

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

(Approved: 5/10/2012)

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 26, 2012, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

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

Chairman Kevin Tanaka: Good afternoon. I'll now call the meeting of the Board of Variances and Appeals to order. It is now 1:36. We have a quorum of six Members.

Let's see, agenda items, if there is no objection, we'd like to take it out of order and jump straight to Item D of Unfinished Business.

D. UNFINISHED BUSINESS

1. **CHRISTINE A. GALE appealing the Director of the Department of Public Works' Notice of Violation (V 20010069) for the construction of a mezzanine without first obtaining the proper building permit, for property located at 3975/3985 Lower Honoapiilani Road, #215, Lahaina, Maui, Hawaii; TMK: (2) 4-3-008:002:0041 (BVAA 20110003). (Deferred from the 10/27/11 meeting.)**
 - a. **Appellee, Director, Department of Public Works, County of Maui's motion to stay appeal pending Appellant Gale's complete abatement of violation;**
 - b. **County of Maui's preliminary exhibit list;**
 - c. **County of Maui's witness list; and**
 - d. **County of Maui's certificate of service.**

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

Ms. Mary Blaine Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, representing the Director.

Ms. Christine Gale: Christine Gale, and I own Polynesian Shores No. 215.

Ms. Johnston: This is a quick background. This came before the Board on an appeal by Ms. Gale of a notice of violation about six months ago. And we continued to give her time to deal with the problem. She has dealt with the problem by removing everything that put her in violation. And Neil Nicholas can explain just very briefly what she has done.

Mr. Neil Nicholas: Originally, when I went out on the RFS, there was a loft in her unit, and it was unpermitted. So we gave Christine an opportunity to get a building permit or remove it. And she chose to try and have it permitted. But because of fire codes and other things, there were so many

roadblocks that finally she decided just to remove the loft. So I was out there last week and everything was removed but the decking. So I went back and checked with the Planning Department, and they said she could keep the deck except for five square feet if she wanted to get it permitted. But Christine wanted to end this whole process because I guess it's been painful for her. So an inspection was done yesterday and everything was removed to end the violation. So yesterday's date will be the date that we stop the fines.

Ms. Johnston: I'm gonna give Ms. Gale a chance to talk. I would add this is sort of an unusual situation that maybe we just continue this for one month. There probably will be nothing further that the Board will have to consider since you don't get into the fine issues, but just to be sure everything is taken care of.

Ms. Gale: I just wanted to let you know that the reason that I decided to not permit or to obtain a permit and do what they asked me to do was because there was so much mixed – everyone had a different answer. And in order for me to have the loft, the mezzanine, of any kind, I had to fire sprinkle. There's 52 units. There were only two of us turned in by– I later– I now have the document by an employee that I pay my homeowner's due to and a board member. And only two of us were turned in. Only two of us are being asked to put in fire sprinklers. So I paid Engineering Dynamics \$1,800 for their draft. And then they said it was gonna be \$4,300 for the sprinkler system. And then Kris McPhee over at the Water Department said that it would be – that the meter and the pipe coming off the road was too small, and so it could be anywhere from \$43,000 to \$123,000. And then he retracted that e-mail, and sent me an e-mail, and said that, no, that was not gonna be enough, that we had to have a dedicated line for domestic and a dedicated line for irrigation into our property. So it wasn't that I didn't want to have my space, and to reduce it, and to abide by the rules. I can't afford that. And to be honest with you, all these other people in my complex that have what I had, I don't even think as a group of us, we could afford that. And I just want this over. I want the County off my back. I don't want anybody to come to my door again. I didn't do anything wrong. I bought it this way. It's turned me into a person that I don't wanna be.

Mr. Rick Tanner: Could I ask you a question?

Ms. Gale: You can ask me anything you want.

Mr. Tanner: Just to jog my memory on this, I remember most of it, but you purchased the unit as is, that the loft was already there. You mentioned that two people in the complex–

Ms. Gale: Only two of us.

Mr. Tanner: How many units do you think have the same mezzanine or loft?

Ms. Gale: There's 26 upstairs units. All of them have. They're all different styles. I even talked to some of the board members that were on the board. The complex was built in, I think, 1972 and in 1974. There were three or four board members that came over to the County. And they talked to someone at the County, and they said, "What do we have to do to put lofts in?" And the County said, "Whatever happens within your four walls is up to you." And back in the day, I don't think they did – you know? I don't know who the member was that she talked to. She doesn't want me to use her name or her husband's name because she doesn't want anybody knocking on her door, and I respect that. So–

Mr. Tanner: Is the notebook that you have there, is that all just related to this loft?

Ms. Gale: That's only one of them. I have three. That's what I thought I might be asked today. I keep everything. As a trade, I'm a speech pathologist. I document because I have to go in and show parents how their children do. So— And I have some things filed under two areas because it might come up in two different situations.

Mr. Tanner: Yeah, I manage a large association so this is, for me, a very disheartening story, and I feel really badly for you. To have to go through all this, and then having to remove it, and things like that, I know is incredibly difficult.

Ms. Gale: It's not the same. You know, it's not the same home. Did you read March 29th's newspaper on the front of it—the Molokai Case where the couple were—? That's how this all started is because I was being intimidated by the resident manager. And I had gone to the cops. And they told me not to bring it – not to get a restraining order until I had pictures of what he was doing. And so I bought a motion detector, night-censored camera. And that stopped part of what was going on, but it's still happening today. He still comes onto property. So I just have to get this cleared up and then decide— I don't wanna sell it with the market the way it is now. My property value has, you know, everything I've worked for, for the last 30 years is— So—

Mr. Tanner: Thank you.

Ms. Johnston: I guess the request is just to continue this for about a month so we can wrap up the loose ends and just in case we need to come back for some reason.

Mr. Bart Santiago: I have a question. You mentioned fines. Have there been fines assessed on this case?

Mr. Nicholas: Yes.

Mr. Santiago: What's the amount?

Mr. Nicholas: \$179,000 plus the original \$500 fine.

Mr. Santiago: Does the County expect to collect that?

