, so I'm just gonna try to break it in its simplest terms here.

What is a contested case? A contested case means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing. And the courts have litigated every section of that sentence to figure out what a contested case is. So I'm gonna break it down real easy.

These are the three cases that pretty much clarify what we need to know. And in J. Lounge Operating Company v. Liquor Commission, there's a citation there. That was a Supreme Court case and it was huge reading. It's about an inch and a half of paper. But at the end of the day, it just said that if a public hearing is a contested case, all provisions of HRS, Chapter 91 apply. Yeah. So we gotta follow all the rules.

East Diamond Head Association v. Zoning Board of Appeals back in 1971 already found that variances are contested cases. So for our purposes, we just have to know that all of the requirements of a contested case have to be followed when we're doing a variance. And also, it applies to appeals because appeals by its very nature are contested cases.

Once you are in a contested case, here's the requirements: you have to have notice to the people who are involved that they have a right to come before the Board and have their case heard. They have a right once they're here to submit evidence. And there's rights of cross examination and rebuttal evidence.

So the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence, as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

So somebody who wants a variance has that–the burden. And they have the burden to bring the evidence. If they show up and they just say, "Well, you know what I'm talking about." No, we don't. You gotta show us a picture. And they have to have that evidence, and it has to be persuasive to change your mind about whether or not the property should actually deviate from the standard law. The law is the law. They're asking for a deviation from the law. And that means that they have to meet the criteria in order to persuade that they should be treated different than the rest of the public.

So the degree or quantum of proof is the preponderance of the evidence. And again, it's not beyond a reasonable doubt. They don't have to bring in the actual deed that was signed and ink is from the same Judge. They don't have to do that. They can have a Xerox copy and say this is a copy of my deed. You're okay. Nobody's saying, liar, liar, so we believe you. So it's a different standard. But that doesn't mean that you don't ask questions if you have doubts. If you have doubts, is that really the deed? Yeah, it's the deed. Well, how do we know? You can ask those questions. It's just they don't have to bring in the forensic evidence that we see on C.I. – what is that? C.I.S.? C.S.I.? See, I don't watch T.V. I lived it. I don't watch it. I used to demand the DNA.

The decision-maker shall personally consider the whole record or such portions thereof as may be cited by the parties. Every decision and order adverse to a party must be in writing and accompanied by a separate findings of facts and conclusions of law. And that document has to be served on the applicant, and there's an opportunity for judicial review.

And the first one, it's just that a lot of times because we're on a board or committee and we have nine members, some members are coming in the middle of a hearing, some are leaving, the new members, as long as they look at the pertinent part of the record, you read the transcript, you see the pleadings, you can make a decision. You don't have to have been sitting there hearing the evidence. As long as you have reviewed the pertinent record, and your decision is based on that record, you can make a decision. And as long as after the decision is made, we memorialize it in an order that has the findings of fact, the reasons you were relying on to make that decision, and the law that you are deciding on is usually the criteria that we're using, then the person has an ability to understand why you made the decision, and he also has the opportunity, once he's served, to go to court and challenge that. And the judge can have a legal document that he can review in order to make sure that the decision was made in accordance to the law.

Judicial review–an administrative agency's findings of fact are reviewable for clear error while its conclusions of law are freely reviewable. And this is just lawyer talk for trying not to confuse everybody. But the findings of fact is basically, did you find something to be true? Is it a house? Yes, it's a house. Well, that's a fact. We found that it was a house. A judge is not gonna question that finding unless it clearly was not a house. It was a barn. Okay, we were wrong. Clear error. While the conclusions of law are freely reviewable like, is this a violation of due process? Well, that's legal stuff. The judge is gonna look at that in a bubble. He's gonna basically, take your – what you did, take it out of your hands, look at it in a legal bubble, and decide based on the history of case law, and he's gonna make that decision based on law. But again, from my previous discussion, sometimes the law is the facts, and sometimes the facts is the law. And so the judge has to make those clear distinctions. And we try to do it for him. We try to say these are what we

saw as facts and this is what we saw as law. But at the end of those, we have a caveat that if you find it to be a fact, then it's a fact. But if you find the fact to be a law, then it's the law. And the judge makes that decision or his clerk does.

An administrative agency's findings of facts will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or the appellate court upon a thorough examination of the record is left with a definite and firm conviction that a mistake has been made. So this is the analysis that the court has to do in order to overturn your decision.

As a general rule, an administrative agency's decision within its sphere of expertise is given a presumption of validity. And one who seeks to overturn the agency's decision bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequence. So between nine Members of this Body, your decision, once it's made, there's an assumption that it is within your expertise because you're on the Board of Variances because of your background, because of your understanding of the law and procedure that that decision has a validity. That once you make that order, we with the County, are gonna assume it's lawful. We are going to defend it when it goes to court, when we are going to try to make sure that that decision stands. And that's why your staff and your legal, while you're making those decisions, we wanna be as available as possible, so you can bounce stuff off of us, and understand what the criteria is, and what you guys are – you know, what we are looking at to see that your decision will stand, and that if we have to defend it in court, we can do it well. Because at the end of the day, we wanna be in front of the judge defending that decision, and saying, yes, we were there, and we back it up, because you're doing the work of the County.

Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings, or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are in violation of constitutional or statutory provisions; or in excess of the statutory authority or jurisdiction of the agency; or made upon unlawful procedure; or affected by other error of law; or clearly erroneous in view of the reliable probative and a substantial evidence on the whole record; or arbitrary, or capricious, or characterized abuse of discretion; or clearly unwarranted exercise of discretion. If that doesn't make your eyes roll back.

The first one would be that if your decision violates the Constitution. If it violates somebody's First Amendment, due process, religious freedom, anything like that that is basically – the Federal Constitution, that's the big guy. All our decisions have to comport with that. If it doesn't, the courts will return our decision.

Statutory is all of our State laws. Everything in the Hawaii Revised Statutes that governs land, development, all of that is – would be reviewed. And if our decision violates any of those, then the courts would overturn the decision.

In excess of statutory authority or jurisdiction, a lot of times you'll hear me talk about we are a court of limited jurisdiction. And that means we look at the variance. And if that variance under our Charter gives us authority, we can make a decision on it. If it's an appeal, we are only given authority over the question asked. If somebody comes in and says, hey– And we have the Makila decision right in front of us, the case and point. They ask us for a specific finding. And we are only given jurisdiction over that question. It doesn't then give us jurisdiction over the whole Department.

It only gives us the question: when the head of the Department wrote this letter, was he right or wrong? That's all we were asked. Not, is the whole permit process illegal? Not the question asked.

Mr. Santiago: James, would the issue of defending the Board's decision to grant variances or appeals, and if the recommendation from the staff is not to grant it, and we go against that, which . . . (inaudible) . . . how do you guys reconcile defending those decisions that we make?

Mr. Giroux: That's a good question, because the first layer of analysis is that there's the staff report, and then there's the hearing. At the hearing, if there's information that would either contradict, support, rebut, or change the analysis, as long as you can point to that and say, well, so and so testified that the incline is over 90 degrees, oh, but staff analysis says that it doesn't affect the ability to build a house, well, with the findings that now you have a different degree, different slope, they bring in an engineer that says, no, we tried, and our model shows that the house would fall down, well, then, you've got new evidence. So you insert that into your findings. That would be part of your findings of fact.