Ms. Gale: There's no way I can pay that.

Mr. Nicholas: No. I think these fines are in place because some people completely ignore the County, and don't follow through on things, so the County has to take this action.

Mr. Santiago: So the fines have been levied but the County doesn't expect to collect it?

Mr. Nicholas: Well, I guess they can do that if they want, but they'll probably put her out of her home. That's not my decision. I, you know—

Ms. Johnston: Maybe I can help you out. There is a set fine schedule. It's set under the code. It's subject to – there are guidelines for adjusting that fine. The Director can adjust the fines and

usually that's what happens. When you have a huge amount like this, there is an adjustment. And the fines that Ms. Gale – I guess you have to pay will be probably considerably less because she has cooperated. There are many people who don't cooperate, and that's one of the reasons, I believe, maybe Mr. Giroux can help, that the fines – the daily fines are set pretty high is to try to encourage people not to take it lightly, but to go forward and correct the violation. So the fine amount is up in the air. I mean, there is a fine under a schedule. When it finally gets levied by the County remains to be seen.

Mr. G. Clark Abbott: Mr. Chairman, who – what board has the decision over the fine whether it will or won't be, or how much, or whatever? It's this Board?

Chairman Tanaka: No, the Board does not have the authority.

Mr. Abbott: She mentioned "Board."

Mr. James Giroux: I just want to clear that up. Because of the nature of ongoing fines, the County has just said that they've stopped the clock. So the fact that there's still an appeal on the books, there is a certain amount of negotiation that can go on between the County and the appellant. So – and that raises a whole other issue of whether or not at the end of the day those fines are fair or not. If there's a . . . (inaudible) . . . that's another appeal.

Mr. Abbott: Thank you.

Chairman Tanaka: Okay, so if there's no, I guess, no objections from the Board or any other questions–

Mr. Santiago: I just had one last question, the clarification on the fines. Were those fines being assessed daily since the deferral of this hearing from August, October, last year?

Mr. Nicholas: The way the process works is we give people 180 days, six months, to get a building permit. And if they don't obtain their building permit within that 180 days, then we send them a notice of violation and saying you have another 30 days to get your building permit. And if they don't get it within that 30 days, then fines start at a hundred dollars a day. And the next month, they double to two hundred dollars a day until they top out at a thousand dollars a day. And the fines just keep running till the violation is removed.

Mr. Santiago: Doesn't answer my question. Were the fines being assessed all through this time while we were waiting–?

Mr. Nicholas: No, no, not all through this time. They started because she did not get a building permit for the space she had. That's when we started the fines.

Mr. Santiago: But it was suspended during this hearing?

Ms. Johnston: No.

Mr. Santiago: No?

Ms. Johnston: No. It continues to run on paper, but that's certainly one of the things to be considered by the Director when they determine an exact fine amount.

Mr. Santiago: So since the last time we heard this case, which was in October 2011, and we deferred the hearing until now, every day there's been a fine assessed? A thousand dollars a day throughout that time until now?

Ms. Johnston: Correct.

Mr. Santiago: Wow. Thank you.

Chairman Tanaka: Okay, again, on paper, the clock kept ticking. I believe that—

Mr. Santiago: Does it make sense when you're in a hearing or a contested case?

Chairman Tanaka: Well, in this process, because the—

Mr. Santiago: It doesn't make sense. It should be suspended if you're in a hearing or a contested case. Does that make any sense to anyone?

Chairman Tanaka: Yeah, there are times when we have been — where the clock has been stopped. But in this case, particularly, I believe that the Director — the fines shall be — I don't wanna speak for the Director, but significantly— I mean, all factors are weighed in when there is a settlement reached.

Mr. Santiago: I don't know, James, is that something that should be considered or discussed? The procedure doesn't make sense that if you're in a contested case, you've filed an appeal, you're in a case, that the fine continues. It's just doesn't make any sense.

Mr. Giroux: Yeah, I guess as a historic background as far as the challenges of enforcement, when there's a violation, the County doesn't know what that person's gonna do. And so in order to set firm boundaries, if a person knows there's a violation, then there's a leeway time, and that person can correct it. Once that time is over, and there's a decision to be made, are they going to remedy that infraction. There's an issue of time. Somebody can say they're gonna do it. Two years later, you do an inspection, nothing's happened. If you're not accruing the clock from the time you give 'em the warning, there's no way to calculate the fine. So this sets a bottom standard that at least everybody knows what's on the books from the day that the clock starts ticking till it ends. Now, if it's resolved, if there's an appeal, and the person wins, it's zero. There's no infraction, hence, no fine. If in the middle of the process, it's remedied, then the Department has to go back and look at whether or not they feel that there was good faith in the time it took, whether or not there was cooperation. There's factors that they have to take into effect of whether or not the end fine that they demand is reasonable or not. So in the law when somebody does ultimately remedy the situation, there's a presumption that the fines should be less because there's a remedy. But whether or not there was good faith involved, or whether or not somebody was hiding the ball, and then at the last minute decided, okay, we're gonna do it, there's a lot of factors that have to be determined, and that has to be done by the Director, and he has to use his discretion. The problem is, or the issue is, is that the letter of the law starts the clock ticking, and ends the clock ticking, and then we take it from there. And then that's where the Directors have to evaluate the case — case-

by-case basis.

Mr. Santiago: I guess my only question, last question on this is, this is a deferral from 10/27/11. I don't recall the issue why it was deferred. Could that be construed as having extended the time by not making – allowing it to be heard? For the case to be heard so that we can make a decision?