Now, if absent that, within our Department, we would have to look at who's appealing. If it's internally, if it's something like a decision of a Director, and you ask for variances, but it would most likely appear in the Director's scenario where the Director would ask our office for an attorney to represent them, they lose, your decision we assume is valid. However, the Director wants an appeal. So what happens is by law, we have to create a Chinese wall in our office. I don't talk to the litigator. The litigator doesn't talk to me. In this case, the Makila Case, I became your point attorney representing the Board on your decision. The litigator was the point attorney for the Department in trying to litigate the facts of the case. So there's a wall, and then we have to respect that. So as far as the variance goes, it's an issue of who appealed. If there's an intervenor, then it's the intervenor's burden to say that you were wrong. We would assume that – we would again assume that your decision is valid. If five Members voted for it, then we are gonna defend it, if an intervenor comes. If the intervenor is a member of staff or another Director, then we need to again make that Chinese wall. We would do the same thing. The Department would be represented by one group of attorneys, and the Board, by another. That's the short and sweet. We hope that never happens. It is possible. And it's – we have looked at that scenario in order to make sure that you get seamless coverage.

Unlawful procedure–you didn't follow your own rules, didn't give the person a chance to speak, ignored – didn't accept evidence, that would be illegal.

Affected by error of law–basically, you read the law, and you just – you read it, you either ignored it, or misinterpreted it. That, the court, would just take – again, that would be in a bubble. They would look at that, and they would read your rules, see if you read the rule right, and then apply it.

Clearly erroneous in view of the reliable probative and a substantial evidence on the whole record. And this is the one that's applied to facts. So if the facts – looking at the totality of the case, looking at it as a reasonable person, would a reasonable person think that a mistake was made? Then the judge would say, you know, I gotta disagree with the Board, and I'm gonna change the outcome.

Arbitrary, or capricious, or characterized by abuse of discretion; or clearly unwarranted exercise of discretion. That is the same criteria that you use when you're looking at an appeal of the decision of the Director. So the courts are using the same criteria. And basically, if something is done

without any facts, without any – you know, I call it the "willy-nilly." You just showed up, voted, and walked out of the room, and we didn't even have a hearing. It's just abuse of discretion. You heard the facts. You ignored it. And you just went and did what you wanted to do. Nothing to back it up. And that's, I think, was the concern of Bart is that if you go against what the Planning Department has written, is that gonna be characterized as an unwarranted abuse of discretion? The answer is no if there's facts that you can point to on the record that would change that analysis.

Things to remember–when dealing with a contested case, you are exercising your adjudicatory function. That means you are now basically, citizen judges. You must remain impartial and not openly make conclusory remarks until all of the evidence has been received. Your decision must be based on the evidence on the record. Avoid any statements that may be mistaken as an attack on somebody's race, sex, gender, or religion. And basically, this is the nutshell of the – if you follow this, we can almost guarantee that we can either keep you out of court, or if we get to court, we win.

So basically, for mark no. 2, the impartiality, you know, when the facts are coming up, it's not a violation of impartiality to question somebody. They have the burden of proof. So if you say, hey, you know, I wanna see that picture, and, hey, this picture looks doctored, do we have any other – staff, do we have any other pictures of this area? Your questioning is not a question of impartiality. It's you're doing your job. You're basically forcing the applicant to meet the burden of proof. That's okay. But if at the beginning of the meeting you say, this project's crap, and I would never vote for that, well, you wanna avoid that stuff, because you want all the evidence to be on the table before you make that remark. Now, once all the evidence is in, and you are in motion and deliberation, you can make some statements, but again, I would avoid. I would go to bullet point no. – the last one, and make sure those statements don't arose those types of comments regarding race, sex, gender, or religion because that's gonna push it into the Federal arena. And that's where the judge is gonna look at the Constitution and say, wait a second. We have a people who are patently unfair to this race, or this gender, or this religion, and that's gonna run the risk of us getting into the Federal arena where we don't wanna be. So that's it. Any questions?

Chairman Tanaka: Okay, thanks, James. Actually, does that conclude our orientation? Okay. Thank you very much. Again to all of us, if there's any ever any questions, staff is here and James is here to answer all our questions.

E. COMMUNICATIONS

1. Director of Public Works, County of Maui vs. Board of Variances and Appeals, County of Maui, and Makila Land Co., LLC - Civil No. 11-1-0189(1) Agency Appeal.

a. Stipulation Affirming Agency Decision

Chairman Tanaka: Okay, next item on our agenda, Communications. James?

Mr. Giroux: Communications, I think we talked about some of this in our review. But basically what you have on your agenda and in front of you is a copy of the stipulation affirming the Agency's decision in the Director of Public Works v. the Board of Variances.

So I was your attorney on this because the appellant was the Public Works, which was represented by Jane Lovell. So Jane Lovell represented the County, the Director of Public Works. Basically,

the decision was made by the Board, and the decision in and of itself was never challenged. From the time of the appeal, the Public Works Department was concerned that there was certain language in the findings of fact and conclusions of law that might expose their Department to liability in the future. The concern I think was valid in that the state of the special management area permit, 205A, and subdivision is not only was it influx at the time these decision-makings were made by the Director, but they are still influx. The State Legislature tried to do a remedy. That remedy just made things worse. So basically, the County is looking at basically, damage control on basically, our procedures.

And in – when the hearings officer came before us, his report basically told us if your procedures are illegal for subdivisions then this subdivision shouldn't be granted. That was not the question before us. And again, you remember I talked about we are a court of limited jurisdiction. The question before us was, if the subdivision was granted, which it was, were the conditions placed on it legal or illegal? We found that it was illegal because they were untimely. That was our decision. We gave them – we said, you know what? You did what you were supposed to do as an applicant. You should have a permit. The caveat is, is that if the Director of Public Works were to revoke your permit, we wouldn't be in the position of saying whether that was right or wrong until you appealed that decision. That decision was never brought to us. So the Director of Public Works had to make an administrative decision not only on this permit, but on every other permit that is a subdivision within the SMA. That was not our purview. That's not our kuleana. That's an administrative decision.

So what they worried about is that because we allowed the other side to draft the document, that the drafter was able to artfully insert certain phrases that would benefit them and their clients in the future. And the County objected. So the only – they did come before us and asked us to change that language. We said, well, we're done. We're done. We did what we did. We're not gonna change our decision. And so their option was to go and appeal it to the circuit court, which they did.

So during the time of the circuit court, these conversations were being made, and these negotiations were being hashed out. Offers were given back and forth. I came before the Board as your attorney to let you know that I firmly believed the decision is correct. That if the County is successful in negotiating the language that they feel would protect them, then I would sign on as your attorney and support that, as long as our decision stood. So that's what we – eventually, it took us almost a year and a half to negotiate, but we got it.

So I think about a week ago, we got the paperwork back, forward, signed. Still e-mails are going back and forth, but all of the parties were happy as far as the outcome because the applicant got his permit, the Board of Variances' decision stood, and the County felt that its procedures and liabilities for the future were covered.

And a lot of it, you know, even though the attorney managed – the opposing attorney or the applicant's attorney managed to get that language in our document, again, we are a board of limited jurisdiction. We do not change SMA law. If the Supreme Court says, this is legal or illegal. What our decision says that the findings of fact and conclusions of law doesn't change that. And that's just the facts, but to have it in our documents, it doesn't look– So I was supportive. I was supportive of the change in language.

And again, just to bring to light what that language was, it's regarding the – you remember the judge's – the judge's analysis of this whole case was that the Leslie Law, the Leslie Case, basically

said that – and this was focused at the County of Hawaii, but our procedures are exactly the same, that you cannot process a subdivision, which is in the SMA shoreline area prior to getting an SMA permit. Historically, the Counties have always done it simultaneously. And it makes sense. It makes logical sense to do it that way. The Supreme Court didn't see it that way. They said, no, you do your SMA first, you go get your subdivision, then there's no problems of whether or not your subdivision violates the SMA. You do it sequentially.