Ms. Johnston: Let me speak to that because I went back and reviewed the transcript from the last hearing. Ms. Gale's appeal did not challenge the fact that there was a violation. She said she bought it violation in place. It was not disclosed and had tried to deal with it. So there was never an issue in her appeal about whether there was a violation or not, which is very unusual. Usually you come in and say, no, I really didn't have a violation. What she needed was more time to try to address whatever she was gonna do to fix it. She finally, I guess, just very recently made the decision rather than trying to keep going with all the costs that she's recited to you, it's just better to take it out. But in that timeframe, the fine, technically, under the rule keeps running. And again, there's discretion on the part of the Director, the Department, to weigh her good faith efforts in adjusting the fine. And I think that usually happens. The fine, we come in and say, oh, this has been computed strictly according to the rule. It rarely is the fine that's finally assessed and okayed. But I can't – it's up to the Director. I can only say that it's just for the general–

Ms. Gale: The reason I took it to the final days is because I kept trying to get somehow to be able to save it, but there's no way I can afford those. I can't put sprinklers. So it's easier just to rip it out.

Chairman Tanaka: Okay. Ms. Johnston, so you're saying a month from now you would report back to this Board as to the–?

Ms. Johnston: Yes, either we'll file a dismissal, or just put it on the calendar and call it up. But Mr. Nicholas has indicated the fines have stopped as of today? Yesterday? Yesterday, so that's–

Chairman Tanaka: Okay, so if there's no objections from the Board, we'll defer this item to a month from now where we will be brought up to the date on the settlement.

Ms. Johnston: Yes, thank you.

Chairman Tanaka: Thank you. Okay, back to the first item on our agenda, Appeals. Trisha?

B. APPEALS

1. Determine a hearings officer to preside over the following matter:

WILLIAM C. BYRNS of MACDONALD RUDY BYRNS O'NEILL & YAMAUCHI representing LINEX INVESTMENTS, LLC appealing the Planning Director's decision to require a fifteen (15) foot agricultural setback for a garage/storage structure on property located at 3412 Kalua Koi Road, Kaluakoi, Molokai, Hawaii; TMK: (2) 5-1-007:064 (BVAA 20120001).

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

Ms. Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, appearing on behalf of the Director. Last week I had talked with William Byrns. He's the attorney for the appellant in this case. And we have agreed on a hearings officer. We would ask that the Board appoint Judge John McConnell. We have talked to Judge McConnell. He is available and willing to undertake this assignment.

Chairman Tanaka: So, Board Members, if there are no objections, this Board will recognize Judge McConnell as the hearings officer for this case.

Ms. Johnston: And let me just represent for the record, I told Mr. – Mr. Byrns is an attorney in Honolulu. And I told him, during our agreement, he need not make the trip over here. His client is on Molokai. Same thing. I said just if we agree ahead of time then everybody can save some money, so that's why they're not here.

Chairman Tanaka: Thank you. Alright. Next item, Variances. Trisha?

C. VARIANCES

- 1. PAUL L. HORIKAWA, ESQ. representing JONATHAN ROSS and SEAN ROSS requesting variances to delete: (1) The requirement that right-of-way access streets be a minimum width of twenty-four (24) feet, as required by Maui County Code, §18.16.060; and (2) The requirement to pave a portion of Door of Faith Road, as required by MCC, §18.20.040, for the Huelo Hui Partition Lots Subdivision (Ross Subdivision) (Subdivision File No. 2.2063) located at 215 and 295 Door of Faith Road, Huelo, Maui, Hawaii; TMK: (2) 2-9-007:020 (BVAV 20100001).**
 - a. Request to delete the requirement to obtain an insurance policy with a minimum policy limit of \$50,000.00 and name the County of Maui as an additional insured on said policy.**

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

Chairman Tanaka: Mr. Horikawa?

Mr. Paul Horikawa: Good afternoon, Mr. Chairman, and Members of the Board. My name is Paul Horikawa. Also present before the Board is Jonathan Ross. Jonathan is one of the applicants. Jonathan's brother Sean, he's a longshoreman, and so when they have work – because of the economy, it's slowed down, so I ask – because of his commitment and the need to feed his family, I ask that his absence be excused today. It's tough going around in the community, but I would ask that you forgive Mr. Sean Ross for not appearing.

By way of background, the Board may recall that this matter came before the Board on September 22nd of 2011. And the Board had granted the request for the variance subject to the condition that my client obtain an insurance policy and name the County as an additional insured. They did attempt to get the insurance policy. And by way of a letter dated March 16th 2012, I had sent a letter asking the Board to delete the requirement. And one of the reasons was that they could not

get the insurance. What I would like to do is circulate something else to the Board. This is a letter . . . (inaudible) . . .

Chairman Tanaka: Paul, can you speak into a mic.?

Mr. Horikawa: Can you hear me? Mr. Chairman, what I'm doing is I'm circulating a letter dated the 24th, 2012. When I had prepared the original letter, I was having some computer problems, and I could only print one of the pages that's attached to my initial letter to you, but what I did was I was able to print out the whole transmittal that was sent to me.

And what you have before you is a letter – well, actually, it's my letter, but the attachment is of more concern. And the attachment is from Leonard Oka. You may recall Leonard Oka. I think his claim to fame is the Nisei Center, Sons and Daughters, and the Center, but Leonard was also a member of the Board years ago. So he was – I had suggested that they go through Leonard because he has a background regarding these matters, and so he's also in the insurance business. He's a broker, an insurance broker.

And attached to his communications are six communications declining to provide the insurance coverage that the Rosses had requested. The first is a letter. It's a communication dated February 10th 2012 from Island Insurance Company in which they were unable to provide a quote or issue the policy because of restrictions on the underwriting. And there's another one from Fairmont Speciality in which they declined because of the – I guess, well, they just declined to provide a policy. One of the reasons is they do not acknowledge the existing of a road-widening variance as a commercial operation.

I will note that this property is located in Huelo. It's approximately 20 miles in the Hana direction from Paia. And one of the reasons why the insurance didn't really wanna issue the policy is if there was a fire, it would probably take a half an hour to 45 minutes to get the fire truck from Paia out to Huelo. And because of that consideration in the past, they don't even have insurance for their own homes as it stands today. And that was one of the difficulties that they came across in trying to get the policy that the Board had imposed as a condition of granting – the granting of the variance.

I will note that in looking at the minutes of that meeting, the Board asked my clients what their position was. And we had asked that the Board grant the variance, but we reserved the right to come back before the Board in the event that if the – in the event that it was cost-prohibitive to obtain the variance. And it's not an issue of cost-prohibitive, now, it's just that they can't even get the insurance now. That's kind of where we're – what we're facing right now. And because of that, we would ask that the Board delete the requirement that they obtain the insurance policy.

As far as the other requirements, my understanding is that all of the other requirements have been satisfied, but it was just with this one issue. And then, they may – not only did the Rosses work pretty hard in getting the variance, I had numerous conversations with Leonard in trying to – you know, how we could rephrase the request. But in the end, it came down to the final answer being they cannot get the policy.

Mr. Santiago: Paul, can you remind us? Didn't we have hold harmless language as a contingency?

Mr. Horikawa: That's been submitted to the Department. It's been executed and it's with the Board

right now.

Mr. Santiago: Thank you.

Chairman Tanaka: I have a question for James. I mean, it's interesting. We've had the request for— This is in my limited experience, but this is the first time that actually came back and said nobody would give them the insurance. But in looking at it, most of our variances, we kinda go through this back and forth a couple of times in the amount of insurance, if there is the insurance requirement that goes along with it. It has always been my understanding that legally, the County is not held liable because of the variance, and it is in writing through the hold harmless agreement. Now, having the additional insurance, while I understand the principle, I don't necessarily agree with it a lot of the times. I guess I'm posing this question: how does this Board even address this?

Mr. Giroux: Well, in your own rules, there's a section that talks about the hold harmless agreement and that you can ask for a million-dollar liability insurance to go along with that hold harmless. But there's also a section in that rule that says that you can reduce that in accordance to the liability that you see that the variance would most likely cause. We have situations where people are building their house three or four inches too high and a million-dollar insurance wouldn't make any sense because the liability would be that if somebody climbed to the top of that and fell, and we're to assume that it was the County's fault for giving them the variance, and they wouldn't have fell and broken their neck, you know, these are the kind of lawsuits we're trying to protect ourselves against. A typical homeowners insurance would cover a majority of the defense and most likely a summary judgement. So that's the kind of risk analysis that's made is what kind of liability would the County likely see itself being dragged into as a lawsuit. Where there's definite liability where somebody's building up onto a cliff side, and there's chances that the cliff falls, or something falls on the house, and somebody could die, you know, we look at the situation and say, well, if this is a ten million-dollar home, what's the risk to the County if we're dragged into a lawsuit and found liable for allowing a variance in a dangerous situation.

So there's no — nothing written in stone on what this number is. It's kind of — we do have a Department within the County called Risk Management. That's their expertise. They look at the insurance issues, look at what our exposures are. And we, as the County, are self-insured and we have various underwriters. It's a complex arena. I'm not gonna say I'm an expert in it. I think I've dealt with it enough to understand that it's complex. But unless you're talking to somebody who's an underwriter, or a risk manager, or somebody like that to understand exactly what you're dealing with, what is the coverage, what's the cost, what's the liabilities you're looking at, it's a— We kind of leave the issue to the Board because you're the ones reviewing. You get the topographicals. You get how much of a variance is this from the normal run of the mill construction project. Or is it something that is health and safety — raises a health and safety concern? So a million dollars is not set in stone. In this case, you guys dropped it down to fifty thousand. So it's just an issue of right now, we're being told that it's not — they're not able to acquire it.

Mr. Horikawa: Can I make—? I'll make three statements dealing with pretty much the same issue. One, several years ago, I think this is like two or three years ago, we did the variance for the expansion of the Binhi At Ani. And as you may recall, the Board in that particular case, they waived the requirement that they get the insurance. And that was only for a parking variance.

But more to the present, I think an issue that's more at hand is on the September 22nd agenda, we had the Morreira Variance, but because of the time that it took to deal with that particular issue, that

particular matter was carried over as unfinished business, and I think we took it up either on the 13th or the 27th of October. And it was the same – the Morreiras and the Shims, they had the same request that the Rosses had with respect to their subdivision that was right below Kula San. And in that particular case, the Board did grant the variance, but they did not impose a requirement that the Shims and the Morreiras obtain the insurance. And in that particular case, I think there was justification for it.

As Jim said, it's up to the experts. And in this particular case, based upon the comments of the underwriters, I mean, they just – they don't wanna – for whatever reason, they just don't wanna provide a quote. They don't wanna write the policy. So it's sort of like an impossibility situation where it's really difficult for them to get the required insurance. They would like the variance, but they would also request that you delete the requirement because of what they've been told by their insurance carriers.

Mr. Santiago: I'd like to go ahead and make a motion.

Chairman Tanaka: Go ahead.

Mr. Santiago: Motion to delete the condition of the insurance for the simple fact that there's no opportunity to secure insurance.

Mr. Tanner: I'll second.

Chairman Tanaka: It has been moved and seconded. Discussion?

Mr. Abbott: Please, Mr. Chairman. I'm not familiar with a lot of this. I've read all we have here. My concern is health and safety. They are admittedly and according to the insurance company, 20 miles away from the nearest thing they even want to touch. If the road is to be used for emergency vehicles, i.e., Fire Department, Police, whatever else, and intruders, you know, who knows what's gonna happen? Somehow the County's got to be protected and this Board. And I don't think it's a wise idea to not insure somehow.

Mr. Santiago: But I thought the hold harmless protected us.

Mr. Giroux: The way a hold harmless works is that basically, it's a document that if something happens and there's an injury or a loss, the person who has that injury or loss sues somebody, and the attorneys do a shotgun. The property owner, you know, who built the road, who built the fence, who's required to maintain it, who's required – who has custody, control, the complaints are like this thick. The County somehow gets dragged in there because we gave them a variance.

The hold harmless states that – basically, we tender to their insurance company and says, hey, there's a hold harmless. That means you defend us in this case. Now, with the hold harmless, it's only as good as the person's ability to tender a defense meaning that if they don't have insurance, that's usually your defense. Without insurance, you're asking the homeowner to carry the burden of your defense. That means he's gonna hire his own attorney. His own attorney is gonna be defending you and the money's gonna come out of his pocket. Now, as a homeowner, something like that is very – if you catch yourself on the back end of that puppy, you're gonna get kicked because as a homeowner, that's – you know, we're talking – if somebody – a death or an injury that

ends up in somebody not being able to work for the rest of their lives, you're talking about three, four, five, ten million dollars. That's just what they're asking for. The cost of litigation, you can automatically just throw in a third of that just to get you started. We're talking depositions, medical records, experts, you know, it goes on and on. It's expensive. This type of litigation is very expensive. People – lawyers mortgage their homes in order to finance this type of litigation. So that's when they think they're gonna win. When you're on the possible losing end of that, it really becomes a real burden on the litigant. You know, we're talking worst case scenario, and that's what insurance is for is when things don't go the way that you had dreamed. Hopefully, the insurance company that you've hired has the resources to protect those interests.

Mr. Abbott: If I may? Did I not hear from Mr. Horikawa that he said that the homeowners themselves don't have insurance on their own properties?

Mr. Horikawa: That's correct.

Mr. Abbott: It's a touchy situation.

Chairman Tanaka: I guess specifically to this, the issue of insurance, it's not – we're not talking about if the property owner's house burns down and having the insurance to pay for building a new house. We're talking about by the granting of the variance that if somebody – if the roadway had been widened to 24 feet, the road was that much safer. So if somebody died on that road, got run over on the road and sued them, the County would become– Now, there is an agreement that goes along with it which is legally binding, but like James had just described, it is possible that the County could be dragged in too. Part of my feeling is that when you talk about something in an extreme case where a hundred million dollar lawsuit, what does a million dollars of insurance do? What would ten million do? What would no insurance do? So we weigh that as well. None of which helps me – direction here.

Mr. Santiago: We're talking about a fifty thousand-dollar coverage. If there's gonna be a critical case, what's fifty thousand, really?

Chairman Tanaka: And actually, Mr. Horikawa, in our meeting minutes, I believe it was – the number was reduced from a million to \$500,000.

Mr. Santiago: Not \$50,000?

Chairman Tanaka: In your letters to the Board–

Mr. Horikawa: Well, what I did was I was looking at the letter dated January 30th that's attached to the March 16th letter. That's the approval letter from the Department. I had just quoted what the Department had sent to me regarding the preparation of the hold harmless.

Chairman Tanaka: Interesting. You're missing a zero there. Well, Board Members, any more discussion? More questions? We have a motion. We have a second. So we are procedurally in discussion of that motion.

Ms. Kapua`ala: Excuse me, Mr. Chair, the record should be corrected that it is a \$500,000 insurance requirement that the Board–

Chairman Tanaka: It was reduced to \$500,000.

Mr. Horikawa: With that, I would also request that my letter to be revised to include the amount that the Board had granted when it acted on the matter, whatever it is.

Ms. Kapua`ala: That is not a problem, sir.

Mr. Horikawa: Thank you.

Chairman Tanaka: Help. Board Members, we are still in the discussion phase of our motion. Any more discussion?

Mr. Ray Shimabuku: Well, for me, I would agree with Mr. Abbott. If this was 30, 40 years ago, maybe no problem because back then, people didn't sue as it's happening. But in today's situation, you know, anything goes now days, you never can tell. That's my only concern.

Chairman Tanaka: Now, Mr. Horikawa, correct me if I'm wrong. My recollection of this and by kinda skimming through our minutes was that – well, the character of the area, the Public Works or the County of Maui says you need 24 feet of pavement or access? A 24-foot right-of-way or pavement? Well, we granted the variance from that?

Mr. Horikawa: Yeah, there were two requirements. One, as the Board may recall, one, there is – this subdivision is like a ten-year-old subdivision? How old?

Mr. Ross: . . . (inaudible) . . . We got a preliminary approval in 1992. I think somewhere it states that. We've been working on it since then. It's not to be developed. It's for family members to build houses. The County wouldn't let us build more than two houses onto 12 acres. So basically, when my parents were alive, we went to split it, you know, the five ways. That's just a little background on it.

Chairman Tanaka: Yeah. Now, how many lots?

Mr. Horikawa: Five lots?

Mr. Ross: Five and one dedicated to the County, right? Six.

Mr. Horikawa: Let me explain the context of the 24-foot. What happened is this subdivision has been pending for about almost 20 years now. And what happened was in the interim, as you may recall, there was another subdivision that's closer to Hana Highway that was being processed, and that was the Wimberly Subdivision. You're familiar with the—? And what they found out was the roadway was in the wrong location. Even though the roadway, according to the maps that were prepared for the State, as well as the Territory— I mean, we even went back to the maps that were prepared in the '30s. And the map we found was – it appeared to be in the same location. And even in some of the State maps showed the roadway to be 30 feet. But when they did Wimberly, they said that the road was in the wrong location. And because of that, because the road was partially in the Wimberly's property, and part of it was in the original location, they said it was less than 24 feet. I think there was testimony presented to the Board that the actual width of the road is like about 30 feet. But because it presented a potential issue, we asked for the variance because

there was – I think the – Subdivisions was taking the position that it was less than 24 because it was – a portion of it was on private road. So that was the nature of that variance.

The other variance is to delete the paving requirement. They would be required to go pave what is now known as Door of Faith Road because of the subdivision requirements. Before you could defer it, but a couple of years ago, they deleted that provision. So we asked the Board, and the Board granted the request for the variance to delete the paving requirement. You may recall that we had testimony of a lot of the residents of Lower Huelo including, Lucienne DeNaie and all of those people. And Jonathan– I mean, Lucienne, she's part of the committee that collects the funds from all of the neighbors. And Jonathan has the backhoe. And so what they'll do is they provide the maintenance for the roadway. They've been doing that for the last 20 years. So in that portion of fronting the property, I don't have the pictures with me now, but it was pretty well maintained when I went down. And they do it–what? Twice?

Mr. Ross: We'll maintain it whenever it gets bad. It's weather-dependent. We don't– It's not a regular– The County doesn't recognize the road. And there's no TMK for the road. It's real gray, literally, gray. So we gravel it. We take care of it. We've been doing it for more than 20 years, closer to 30, probably. And in my opinion, actually, if that road got paved, there'd be problems. There would be problems. We've installed our own little speed bumps and you can tell in the dust. And Moki Kahiamoe is a very good friend of mine, an equipment operator also, and we kinda take care of the roughians that–

Mr. Horikawa: Yeah, that burn rubber. The first quarter of a mile or so, it is paved, and it was done under Mayor Lingle's administration. And I spoke to David Goode about this and they pave it. You know, when they had excess asphalt, they would come down and pave it. So – and it also serves one of the historic churches and it's also a polling place. So that portion is pretty well paved. But that road eventually turns into dirt as you go further towards the ocean. So that's–

Mr. Giroux: Can I ask a question, Chair? Just for clarity, does Lucienne's – do they have like a nonprofit organization, or did they officially establish themselves as an organization?

Mr. Horikawa: It's just a neighborhood association that most of the people–

Mr. Ross: Ad hoc.

Mr. Giroux: So they're not carrying insurance either?

Mr. Ross: No. We've tried to get insurance on our property. I mean, you know, of course, everybody wants to be insured. I mean, I built a house. We would never be able to have a mortgage or borrow against the house, and our bankers have told us that. And one of the biggest reasons is the fire issue. Of course, you can probably get some sort of insurance by going to Lloyd's or somewhere. That's what they're saying but it's gonna be astronomical. I mean, anything can be insured. But in all practicality, they wanted to issue a homeowners, you know, if we wanted to go to a bank, and they said, okay, we need insurance. We couldn't get it on the property, on the big chunk.

Mr. Giroux: I completely understand your situation. I just want to throw two things out and hopefully, it doesn't cause confusion. But one, we did have a variance for a road-widening lot in Huelo, the

north – the South Holokala Road. That was a subdivision halfway up that road. And we gave a variance to not widen the part of the road that the applicant didn't own. I believe there was insurance related to that.

Mr. Horikawa: Who's the applicant?

Mr. Giroux: Trish, do you remember the applicant on that? We made them do bulb-outs because they didn't wanna cut the trees down. It was coming off of South Holokala, and then there was a big turn, and then on the top of that, there was a four-lot subdivision. But I believe they had to get insurance because they had to widen what was in front of their yard or in front of their lot, but we didn't make them widen the whole access. And that's – I believe they're in the same situation. They're off grid, possibly, without responder – you know, the 45-minute response, the insurance.

The other thing I wanna throw out is that sometimes there is possibilities with your auto insurance to create umbrellas that would cover certain liabilities that could be specifically set out by the insurance company. I mean, I don't wanna be a commercial, but if you talked to Allstate, you know, some of these American–

Mr. Ross: Yeah, I went to Liberty Mutual who I've been with forever since I started driving. That was my father's company and then – everybody used in our family. He – John . . . (inaudible) . . . basically shut us down, too, on that. So we'd change – we'd have to change.

Mr. Giroux: Insurance carriers.

Mr. Ross: Yes, of course.

Mr. Giroux: I've recent – I mean, personally, I recently have because of my insurance situation, I explored that. And my carrier told me that they could work with me as far as because I don't own property, but I rent, but then I have other liabilities, and that they could actually create umbrellas specifically for what I wanted to protect. That's boats, cars, trailer, and other assets. So there's– When I'm looking at your – this company that you went to, and I'm not making any judgement calls, I'm not saying I'm an expert, but what I'm looking at is that this is a commercial general liability company. The product that they produce is for businesses. And from what I'm reading is that they're saying, first of all, you're not a business. You're not running a business on this property, and that that's not the product they would sell you. The product they probably could sell you is insurance for fire, but they're not gonna cover that because the – of the response time. So I'm reading this, and I'm reading a no. I understand the no. I'm just questioning, is this the company that's gonna be able to offer you the product you're looking for?

Mr. Ross: I believe when we went looking for it through Mr. Oka, it had to be through a commercial. He said that has to be a commercial – I think they call it a surplus and excess or something. That's how they hunt for this.

Mr. Horikawa: Well, no. He had tried to go through it as a residential. And when he didn't get the response, he said he wanted to try as a commercial because he might be able to get the coverage that way. So that's the result of what you have before you today.

Mr. Giroux: Because I'm just reading the response, the February 9th response. And it's saying,

“Please mark your records that we must decline this submission because we are not a GL market,” a general liability market, “for businesses which have house, horse, or business.” And then the second phrase is, “Lacking an active business operation.” So they’re looking at the property and saying we know you’re asking for a business coverage, but we can’t do it because we can’t define you as a business. And then the next phrase is, “We do not acknowledge the existence of road-widening variances as a commercial operation.” So I don’t see if somebody were offering general liability, and their underwriter wasn’t restricted to only covering businesses that then they could – they could possibly offer you a general liability on property ownership not related to housing.

Mr. Horikawa: Well, we can try again, and come back again if you allow us to do that, but I don’t know what the response– We can try.

Mr. Giroux: Yeah, I mean, I’m just throwing that out as far as I’m looking at it as in front of me. I mean, I know this is difficult, but we have sent people back, told them look at option two and three, and then if you’re seriously closed out, then we–

Mr. Horikawa: Yeah, what I had done is I just e-mailed the findings of fact and conclusions of law and the order to Mr. Oka, and I said, “Eh, get us the insurance.” I mean, that was the marching orders on that one.

Chairman Tanaka: Let’s see if we get to that point. Well, part of it as I browse through this back in our minutes where the Fire Department said no – well, basically, no problem. The Police Department said, yeah, it would be nice to have paved roads if we ever have to go down there. But that was part of the justification for the variance.

So now back to the issue of the insurance. And I think because of the fact that it’s not a public road, it’s not – tourists aren’t gonna be driving down there and run over each other, that was the reason why I think we reduced the insurance policy. In fact, our minutes actually – we had to backtrack and say if we were even gonna add any insurance to this variance. Again, trying to weigh what kind of possible liability there is.

Okay, it has been discussed. We still have a motion and a second on the floor. Why don’t we go through that, then? It has been moved and seconded to delete the insurance requirement. All those in favor, please say aye. Three ayes. Any opposed?

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

VOTED: To delete the insurance requirement.

(Assenting: B. Santiago, R. Tanner, T. Espeleta.)

(Dissenting: R. Shimabuku, G. Abbott.)

(Excused: P. De Ponte, B. Vadla, J. Haraguchi.)

Chairman Tanaka: **Okay, we’re three to two, so the motion is–**

Mr. Giroux: Well, there’s no action. We can defer this, there’s a couple Members that are not present, unless there’s an alternative motion.

Chairman Tanaka: Yeah, actually, it sounds like the applicant and Mr. Horikawa are willing to – probably will have to go back and– What I would entertain, I guess, from the Board would be–

Mr. Giroux: You can move to defer or it would be – a deferral would be automatic if we have just lack of–

Chairman Tanaka: If we have no action. Okay. So at this – at present, we have no action. Board Members, is there any other discussion? Any other suggestion? Otherwise, taking no action, I guess what we would have to do would be for the applicant to–

Mr. Horikawa: Can I make a request? I'll speak to Mr. Giroux, and we'll take his advice, and then we'll ask that the Board defer this. I'm – in a month, it's gonna be bad for me. I know there are time guidelines that these things have to be submitted by, but I would also ask for an extension of the time to submit everything. And the only reason is next month is a real bad month for me. And then in the latter part of June, I have to take my wife up to the Mainland for an operation. So either in – I don't know what your schedule is like, but if we could do it sometime in the early part of June, and then maybe the first meeting in June, or maybe the first meeting in July, if that's – if your schedule permits.

Chairman Tanaka: Yeah, as long as any timeframe requirements, I would see no problem if we said in July.

Mr. Horikawa: Yeah, but I would also ask for an extension because I know there's a deadline to submit the insurance as well as the hold harmless.

Chairman Tanaka: Now, the hold harmless agreement has already been recorded?

Mr. Horikawa: No, it's been submitted, but it hasn't been given back to me to record yet.

Chairman Tanaka: Okay. And is that because it's only a piece of the entire requirement?

Mr. Giroux: Yeah, we usually wait for the certificate of insurance.

Chairman Tanaka: Okay. So, Trisha, is that correct? Ninety days of that issuance was–?

Ms. Kapua`ala: That's the standard language within that condition that the hold harmless agreement be – is it recorded or submitted? Submitted to the Department within 90 days from the date of the decision and order. So that 90 days has actually–

Chairman Tanaka: It's already gone by?

Ms. Kapua`ala: January 30th was the date that this decision and order was served. So the 30th. They will not – they will pass the 90-day requirement, but it's not uncommon for this to happen. We are constantly working with applicants to get their insurance, get the sign off from Corp. Counsel, the Mayor, as well as the proper–

Chairman Tanaka: My question would be to James then, is something that has been accepted versus recorded, is it legally binding?

Mr. Giroux: Well, they've signed it and submitted it, so since he hasn't sold the property, he's on notice that there's a document there. The recording makes it run with the land, but the problem is, is we don't have the problem is we don't have the insurance to go with it.

Ms. Kapua`ala: And – well actually, this variance is not in place until all of the conditions are met meaning the hold harmless agreement be not only submitted as an executed document, but executed by the Mayor, under County Seal, recorded, and part of that agreement is that the insurance certificate be attached.

Mr. Giroux: Yeah, the Mayor hasn't signed it yet.

Chairman Tanaka: So giving you to July is no problem because theoretically, you don't have a variance until this happens anyway.

Mr. Horikawa: Yeah. Sometimes in the past, they – I'll get a call telling me that the variance is gonna be rescinded. So I kinda have to get on the horse and start–

Chairman Tanaka: Is it within our power for this Board to say, okay, we'll set the date of July?

Mr. Giroux: That's fine.

Chairman Tanaka: Okay. Is there any objections from the Board? July would be– Okay, we'll do it that way.

Mr. Aaron Shinmoto: July 12 is the–

Chairman Tanaka: Would that be alright–the meeting date?

Mr. Horikawa: Well, let me – yeah, the meeting date is July 12th. July 12th is fine. Okay, that's fine, yeah.

Mr. Shinmoto: Mr. Chair and Mr. Horikawa, the dates we have are June 14th, June 28th, July 12th, or the 26th.

Mr. Horikawa: Oh, no, no. No, no, he'll come on July 12.

Mr. Shinmoto: July 12, okay.

Chairman Tanaka: On or before July 12th? Potentially, that could be before.

Mr. Horikawa: Wait, wait, wait. Wait, I thought the hearing date was July 12th, on the request, but the insurance is by when?

Chairman Tanaka: Oh, no, no, no. I mean, this – yeah, sorry. That we have set the date of July 12th, July 12th's meeting for this to come back.

Mr. Horikawa: Thank you. Appreciate it.

Chairman Tanaka: Alrighty. Next item on our agenda, Trish?

2. **MICHAEL J. ANDERSON** requesting variances from Maui County Code, §§19.30A.030, 16.08.060(A) and (E), and 1997 Uniform Building Code, §§501, 503.2., 705, 1006.2.1, and Table 5-A, to allow the western portion of an existing dwelling to be on the property line, whereby a six (6) foot and fifteen (15) foot side yards, a roof projection no nearer than three (3) feet to the lot boundary, and one (1) hour fire-resistive construction for exterior walls and projections are required, and to allow roof projections to exceed twelve (12) inches in areas where openings (windows/doors) are prohibited, and unprotected openings in exterior walls, an exterior exit balcony and a stairway to be less than three (3) feet to the property line for property located off of Hana Highway, Pauwela, Haiku, Maui, Hawaii; TMK: (2) 2-7-004:039 (BVAV 20110018).

- a. **Findings of fact, conclusions of law, and decision and order.**

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

Ms. Kapua`ala: And this is a request from staff that we clarify the final decision and order. We've drafted the document and after reviewing the minutes realized that the Board granted this variance in two parts. One for – one motion was taken up for Title 19, and then one was for Title 16. But what happened was the discussions were separated where an approval for the Title 19 variance said, and I might be mixing this up, but one approval said we shall have a hold harmless agreement, while the other one said that the insurance requirement would be one million dollars. And rather than splitting the two approvals in writing, because that would mean is that I would have to say Title 16 has this condition of a hold harmless agreement; Title 19 has this condition of insurance requirement. Just procedurally, it would be cleaner if it was okay with the Board that we draft the decision and order as one comprehensive approval with the following conditions. And so all we're doing is asking that the Board amend its decision to reflect what was submitted to you and is on record today as the proposed findings of fact, conclusions of law, decision and order.

Chairman Tanaka: Okay, and that would be for both to have the hold harmless agreement and the million-dollar insurance requirement?

Ms. Kapua`ala: Correct, as well as Conditions No. 3 and 4 just to be part of the comprehensive approval rather than only attach to a Title 19 variance versus a Title 16 variance.

Chairman Tanaka: Board Members who were here at that time, what is your recollection of this? This was they were going to remove a sliver of that building.

Mr. Shimabuku: They were gonna remove it, eh?

Chairman Tanaka: Yeah. It was just a – whatever, a foot–

Mr. Tanner: A few inches of a corner.

Mr. Abbott: Yeah, 1.78 inches.

Chairman Tanaka: Okay, so now with – well, the reason why I asked the Board Members who were here, was that– Now I'm trying to look at who made the motion and how we proceeded.

Mr. Tanner: Yeah, I think the intention was that both conditions would be placed on both variances.

Mr. Giroux: I guess the confusion could be that since we took it up separately, when we do – when we put the million-dollar insurance is what we don't wanna do is have an accrual of two million dollars. So the intent to clarify would be that we did take up two separate types of variances, but the project as a whole would only carry the hold harmless agreement and the million dollars. So one hold harmless agreement and one million-dollar insurance coverage for the project as a whole and not as an accrual.

Mr. Tanner: James, to make sure I'm clear, when we talk about a million dollars' insurance coverage, what we're talking about is that the County be added as an additionally insured on that coverage, not that you're going out and getting a separate–

Mr. Giroux: Right, you're not buying– What the hope is, is that the homeowners' insurance will give you an umbrella, and on that umbrella, the County will be named as an insured. On this one, I don't think the intent was to have the– I think what happened was because the intent was only to make it a million, we just – somehow just had the hold harmless, and then on the other one had the million dollars.

Mr. Santiago: . . . (inaudible) . . . not double . . . (inaudible) . . .

Mr. Giroux: Yeah, I think it's more of a drafting issue than double . . . (inaudible) . . . a million dollars for every variance.

Chairman Tanaka: Okay. So we need to – is it adopt this as the final D&O?

Mr. Giroux: Yeah, as recommended by the Planning Department.

Chairman Tanaka: Which is what you just stated, Trish, that it's a single entity of – for both?

Ms. Kapua`ala: Yes.

Chairman Tanaka: Okay, the Chair needs a motion to accept the findings of fact, conclusions of law, and decision and order.

Mr. Espeleta: So moved.

Chairman Tanaka: It has been so moved. Is there a second?

Mr. Tanner: Second.

Chairman Tanaka: Okay, it has been moved and seconded. All those in favor of adopting as stated in front of us and explained by Trisha, please say aye. Any opposed? No.

It was moved by Mr. Espeleta, seconded by Mr. Tanner, then

VOTED: To accept the findings of fact, conclusions of law, and decision and order as discussed.

(Assenting: T. Espeleta, R. Tanner, B. Santiago, R. Shimabuku, G. Abbott..)

(Excused: P. De Ponte, B. Vadla, J. Haraguchi.)

Chairman Tanaka: **It has been accepted.** Thank you very much.

Ms. Kapua`ala: Thank you.

Chairman Tanaka: Okay, next item, approval of April 12, 2012 minutes.

D. APPROVAL OF THE APRIL 12, 2012 MEETING MINUTES

Chairman Tanaka: I guess we need a motion to approve the minutes.

Mr. Shimabuku: I make a motion to approve.

Chairman Tanaka: So moved. Any second?

Mr. Abbott: Second.

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

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

VOTED: To approve the minutes of the April 12, 2012 meeting.

(Assenting: R. Shimabuku, G. Abbott, T. Espeleta, R. Tanner, B. Santiago.)

(Excused: P. De Ponte, B. Vadla, J. Haraguchi.)

Chairman Tanaka: **Minutes approved.** Thank you. Let's see, Director's report, status. Trish or Aaron?

F. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: No, there is nothing to report at this moment.

G NEXT MEETING DATE: Thursday, May 10, 2012

Chairman Tanaka: Okay. The next meeting date, Thursday, May 10th. Do we know what we have at this time?

Ms. Kapua`ala: Yes, we have a variance request from the flood zoning requirements to not elevate a proposed Baldwin Beach Park comfort station. It's a variance request from the County of Maui; however, they're being represented by Munekiyo and Hiraga.

Mr. Giroux: Is that the Parks Department or is it Public Works?

Mr. Shinmoto: This is a comfort station, restroom, that got destroyed this last high waves, I guess, we had. It's a replacement restroom that's being built at ground level. If they're in a tsunami zone, it requires elevation. So this is what they're coming in for.

Mr. Tanner: Where was this?

Mr. Shinmoto: Baldwin Park, Paia.

Chairman Tanaka: Okay, is that the only item that we have so far?

Ms. Kapua`ala: Yes.

Chairman Tanaka: Alrighty, any other discussion? None? We'll see you next month. Meeting adjourned.

H. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at approximately, 2:50 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Chairman
Rick Tanner, Vice-Chairman
Ray Shimabuku
Bart Santiago
Teddy Espeleta
Gene "Clark" Abbott

Members Excused:

Bernice Vadla
Patrick De Ponte
Jacqueline Haraguchi

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