In reaction to Leslie, the State Legislature took up a bill. I can't quote you the name or the number, but they took up a bill. They actually based this law within SMA – the 205A. It says what is and what is not a development. In the first part of the statute, it says any subdivision of land is a development. Then it starts talking about what's not a development. And it says final subdivision is not a development. The best and brightest. That puts the Counties in the worst possible position because now, what's a development? If any and all subdivisions are developments, but final subdivisions aren't a development, what does that make a preliminary subdivision, which are neither subdivisions nor final? So there's gotta be a political solution to that. And that's the discussion going on. So we got sucked into all of that by this one subdivision that basically, did what they thought they needed to do, felt that the County didn't move fast enough, and we agreed. So that's basically what's happened. And so the decision and order affirms your decision and order with the modifications agreed on by all parties. So there's no further action necessary.

Chairman Tanaka: It's funny that there were 36 of them.

Mr. Giroux: Findings of fact, some of which are law, and some of which are facts.

Chairman Tanaka: That's why it takes a year and a half. Okay. So when I was talking to James, this is just for our information. It's a communication to us saying that this is the end result of what we have gone through or what James has gone through for a while. Was that it?

Mr. Giroux: That's it.

Chairman Tanaka: Okay.

F. APPROVAL OF THE MARCH 22, 2012 MEETING MINUTES

Chairman Tanaka: The next item on our agenda would be approval of March 22nd 2012 meeting minutes. Is there anybody who would like to move to approve those?

Mr. Santiago: I'll make a motion to approve.

Chairman Tanaka: It's been moved. Do we have a second?

Ms. Haraguchi: I'll second.

Chairman Tanaka: Moved and seconded. All those in favor of approving the minutes, please say aye. Any opposed?

It was moved by Mr. Santiago, seconded by Ms. Haraguchi, then

VOTED: To approve the March 22, 2012 meeting minutes as presented.

(Assenting: B. Santiago, J. Haraguchi, R. Shimabuku, T. Espeleta, B. Vadla, G. Abbott.)
(Excused: R. Tanner, P. DePonte.)

Chairman Tanaka: **Minutes approved.** Just for Teddy and Clark, typically what– I guess you received a copy of it. So in this case, our last meeting was six pages long, or seven, nine, whatever. Potentially, they do get lengthy. And to go over and actually sit down and read word for word, I'll just give you a little suggestion. Well, what I have done in the past anyway, as a Board Member, I would – at the very least, what I made sure would be anything that was recorded that I said, I wanted to make sure that it's– I don't know wanna approve anything that I said no and it says I said yeah. So just to let the two of you know. Thanks.

G. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Chairman Tanaka: Next item, Director's report. Trish, do we have–?

Ms. Kapua`ala: Nothing to report other than we are choosing a hearings officer at the next meeting for an appeal for a property located on Molokai. And there also has been a recent appeal. I can't tell you the subject right now, but that'll be coming your way at the next subsequent meeting or the meeting after. So we're starting to get busy.

Chairman Tanaka: And that will be on our Thursday, April 26th meeting? Okay. Is there anything else from James, Trisha? Thank you very much, Trish. Your orientation's getting better every time. No, I appreciate the examples that you have. From day one, when I got on the Board, I don't think you had anything, but your examples help a lot. They do.

Ms. Kapua`ala: Thank you.

H. NEXT MEETING DATE: Thursday, April 26, 2012

Chairman Tanaka: Okay, if there's nothing else, our next meeting is Thursday, April 26. Again, gentlemen, welcome to the Board. I look forward to the next five-year sentence – a five-year term. Thank you very much. Meeting adjourned.

There being no further business to come before the Board, the meeting adjourned at approximately, 3:47 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Chairman
Ray Shimabuku
Bart Santiago
Bernice Vadla
Jacqueline Haraguchi
Teddy Espeleta
Gene “Clark” Abbott

Members Excused:

Rick Tanner, Vice-Chairman
Patrick De Ponte

Others:

Aaron Shinmoto, Planning Program Administrator, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel