

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
JULY 12, 2012**

(Approved: 8/23/2012)

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, 1:30 p.m., Thursday, July 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.)

Chairman Kevin Tanaka: Good afternoon. I'll call the meeting of the Board of Variances and Appeals to order. It is now 1:30. We have a quorum of seven Members. First item on our agenda, Item 1, Trish?

B. APPEALS

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

TOM PIERCE representing MAUI TOMORROW FOUNDATION, INC., SOUTH MAUI CITIZENS FOR RESPONSIBLE GROWTH and DANIEL KANAHELE appealing the Director of the Department of Public Works' decision to issue mass grading permits (G 2012/0030 & 0039) for the Pi'ilani Promenade located at 376, 451 and 524 Kaonoulu Street, Kihei, Maui, Hawaii; TMK: (2) (2) 3-9-001:016, 117, 171, 172, 173, 174. (BVAA 20120006)

a. Appellee David Goode, Director Department of Public Works' Motion To Dismiss Appeal Filed on May 11, 2012

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

Ms. Kapua`ala: And I see that the attorneys are here to make their appearances.

Mr. Tom Pierce: Hi. Tom Pierce here on behalf of the appellants.

Mr. Jonathan Steiner: Jonathan Steiner on behalf of Piilani Promenade North and Piilani Promenade South.

Ms. Jane Lovell: Good afternoon, Chair and Members. My name is Jane Lovell. I'm a Deputy Corporation Counsel and I'm representing David Goode in this matter.

Chairman Tanaka: Thank you. Do you have--?

Mr. Pierce: Mr. Chair, I do have a proposal that I can put in the form of a motion. The -- what is

before us today are two issues. One relates to an appointment of a hearings officer or I guess a decision on whether the BVA would hear this matter themselves. The second issue relates to the motion to dismiss filed by the County, motion to dismiss the appeal. And the attorneys and the parties have agreed to an extension on that. But after looking at this, I'd like to ask the BVA to first consider whether the motion to dismiss is at this stage, unripe. And the reason for that would be the fact that this has already been declared to be by the Planning Department, a contested case hearing. And under the rules, the BVA rules, what needs to happen is that we really need to have that initial appointment of who's going to be hearing this, and then set a motion schedule. So one thing you'll note if you look at the motion to dismiss is that there's no citation by the County to any particular rule that permits them to have the motion to dismiss heard prior to the appointment of the hearings officer. So I think just from a procedural perspective, what's not before us today is an actual discussion of the merits of the motion to dismiss. But what is before us, I think, is this question of whether – whether and when it should be heard.

And so to add on to that, just to get my client's position on this, as stated in the County's motion, we do have – we have also filed a motion with the Land Use Commission because there's an underlying encumbrance on the title of this property that was filed back in 1995 by the former owner of the property. That encumbers the land.

I'm gonna pass this off because there's a little bit of an echo there. You can still pick up the record on this, right? Much better.

Just by way of background, there are two different layers of this case. There's the part that's before the BVA which relates to County actions. There's also a part that we have filed with the State Land Use Commission which relates to whether the developer actually has the right under the State encumbrances, separate from the County zoning issues, whether the developer has a right and the landowners have a right to proceed.

So just to back up what we have here is procedurally what's happening is we have a hearing on the Land Use Commission scheduled for either August 23rd or August 24th. And I would just wanna point out right now that originally that was scheduled to be heard earlier. The landowners' attorney requested additional time and we agreed to that additional time. So one of the reasons it's not being heard until later is at the request of the developers which was consented to by the County in this case. The County will be involved in that case as well as a party.

So what we're asking– The final part I need to mention is that this appeal that's before you right now is based upon an action of the Public Works Director related to the decision to issue grading permits. And of course, once again, we're not here for the merits today. I'm just trying to get the procedural side of this laid out. There's a separate part which is that we requested that the Planning Director take enforcement action under the State Land Use Commission's statutes which put that power to enforce the State Land Use Commission orders before the Planning Director. We've heard from the County of Maui that they will – that the Planning Director will not enforce or take any further action. So we will most likely be filing an appeal of that decision as well. That would, we believe, also be an appeal that would come before you, Members. So the reason I'm laying all these different procedural parts out is to say this, of course, we can go ahead and start appointing a hearings officer. We would encourage that and we would be in favor of that. And hopefully, we would then be working either with you, Members, or with the hearings officer to

schedule that. We are asking the parties to move any substantive type of decisions related to the case off until after the Land Use Commission has begun – has heard our motion there.

The reason we had to file these motions before the BVA is there's a 30-day statute of limitations. So we just have to make sure we meet that to make sure that we're jurisdictionally in there. It doesn't mean necessarily that it's the right time to hear it. We think the right time to hear the BVA matters is after the Land Use Commission has given us some direction on that. We think that'll be helpful to the parties. We think that'll be helpful to the BVA.

So with all that said, what we're asking today in summary would be for a determination that the motion to dismiss really needs to take place after the hearings officer has been selected. And we'd be asking for your Board to ask that – direct that hearings officer to select a time mutually agreeable to the parties after August 23rd or 24th when the LUC is expected to hear its motion. Thank you.

(Mr. Bart Santiago then entered the meeting at approximately, 1:34 p.m.)

Chairman Tanaka: Thank you. Ms. Lovell?

Ms. Lovell: Thank you. When this appeal was filed, we were originally given by the Board staff a deadline for filing pleadings. And that deadline was July 5th. The County filed a motion to dismiss on July 3rd. And the reason that we filed a motion to dismiss is that the decision that is being appealed from here is not an appealable decision. We think this is something that needs to be decided before we go to the expense of a hearings officer. We also think that deciding that issue does not have to wait until August or some later time. It's something that really should be decided now. However, because of the 4th of July holiday, Mr. Pierce pulled up after he got the County's motion on the 3rd and asked if he could have some more time. Now, I'm fine if somebody needs a few more days, or an extra week, or something like that to respond to a motion, but it's actually a very simple motion. It's only about six pages long. The question is, can you appeal from the issuance of a grading permit? Our position is you cannot. So therefore, we would like to get this set for a hearing as soon as possible. I, for one, would be happy to have the Board hear it as a Board so that we don't go to the expense and delay of having a hearings officer appointed. And if the County, if we are right that this is a non appealable issue, then the whole thing goes away. Mr. Pierce is right. There's a whole different proceeding going on in the Land Use Commission. That's a whole other matter, but I don't think the Board needs to get involved in that proceeding, just as the Land Use Commission doesn't need to get involved in this proceeding.

Chairman Tanaka: Thank you. Ms. Lovell, sorry, I was looking at our agenda and it calls out that – and I just looked at this date, “The Department's motion to dismiss filed on May 11, 2012.” So I had that date stuck in my head.

Ms. Lovell: No, actually, I believe the appeal was filed on May 11th. And our motion to dismiss was filed on July 3rd. Previously, Ms. Kapua`ala set a deadline for all parties to get pleadings in by July 5th. And so that was the deadline we were operating under.

Chairman Tanaka: Okay. Mr. Pierce, what Ms. Lovell had just stated as far as – I understand, I guess, your logic as far as timing, and dates, and order, but a response – is it just because that July 5th date was impossible to meet that there wasn't – you did not respond to the motion to dismiss

before today's date or what you had—?

Mr. Pierce: I can answer that. Yes, the answer – well, the simple answer is that the parties, through their attorneys, agreed to an extension of time. The only thing we didn't agree upon was when it was going to be heard. However, the procedural issue that I raised is a new one that I have not raised with the parties. And what I would do is just add a little bit of support to our position. You know, Ms. Lovell says it's an easy motion, you ought to hear it. But what Ms. Lovell has not said, but I think you all know, and certainly, the attorney that's with you today knows who's representing you all is that you have to follow the rules.

And so the first notice after our appeal was a letter dated May 24th signed by Planning Director Will Spence. And it says pursuant – and he's citing your rules here, 12-801-36 and 12-801-80.1, of the rules of practice for the Board, "The subject appeal will be processed as a contested case and as such, a mutually agreed upon hearings officer which may be the Board will be selected to preside over the matter." This is consistent with your rules. If you go – if you actually look at 12-801-80.1, that's called the procedure concerning appeals. And it says there, "The Board shall hold a contested case hearing on the appeal." It doesn't talk about any earlier procedural motion such as the one that Ms. Lovell is asking you to hear prior. And this is also consistent with the fact that now it's already been called a contested case. It is a contested case. And Section 12-801-49, which is in the contested case procedures says motions may be made before, during, or after a contested case hearing. So the contested case hearing is when there's gonna be an evidentiary proceeding. We haven't gotten to that stage yet because we don't even have a hearings officer. So while it may in fact be a simple motion, and it may be one that in fact you could hear, the rules, we believe, do not set it up in that fashion where it can be heard yet. It's what we would call under the law, it's unripe at this time until we've set some other things in place.

Chairman Tanaka: Thank you. Okay. You had something?

Mr. Steiner: Yeah. Just a – we join in the position of the County. I wanted to point out for the record, though, regarding what Mr. Pierce said about the scheduling of the Land Use Commission hearing on August 23rd or 24th. It is true that when we got the motion we did ask for an extension of time to respond to that motion. Under the Land Use Committee rules, there's a seven-day period to respond to such a motion. And when we got – by the time it got to us, I think a day was left. So we asked for an extension of time, but at that point, the matter had not been set for a hearing before the Land Use Commission, and it was our understanding, at least, that no matter when we responded that the 23rd, 24th date was when it would probably be set. I could be wrong in that, but I don't believe that it had previously been set and got moved for a hearing. So I wanted to clarify that.

And also, it's our position that the Commission – that this – the need to file a motion before a hearings officer would only take place if in fact it was a matter that was ripe for appeal. If there is no jurisdiction to appeal, the Board can make that determination.

Mr. Pierce: Mr. Chair, if I may say one other thing regarding the timing because I believe that it'll probably be coming up real quickly here? One thing that is very clear is that neither the County nor the landowners will be harmed by moving this off until after the Land Use Commission has heard this. And the reason is simply this is that the landowners are going full steam right now with their

development process and the County is permitting them. So the only people that are being harmed right now are arguably my clients and the citizens with respect to this, but we think that it's just – it's gonna be way too early for us to start getting into the substantive – the meat and potatoes part of this discussion until after the Land Use Commission has ruled. We'll get a lot more opportunity to hear on what's one of the critical issues here which is this 1995 Land Use Order. And we think that'll be helpful to the Board. And what that'll mean ultimately is hopefully, efficiency in terms of cost, which is one of the things that Ms. Lovell raised to the degree that we can eliminate that. Certainly, that would be something that we're in favor of is keeping it efficient for the Board.

Ms. Lovell: I'm sorry to unnecessarily prolong this hearing and thank you for your patience, but these grading permits are the only thing that's before the Board. Two grading permits were issued and the question was, when a grading permit is issued, can a third party come in and appeal that? That's the question that has to be decided first. And the grading permits were issued in April. If we put this off until after the end of August sometime, in the meantime, everybody loses because grading has gone on for five months. The landowner has certainly expended a lot of money in reliance on lawfully-issued permits. The workforce that's out there doing the work is relying on that project for a paycheck. So we really would like to get this resolved sooner rather than later. And this is a threshold question. And that is when the Department of Public Works issues a grading permit, can a third party come in and contest it through an appeal? That is the question we need to focus on. And it really has almost nothing to do with the Land Use Commission. That is a totally separate situation that's going to be dealt with then. So I strongly disagree that nobody loses if we let this go on for months on end. We really need to come to a resolution. Thank you.

Chairman Tanaka: Thank you. James, correct me if I'm wrong with what you had just explained to me. This Board, the eight of us, may act as hearings officer to address the motion to dismiss before a hearings officer over the actual appeal.

Mr. James Giroux: Thank you, Chair. Let me just explain it. I think the attorneys mentioned these rules and I'm just gonna reiterate that because we're looking at our rules, 12-801-36 is the hearings officer. It talks about choosing the hearings officer, what the powers of a hearings officer are. And part of that is the hearings officer can be you, can be some of you, which some of you experienced. It could be an outside attorney, a retired judge. That's what we're talking about the hearings officer. That hearings officer has powers and they schedule prehearing meetings. They can schedule deadlines. They can hear evidence. They can take oaths. They can take evidence. In this case, it is a contested case. And our rules say that the parties in a contested case can file motions before, during, or after a contested case. They can file them, but it's the duty of the hearings officer to conduct a fair hearing so both sides get heard, and that everybody is aware of what's being filed, and when those decisions are gonna be made, and so everybody's prepared to address the issues in those motions.

Looking at this situation, it's not untenable that because there is a motion before you that the Board could take upon itself to dispose of the motion once you determine that you wanna be the hearings officer regarding the motions, and set those deadlines, and set – make sure there's proper notice to the applicants and to all the parties that you're going to be not only hearing the arguments, but making decisions on that motion. And depending on the outcome of that, you can at that time decide whether or not you wanna continue to be the hearings officer regarding the substantive issues.

So what you're looking at today is decision-making on how do you wanna dispose of the motion that's before you. And again, there's an issue of the motion was filed and there wasn't a hearings officer appointed yet. And so there's an issue of timing and procedure that have to be discussed in order to make sure that everybody gets a fair shot at presenting their side of the arguments on the motion.

Outside of that, the motion itself is a jurisdictional type of motion. It's gonna be a motion on the law. So there's not gonna be a lot of evidentiary witnesses, etc., that are going to need to be giving testimony. So it's basically gonna be 99% arguments of both – of all parties regarding their take on the status of the law looking at the Charter, County Code, State law, and the body of precedence that they can find regarding what kind of jurisdiction you have regarding a grading permit. So that's kind of what you're looking at if you take authority over being the hearings officer regarding the motion. Again, if you hire a hearings officer, that hearings officer will not have the power to dispose of this case because this – if you grant the motion, the case would be over. If you denied the motion, you would have to go on to listen to substantive issues, and listen to evidence, and weigh credibility, and rule on admissibility, those types of things that we've discussed before. So the issue at some point regarding this motion is gonna have to be disposed of. And because of the nature of the motion, the earliest possible time to dispose of that, the better, because you wouldn't want to go through all of that evidentiary process, and then at the end decide that you don't have jurisdiction. That is something you could do, but it's not recommended. You wanna look at it in an orderly fashion as far as how can you take up these issues and dispose of them efficiently and fairly.

Chairman Tanaka: Board Members, any questions or discussion as far as what we have in front of us? It sounds as though if we would like to go in the direction of becoming the hearings officer for this, for the appeal, then we could determine that, and the next step in the process would be actually address the motion to dismiss as we–

Mr. Giroux: Creating a hearing date to hear the motion.

Chairman Tanaka: Motion to dismiss. Okay. Okay. Board Members, are we clear on that? We can address it that way. Any comments? Any questions? This is interesting. This is the first time in my experience that typically in appeals that we have reviewed, it's a party that is appealing a Director's decision themselves. This being a third party is something different. I guess we've all kinda looked over what was submitted to us in our packets. And the – for myself anyway, the point that Ms. Lovell made was the question actually highlighted for myself to discuss at this meeting whether this – if this is something that the Board–? Was this a decision by the Director that–? Okay, let's just stick to the determination of the hearings officer.

Mr. G. Clark Abbott: I have a question but I don't know how to ask it. If we're appointing the Board as the hearings officer for this particular item on the agenda that – does that mean we also appoint ourselves, the Board, or whomever for the rest of what's going on? It's gonna come up with the LUC, and all of the withertos, and wherefores, and–

Mr. Giroux: No, in the motion, you can make it clear that you wanna just take up – you wanna be the hearings officer for the limited purpose of disposing of the motion.

Chairman Tanaka: So procedurally anyway, there will be no action taken no matter what is decided as far as the hearings officer. Procedurally, we'd have to determine the hearings officer, set a date that this Board will meet, and then address the motion to dismiss.

Mr. Ray Shimabuku: We have to get a hearings officer?

Chairman Tanaka: No, we can decide as a Board that we will act as hearings officer.

Mr. Bart Santiago: To make a determination on the motion.

Chairman Tanaka: Yes.

Mr. Santiago: To dismiss it . . . (inaudible) . . .

Chairman Tanaka: Anything that comes up in the future would be a separate item. And any action we take whether it be at the next meeting, or whatever date is set would be specifically to what we have in front of us on our agenda today.

Mr. Santiago: Personally, I would vote to be as a Board, the hearing officer, as opposed to deferring to one individual.

Chairman Tanaka: Board Members, any other comments, opinions, questions? With that, I guess, Bart, since – I'd entertain a motion to–

Mr. Santiago: I'll make a motion to assign the Board of Variances and Appeals as the hearing officer to determine the disposition of the motion to dismiss appeal in front of us exclusively, only for this motion.

Mr. Shimabuku: Second.

Chairman Tanaka: Okay. Discussion. Sorry, just before we finish this, by this Board becoming the hearings officer, the hearings officer makes a recommendation to the Board of Variances and Appeals, and then a decision is made so–

Mr. Giroux: Well, if the whole Board is the hearings officer, you don't have to go through that process. You will hear the arguments, and then you will make the decision, and then you will dispose of the motion. So what we just went through is we had four Members. So those four Members made a report, and then we had to go through a little bit of a different procedure. But if everybody – if the whole Board is on, and the Board listens to the arguments, then that decision can be made by the Board.

Chairman Tanaka: So with the motion that was made and seconded, that's fine.

Mr. Giroux: And then you just have to get a vote now.

Mr. Abbott: Is a quorum involved in any way?

Chairman Tanaka: Yeah. Well– Okay. With that, that's as far as we can get on this matter. So it has been moved and seconded that we, the Board, act as the hearings officer. Any other comments? All those in favor, please say aye. Any opposed?

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

VOTED: To have the Board act as the Hearings Officer to determine the disposition of the motion to dismiss appeal in front of us exclusively, only for this motion.

(Assenting: B. Santiago, R. Shimabuku, P. De Ponte, T. Espeleta, R. Tanner, G. Abbott, J. Haraguchi.)

(Excused: B. Vadla.)

Chairman Tanaka: **Motion carries.** We are – the BVA is the hearings officer for the appeal.

Mr. Giroux: So the next two details is the deadlines for filing of the motion, opposition; and the hearing date for the parties to be present and prepared to make the arguments regarding the motion.

Chairman Tanaka: Okay, Ms. Lovell, I know you're anxious. So would the next available date be – would you approve of that?

Ms. Lovell: That would be acceptable. Thank you.

Chairman Tanaka: Trish, when is our next available?

Ms. Kapua`ala: The next hearing is available to – for the Board to hear this motion. So that would be July 26 with the deadline to submit your response and opposition to Ms. Lovell's motion would be July 19.

Chairman Tanaka: Okay. Mr. Pierce, is this satisfactory?

Mr. Pierce: You know, I'd inform the attorneys that I have a conflict on that day. So from talking to Trish before, it sounds like possibly, August 9th would work. I am available that day.

Chairman Tanaka: Ms. Lovell, can we iron out something here?

Ms. Lovell: Well, if the 26th isn't available, then definitely, the next possible time. And I still would like to get a response as early as possible. Mr. Pierce has had my papers, my six pages, since July 3rd. So I'd really like to – whatever the Board decides in terms of its schedule that we get a response as soon as possible.

Chairman Tanaka: Okay. We need to choose a date.

Mr. Rick Tanner: What's after the 9th?

Ms. Kapua`ala: It's wide open.

Mr. Santiago: Can we do a different date as opposed to a Thursday? We've done it before. We can do a Wednesday or a Monday, sooner than later.

Chairman Tanaka: The 26th, 27th of – what is that? About the – on or about the 3rd of August? Or whatever that works, I guess. We still need to allow two weeks for the exchange of – you know, yeah, legally, for the exchange of motion, and so if the 26th will not work, seven days after the 26th is what date?

Mr. Santiago: August 2nd.

Chairman Tanaka: Okay, would that be doable?

Mr. Pierce: Unfortunately, I'm on the Mainland.

Mr. Santiago: Is there another date other than Thursday?

Mr. Tanner: That Thursday wasn't our meeting date anyway, so that wasn't . . . (inaudible) . . .

Mr. Santiago: It has to be seven days.

Mr. Jacqueline Haraguchi: Yeah, so it would be the 3rd.

Chairman Tanaka: Okay, help. Give me a date so we can decide, please.

Mr. Santiago: Tom, when are you back?

Ms. Lovell: 27th, how about July 27th?

Mr. Aaron Shinmoto: Mr. Chair, the room is not available on that Friday. We do have the 30th or the 31st, Monday or Tuesday.

Chairman Tanaka: Okay, we're narrowing it down—30 or 31.

Ms. Lovell: 30 is fine with me. On the 31st, unfortunately, I have to be at . . . (inaudible) . . .

Chairman Tanaka: The 30th, Mr. Pierce, would you be available on that date?

Mr. Pierce: I just need to check to see when I fly out.

Chairman Tanaka: Board Members, on the 30th? As long as we got at least the five of us.

Mr. Shimabuku: At 1:30?

Mr. Shinmoto: We have that room all day if you want it in the morning.

Chairman Tanaka: Board Members, your preferable time, please?

Ms. Haraguchi: Ten o'clock. Ten o'clock in the morning.

Chairman Tanaka: Is that doable? Mr. Pierce, please?

Mr. Pierce: I'm sorry. My flight leaves at 10:45 on the 30th.

Ms. Lovell: You know, this won't take that long. What about doing it at like four o'clock on the 30th or 4:30?

Chairman Tanaka: No. He leaves in the morning of—

Mr. Pierce: I leave the 30th in the morning, at 10:45 in the morning.

Chairman Tanaka: I can't believe we're dragging this out to find a date that we actually can do this.

Ms. Kapua`ala: On the 27th, the morning is available. The 26th is a regularly scheduled meeting, but on the 27th, we can have the room until 12:00 p.m., Friday, July 27th. The Maui Redevelopment Agency will have its meeting after 12:00.

Chairman Tanaka: Mr. Pierce, are you available on Friday, the 27th at nine o'clock in the morning?
Board Members as well?

Mr. Pierce: Mr. Chair, Members, I am available. I just wanted to reiterate – well, what it means is if I understand the scheduling is that I need to have my response in, in the next week.

Chairman Tanaka: By the 20th.

Mr. Pierce: Right, by the 20th. You know, Ms. Lovell is— What I already have, unfortunately, is a very full calendar on a couple of other motions. If it has to be done that day, it can be, I'll make it work, but let me just say that the harm that Ms. Lovell is talking about is a phantom. Okay? You know, if the developer was really concerned about this, the developer could shut down the operations and hang on. In fact, what we think actually has happened is the developer sped up the operation once we filed the motions. There were no activities. Ms. Lovell is absolutely wrong unless she's talking about some kind of development we don't know about. She said it's been going on for five months. The development, the grading activities, all those things started once we filed our motions. So the risk that's being taken here is being taken by the landowner. They're big boys and girls. They know what they're doing. If they wanna take that choice, they can. So the fact that Ms. Lovell is in here paternalizing or maternalizing the landowners is a bit concerning to me. Okay? So what we're talking about here, like she said, is a very standard kind of motion. We don't have a problem responding to it, but what we do have a problem is being pushed into it at an arbitrary time. And right now what she's asking you all to do is to meet when it's not even your scheduled time for something that is a phantom harm. So I am available on the 27th, but with those statements on the record.

Chairman Tanaka: Okay, but it appears as though most, if not, all of our eight Board Members here wish to, I guess, "expedite" is the word. Okay.

Mr. Abbott: I think we're being pushed into it. I don't know if we want to or not. I think we're being pushed into it.

Ms. Haraguchi: I just think that there's different matters here at hand, and it needs to be discussed, and taken up as soon as possible. I mean, we've done other meetings like this. This will not be our first one. So, I mean, we have up until then to do the research or whatever that everybody has to do on the dismissal, on the motion that is filed. That is what the motion was made.

Chairman Tanaka: Okay, so we will meet on Friday, July 27th at 9:00 a.m. in this room to address this item.

Mr. Tanner: And we're still scheduled for the day before that, right, the 26th for our regular meeting?

Ms. Kapua`ala: As of now, I don't know if we have any agenda items. So that meeting could – likely will be canceled, and meet on the 27th. I do have a question for Mr. Giroux. Being that it's not a regularly scheduled meeting and it's not a public hearing, it's a contested case, what deadlines do we have as far as–? You know, typically, we post the agenda, and we go ahead and do the mailout with all of the documents that the Board needs to be prepared with the week prior, yeah, seven days prior, six days prior. In this case, considering Mr. Pierce's concern about his schedule, is it possible to–? And the Board has to feel comfortable with this, when would they like to receive the documents, and that would help Mr. Pierce, and maybe prolonging the deadline.

Mr. Giroux: Yeah, it would just be an issue of what's the Board's comfortable with because we're gonna be using our adjudicatory authority. So it's an exception to the Sunshine Law. We are in a contested case. And we will be following the contested case rule as far as notice. And the notice is to the party.

Chairman Tanaka: So the typical seven days to submit to the – each other and the County, is that acceptable?

Ms. Lovell: Yes.

Mr. Pierce: Yes, it is.

Chairman Tanaka: Thank you very much. Okay. So it is set for Friday, July 27th, 9:00 a.m. Thank you very much. Next item, Trish?

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

RICK and DEBRA STRINI of the STRINI FAMILY TRUST appealing the Department of Fire and Public Safety's decision to not approve construction plans for failure to provide a 20-foot wide, all weather surface access road, for the proposed Manawai Homestead Subdivision (DSA File No. 2.2806) located at 263 Manawai Place, Haiku, Maui, Hawaii; TMK: (2) 2-8-003:041. (BVAA 20120005)

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

Ms. Mary Blaine Johnston: Good afternoon. Deputy Corporation Counsel, Mary Blaine Johnston, representing the Fire Chief.

Ms. Debra Strini: Debra Strini.

Mr. Rick Strini: Rick Strini.

Ms. Johnston: After all that, I think maybe we're gonna be a little bit boring for the Board.

Chairman Tanaka: Thank you.

Ms. Johnston: Okay. I've talked with the Strinis, and they are fine with requesting that the Board serve as the hearings officer on this matter. And we can go whenever you put us on.

Ms. Strini: I would just ask that it be after 1:30 in the afternoon, is our work schedule, whatever day it's going to be.

Chairman Tanaka: Okay, so for the matter that's before us right now, both parties are – will accept the Board as the hearings officer. So we shall set a date for when this will be heard.

Ms. Johnston: Correct.

Mr. Giroux: Yeah, we just need to nail down the – when the documents, exhibit lists, and exhibits need to be exchanged.

Ms. Johnston: Correct. Correct.

Chairman Tanaka: Okay. Is there a preferred date? Have you discussed, Ms. Johnston—?

Ms. Johnston: Sometime in August at maybe your regular August meeting.

Chairman Tanaka: Sorry, Tremaine, when – the two August dates we have are—?

Ms. Tremaine Balberdi: The 9th and 23rd.

Chairman Tanaka: The 9th and 23rd. Is there one over the other that you prefer?

Ms. Johnston: Okay, how about August 9th beginning at 1:30 is your regular meeting time?

Chairman Tanaka: Okay. And the – as far as – okay, we'll set that August 9th date. The specific – your deadlines for the exchange of documentation, typically, seven days before that date. August 2nd, is that agreeable?

Ms. Johnston: That's fine.

Chairman Tanaka: Okay.

Mr. Giroux: And again, that's gonna be a witness list, exhibit list, and exhibits, and marked accordingly. How do you mark your exhibits? A or numerical?

Ms. Johnston: Trisha?

Ms. Kapua`ala: Let's go County, alphabetical; and the appellants, numerical. When you mark your exhibits, it shall be 1, 2, 3, and the County will go ahead and use A, B, C.

Ms. Johnston: And also that would include any pre-hearing memos to said deadline.

Mr. Giroux: Yeah, we would like to clear up any discovery issues by that deadline, if there's any discovery issues also. Subpoenas, if there's subpoenas that need to be signed by the Chair, it should be signed by that date.

Ms. Johnston: Alright. Okay, so we'll be back on August 9th.

Chairman Tanaka: Okay. So, Board Members, is that fine with you? Okay, so this matter will be brought back to us on August 9th at our regular meeting.

Ms. Johnston: Okay, thank you.

Chairman Tanaka: Thank you. Okay, the next item on our agenda, Trisha?

- 3. JOSEPH A. DURAN of VALLEY ISLE AQUATICS appealing the Director of Parks and Recreation's decision to deny a Type III Activity Permit for the use of various swimming pools for a nonprofit organization. (BVAA 20120004).**
 - a. Valley Isle Aquatics' Proposed Findings of Fact, Conclusions of Law and Decision**
 - b. Director, Department of Parks and Recreation's Proposed Findings of Fact, Conclusions of Law, Decision and Order**
 - c. Valley Isle Aquatics' Proposed Exceptions To Hearing Officer's Report and Recommendations**
 - d. Director, Department of Parks and Recreation's Exceptions to Valley Isle Aquatics' Proposed Findings of Fact, Conclusions of Law and Decision**

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

Mr. Joseph Duran: Joe Duran, Valley Isle Aquatics.

Mr. Tom Kolbe: Good afternoon. Tom Kolbe, on behalf of the County of Maui, Corporation Counsel.

Chairman Tanaka: Okay. Board, this item—

Mr. Giroux: Thank you, Chair. I think how we wanna proceed is basically, we've heard testimony. We've taken evidence. We're using the executive session minutes, verbatim minutes, as being the

recommendation. I think the Chair will speak on that real briefly because you guys do have the verbatim minutes. That's the recommendation. After you've received the recommendation, it would be nice to possibly hear from the attorneys about what they've submitted. What they've submitted is their proposed findings of fact, conclusions of law, and also, exceptions to each other's proposed findings of fact and conclusions of law. I think once we get past that, looking at those documents and hearing their arguments about those submitted documents, then you can go into discussion as a Board as a whole in order to dispose of the matter at hand.

Ms. Kelly Duell: Can I ask a question? Is this the appropriate time to request that the Board take action on this 12-801-59 that you may reopen the docket to take further evidence? Is this the time to do that?

Chairman Tanaka: Basically, the question was asked and procedurally, we, as the Board, may open and accept more testimony. Before we address that, I'll just kinda-

Ms. Duell: I would think that the reason that we are asking for this motion would significantly change the opinion of the BVA. We have substantial evidence to strengthen our case.

Chairman Tanaka: Board Members, it is up to us to decide if we wish to hear. It has been moved that it - that the docket be reopened to take further evidence from the evidence. But we need to decide that before we hear it, as well as- Mr. Kolbe, if you wanna-?

Mr. Kolbe: If I could just respond briefly? I believe that we expedited this particular issue for - and we agreed to an expedited proceeding to try and reach a resolution in this issue. I do object to reopening the record and submitting more testimony. First off, because I think something like that probably ought to have been in writing, and I should've been apprized of this request prior to that. I think that's part of the rules. Secondly, I think they had a full and fair opportunity to address the issues, which amounted to something around four hours' worth of testimony. I don't see any further witnesses that are here. And of course, I didn't come here prepared to put on more evidence. I think that the issue before the court was approval of a Type III permit. And I think we addressed the reasons why that was denied. And I believe that it's time for deliberations and for the Board to make a decision. So I do object to the reopening of the case.

Mr. Tanner: I would absolutely agree with the County. I don't see how we can present new evidence without the County having seen it, and have an opportunity to review it, research it, and make comments on that. I mean, they would be hearing it the same time we were.

Ms. Duell: I would like to say we could not submit the evidence prior to this because the swim meets didn't happen until after the hearing, and so that's what we wanted to show you, proof that we had swim meets.

Mr. Tanner: I mean, you had it before say, just an hour ago, right? What prevented you from giving the information to the County?

Ms. Duell: We have previously told the Counsel that we were scheduled for swim meets. We had dates set up for swim meets. We had that several times. I testified to that at the hearing as well, but for some reason, that was overlooked. So I thought if we brought pictures to show that we had

the swim meets according to the dates that we already mentioned previously that that would show that, in fact, we did have the swim meets, not just that they were scheduled.

Mr. Kolbe: If I could just real briefly? You know, in addition to my arguments that this wouldn't be fair to the County, I'd just note that the decision that the Board – excuse me, the Director of Parks and Finance – Parks and Recreation made was made in March of this year. And so, whether or not they've decided to start having swim meets in June of 2012 isn't gonna aid in the determination of whether or not the Director was correct in denying the permit. It's evidence, but it's not relevant.

Ms. Duell: Well, it is relevant because the swim meets were scheduled at the same time that we submitted the permit request. They weren't scheduled after.

Chairman Tanaka: Board Members?

Mr. Abbott: As one of the Board Members that was here for the marathon session which was very interesting, at any time during that meeting, the VIA was – could have presented evidence to the fact that they had planned these meets in advance up to when this testimony was taken. And I agree with Mr. Kolbe that this is something that happened after-the-fact. And I just can't – I can't . . . (inaudible) . . .

Chairman Tanaka: Okay, as – for myself, going over both parties' findings of fact, conclusions of law, both parties' responses, I guess, exceptions to the other party's findings of facts, and both our meeting and executive session, there are – there were quite a few items that were brought up in the applicant's response that was not really – not really going into during our meeting. And my fear is that this – if we do open this up that there will be items brought up that Mr. Kolbe is not prepared to respond to. I don't know. We still need to decide as a Board if we would act on the motion to introduce new evidence.

Mr. Abbott: It would appear that the Members of the Board that are here now that weren't at the original hearing where we were acting as the hearings officer, they've had a chance to read all of the minutes, and they've had a chance to read all of the documentation, and the responses, and the appeals, and re-responses, and whatever. If they have a question, could they not ask specifically, the Chair, to find out information concerning what happened in the meeting only?

Chairman Tanaka: Yeah, yes, that is true.

Mr. Giroux: And again, as I went over in the training is that when you're doing your quasi-judiciary duties, the decision has to be based on the facts that were entered into evidence, and also, anything – any evidence that was part of the record. It has to be part of the record. We can't after the hearing is closed start presenting testimony that is not evidence, that that's arguments that the parties can make. But if that wasn't – if something wasn't presented or a document wasn't put into evidence, this is not the time to be bringing in further rebuttal or evidence as such. That portion of the hearing is over. We're at the part where we're deliberating on the record because the Members who were not present have the record of the hearing, and that is what the decision should be based on.

Chairman Tanaka: With that being said, I would ask the Members that were not part of the – and

acting as hearings officer, if you would entertain that motion. If not, if you can make a motion yourselves in response.

Mr. Giroux: I think we want the attorneys to address the proposed findings of fact and conclusions of law, or the parties. . . . (inaudible) . . .

Chairman Tanaka: Members, we do not have to, but a motion has been raised to introduce new evidence. Do we want to address that now or do we wish to hear from both parties first?

Mr. Tanner: I would make a motion that that be declined and that we move forward without introducing new evidence.

Mr. Teddy Espeleta: I would second that motion.

Chairman Tanaka: Okay, it has been moved and seconded. Board Members, any discussion, questions?

Mr. Abbott: As I said in the minutes before, a great deal of latitude was given to both parties to explain and present all kinds of evidence that could be hearsay, could be controversial, could be drawing a conclusion, but the opportunity was given, plenty of opportunity to discuss anything, and I think it's over.

Chairman Tanaka: Members, it has been moved and seconded to deny the motion to introduce new evidence. All those in favor, please say aye. Any opposed?

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

VOTED: To deny the motion to introduce new evidence.

**(Assenting: R. Tanner, T. Espeleta, B. Santiago, R. Shimabuku,
P. De Ponte, G. Abbott, J. Haraguchi.)**

(Excused: B. Vadla.)

Chairman Tanaka: **The motion is denied.** Okay. We need to address both parties' findings of fact and conclusions of law and decision. Okay, we'll hear from the applicant first. Sorry, before you start, it's 2:30. Let's take a five-minute break.

(A recess was then taken at 2:32 p.m. and the meeting reconvened at 2:36 p.m.)

Chairman Tanaka: Ms. Duell?

Ms. Duell: Good afternoon. We're here to consider the matter of the Type III permit being denied to Valley Isle Aquatics. Corporate Counsel's main objection was that he felt that we are not a swim team. According to his— I'm sorry, a sports league. According to his definition, we actually meet that requirement or we do qualify under his definition because we do have a swim team. We do have swim meets. He pointed out that he was unaware of these activities; however, we did give him copies of the various permits that we had requested that indicated the swim meets that were

scheduled. We also shared with him in a verbal conversation prior to the hearing about the – that we have swim teams, we have swim meets coming up. How is that different than other swim teams? How is that different than being a sports league? His response was that he didn't know what the difference was. So under his definition, we do qualify. I also did testify, if you look on page 45 of the hearing minutes, I think that's what it's called, I did say for the record that we had some meets scheduled. I also did state that we had some team practices. So that is on page 45. So those were brought forth during testimony. I also did testify that we had submitted various permit requests as well as Mr. Duran, and all of those permit request have also been denied. Those also indicated swim teams and swim practices. So based on the only reason that Corp. Counsel feels that we do not meet the requirement of being a sports league, we do. And so that all the other points whether we feel are relevant or irrelevant doesn't seem to be an issue with either side. The only issue seems to be the sports league. So that's why we're bringing forth that you need to review those minutes indicating that we do, in fact, offer that program to our community. Thank you.

Chairman Tanaka: Mr. Kolbe?

Mr. Kolbe: Well, looking at page 45, I don't recall it, but I believe her when she says that they were planning to conduct some meets. I know later down below it says, "They're still learning how to swim. We're doing fun activities that encourage the kids to swim, become better at swimming. So some of our swim meet activities might not look like starter gun, but they're gonna be competing within our own organization."

At the time that the Director of Parks and Recreation sent a letter rejecting a Type III permit, they did that on the basis of what was in front of them, and made a determination that a Type III permit wasn't appropriate because they weren't a sports league but they were charging a commission for their swim lessons. A lot of the testimony that we listened to was uncontroverted in the sense that everybody believes that Ms. Duell and Mr. Duran's providing good swim lessons. It just didn't qualify for a Type III permit.

And actually, the issue isn't really whether or not they're a sports league. The issue is whether the Director's determination that they were not a sports league was arbitrary and capricious, clearly erroneous law or fact – the third escapes me, but these are the legal questions that the Board is supposed to consider. I think that there was a lot of evidence from Ms. Yamamoto, from Mr. Duran, from Ms. Duell, and from one of the parents addressing all of these issues. I think that the findings of fact and conclusions of law that I submitted I believe are supported by the testimony that were there.

The conclusions of law that I'm asking this Board to find which are beginning on page 5 are that we're applying the correct standards of appeal under 12-801-81 of the rules of practice and procedures. And then applying those, they didn't qualify for a Type III. They were not erroneous as to the finding of material of fact, improper procedure, or erroneous application of law. And that the decision to deny their permit were not arbitrary and capricious. I think those are the standards that were supported by the testimony.

To that extent, I know it's difficult. It's a – it is unfortunate that the way that the resources are being allocated in the County right now doesn't line up with what Valley Isle Aquatics wants to do. But they have to make that decision. I think they've made that decision. I think it was based on a

sound reason which is their lack of being a sports league but charging for the lessons. And so I don't know exactly whether you want me to go through each of these findings of fact and conclusions of law, but I would say that I think we've met our – you know, they have not met their burden to show that this was somehow a violation under the Board of Variances' rules.

The only other finding of fact I think is pretty critical for the Board to find relates to Findings of Fact, 13, 14, and 15. The first is that they did not qualify for a Type III permit. The 14th is that Yamamoto, the woman that testified about evaluating these permits, was not pressured to deny the permits and did not consider the lawsuit in evaluating their application. The other finding by the Board that Valley Isle Aquatics' definition of an organized youth and adult sports league. To the extent that Valley Isle Aquatics may disagree with my other findings of fact proposed to the Board, I guess we can discuss those, but I think the bottom line here is that they haven't met their burden to show it was capricious or erroneous. And for those reasons, I'm gonna ask you to accept the proposed findings of fact, and conclusions of law as submitted by the County. Thank you.

Chairman Tanaka: Thank you. Ms. Duell, a response to what – Mr. Kolbe's statements?

Ms. Duell: Yes, the Director was well aware of the swim meets and the swim teams at the time of the permit request because when he first indicated that he wasn't sure we met the burden of proof of being such, and then he – he did not indicate to us exactly what he expected on the request. And so we did not actually list specific activities, specific classes, specific swim team practices on our request, nor does any other swim team, or the YMCA, or any other organization. None – no other nonprofit is required to list their activity, nor if they charge or not on their permit request. It's only us that was required. So after he told us that he wasn't sure if it was going to pass or not, and that he hadn't made the decision yet, we then went ahead and sent in another request about a day after so that he would know specifically, the dates that we were planning the swim meets, and also letting him know that we had some team practices scheduled. That was prior to any denial. So he was well aware at the time before he decided to deny us the permit that that was scheduled. And I did indicate that in some testimony, as well as in our meeting with Corp. Counsel. We discussed all of these issues and he was well aware of that prior to the hearing as well.

So I do think we have met the burden of proof. I do believe that the Director did make a decision randomly. That it was completely against us rather than what is best for the community. He did not take into consideration the community's needs, wants or desires. He made this choice arbitrarily as indicated by all of the other organizations, companies, instructors that are continuing to use those facilities currently. And as Ms. Yamamoto testified, she doesn't ask them what they're doing or if they're charging. She has no idea. That was her testimony. So again, that does indicate that we are being singled out to not be given a permit for various reasons.

And in addition to that, we have requested a multitude of permits and have been denied every single permit request, every level of permit except for a V. That was also testified by myself and Mr. Duran, as well as Ms. Yamamoto did recognize that we had applied for several different permits. So if we don't qualify for a Type III because we charge according to Corp. Counsel, why are we denied a Type IV? It's the same thing but you can charge. So we feel like all of these factors do come into play when it comes to being denied a Type III. In addition to that, Type III permits do allow charging for participation as long as it offsets the cost of running your program. And as testified, we only charge what the County told us to charge to offset the cost of the program. There's no profit. It all goes right back into the program. So again, I do wanna say that the County

was well aware of our intentions at the time that we submitted the permit. Thank you.

Chairman Tanaka: Thank you.

Mr. Giroux: Ms. Duell, to help the Board out, can you, in the transcript– Do you have a copy of this transcript?

Ms. Duell: Yes, I do.

Mr. Giroux: Can you point out in it where you discuss your discussions with Mr. Correa about these swim meets?

Ms. Duell: I'm sorry. I don't have a physical copy of that because it was too long to print. Oh, wait, maybe I do have a copy.

Mr. Kolbe: I can provide a copy.

Ms. Duell: I'm not sure if I testified to the conversation we had in discovery specific to that. I do believe I mentioned that I gave him all the permit requests during discovery. I did say that.

Mr. Giroux: Okay, because, I mean, I was at the hearing, too, and I remember your husband testifying that he had several meetings with members of the Parks Department, but I don't recall any testimony regarding discussions of swim meets.

Ms. Duell: With him?

Mr. Giroux: No, on the record when he bore under oath and when people were testifying.

Ms. Duell: Yeah, page 45, I definitely did say that there's swim meets.

Mr. Giroux: I'm not asking you if you said there was a swim meet. I'm asking you is that – regarding your conversations with the staff of the Parks Department is what I'm trying to clarify. I know – I see that page.

Ms. Duell: I thought you wanted me to show you that I discussed discovery with Corp. Counsel.

Mr. Giroux: No. What we're looking at is this is what everybody has to decide the case on is this record. And what I'm trying to do is guide you to those areas that would help the Board make those decisions of whether or not there's evidence in the record that there were conversations and discussions with the Board, the Director or staff of the Parks Department that your organization was conducting swim meets.

Chairman Tanaka: You made a statement saying that you had corresponded with the Director twice.

Ms. Duell: Yes.

Chairman Tanaka: Once verbally and after your application. And you said that it was – it had not

been decided yet. So you submitted another letter the next day saying that you – this is the schedule of your practices, meets, whatever. To my recollection, I do not remember that. Or as a piece of evidence, I think it should've been – a copy of that letter with whatever date that was. So you're saying something that I don't remember it that way. That's my question. That's our question.

Ms. Duell: I believe I did not put the actual permit request letter in evidence. I didn't realize that I needed to do that since I had already shared it with Corp. Counsel. And he – I gave him physically, a copy of that. I did not realize I needed to put that down for evidence.

Ms. Kapua`ala: Excuse me. This might not be on the record.

Ms. Duell: Sorry.

Ms. Kapua`ala: It's okay. We're still . . . (inaudible) . . . , but as far as the transcript . . . (inaudible) . . .

Mr. Giroux: Trish, can you move maybe that mic. down or did you fix the problem with the mic.?

Chairman Tanaka: Maybe just put that mic. down in front of you?

Ms. Duell: Mr. Duran does believe that he did testify to this statement that he had tried to speak with–

Mr. Duran: Yeah, I had a meeting with – well, actually, in the minutes I said that I went in to speak with Mr. Correa. I was advised by actually, the Mayor. Went and talked to him again about the situation. When I went into the meeting– He said to actually go in there, which I went into his office. I was told by someone else that if you see a white car, that's when he's available. So I went in about 9:00 a.m. I figured– It is on the record.

I was speaking to Mr. Correa when he had Duke Sevilla came in. Sevilla came into the office. That's when Duke– I was gonna tell 'em all about the program, but Duke had brought in a paper that had our press release on there that said we were going to give lessons at various pools, and he accused of me of going to use the County pools to give–

Chairman Tanaka: Yeah, I mean, I do recall–

Mr. Duran: That's when I was going in to tell him about our program. But when Duke came in and accused me of wanting to do illegal lessons, I figured it was a moot point, and it was time to leave that meeting.

Chairman Tanaka: Yes. Now, the question that was posed, I do recall your testimony, Mr. Duran, but my question or statement to Ms. Duell regarding a statement that you made today that there was an actual letter submitted to the Director, that was never a part of the record, nor part of evidence that came before us at our meeting.

Ms. Duell: Again, I didn't realize I needed to submit that as evidence since I had given it to Corp. Counsel already. I did testify that we had submitted a multitude of various permits. I did testify to

that. I'm not sure what page. I'll have to look for it.

Chairman Tanaka: You see, I mean, that's the dilemma that this Board is in specifically for this item. Because that copy was not presented as evidence by yourself, the eight of us here have to say, well, okay— I mean, that should've been brought up as part of the evidence during the actual hearing.

Okay, so with – well, with that being said, the eight of us need to deliberate on – well, I guess the next point would be as hearings officer to this appeal. I think the Members who were not here, you read our – the minutes of the meeting, as well as the executive session. I guess I'd like of summarize what was discussed in executive session. Basically, what Mr. Kolbe said, I mean, it came down to the four Members as hearings officer would recommend adopting the findings of fact, conclusions of law and decision by Mr. Kolbe. Some of the things repeating what was discussed was that, you know, as good of an idea as this may be, as much of a need there possibly is, you know, by them not being able to operate, there is a demand. The community suffers. The public suffers. Unfortunately, we are not – that's not our decision. The Parks Director made a decision. While I think the four of us discussed this and agreed that the Director could've done this on his own, it could be – it has been argued by the applicant that it should've been done by the Director, but it was not. So the denial of the Type III permit went forward. The County, as Ms. Yamamoto testified before us that it's – their activities were on a space available or time available – availability. So it was not – it wasn't proven to us that basically that they were discriminated against.

I guess back to what we have to address specifically would be the three criteria of the appeal. Now, was the denial an erroneous finding of fact or application of law? We discussed that in-depth during their testimonies as well as in executive session. You know, we don't feel that. Was it arbitrary and capricious in any way? Everything pretty much is – well, was either hearsay or direct testimony from County employees. The third item would be a clearly unwarranted abuse of discretion. And I don't think that was proven. So that's why in our minutes somewhere in here, my statement would've been that our recommendation to the rest of you and to the Board overall with at that time, haven't had seen the findings of fact, conclusions of law by Mr. Kolbe that we would probably – that we would recommend to the Board that the appeal would be denied or that we would recommend adopting the County's case.

Ms. Duell: Excuse me, Mr. Chairperson, it is page 51 that I testified to all the various permits that we had already applied for.

Chairman Tanaka: Well, actually, what my question— I know – I realize that on numerous occasions during both your testimony, Mr. Duran's, and direct questioning that there were numerous permits applied for. And to my recollection, there was no – an exact number or copies of denials. For one, I realize that you never received written denials for, I guess, all of your – these permits applied for. What I was addressing when we first started this was that you did testify that you gave the Director a schedule saying that you had these swim meets.

Ms. Duell: That would've been on the permit requests. I was testifying that page showed that I testified that we put in all the different types of permit requests. That's page 51. On the permit requests is what indicates the swim meets and so forth.

Chairman Tanaka: Then let me ask. Well, okay, I guess the direct question would be were those

submitted as exhibits on your behalf?

Ms. Duell: No, as I indicated, I did not realize that because I already gave 'em to Corp. Counsel that I had to put them for evidence. That's my mistake.

Chairman Tanaka: Okay. Just out of my curiosity, on or about what date, or was that what you specifically referred to as your submittal the day after your conversation?

Ms. Duell: Yes, March 28th is one of the dates that indicate the swim meets.

Chairman Tanaka: Okay. And that was regarding specifically the – the specific Type III permit application that is before us now?

Ms. Duell: No, this is – you asked about the other permits. So this is a Type IV that was also denied that indicate swim meets. So we didn't know– He didn't tell us we had to list our activities on the permit. So therefore, we didn't list it on the permit. And then we listed it the next time after we were told we had to list it. We weren't told the first time.

Chairman Tanaka: Now, Mr. Kolbe made this morning, and again, I mean, I really sympathize with you on this overall, but the problem is, and it appears as though that swim meets – to accommodate the definition of a sports league, your swim meets were created after-the-fact. If there were documentation– I understand that you started trying to document it after, but it's the appearance in that – to me, I shouldn't speak to everyone, or to any person that after the denial of the permit, then efforts were taken to meet the definition of a league, so creating swim meets after-the-fact. So, while again, while I sympathize with you, what's before us is what we have to act on, to decide on. If– I'll put this on record. For myself, after going through all of this, if I were the Director of Parks and Recreation, I would've given you the permit because I would've had – I would have the power. I am not in that position. I am in this position hearing it – you know, all of this after-the-fact. But again, we need to, as a Board, basically answer three questions. And that's what we need to deliberate on now. So, Mr. Kolbe, you had something?

Mr. Kolbe: I don't want to belabor it, but even the March 28th document is after the Director's decision.

Chairman Tanaka: Okay so, Board Members, based on what we have, what you have been submitted, the minutes of the hearing itself, the executive session that the four of us were in, again, it would be our – as hearings officer, our recommendation to the Board that we would adopt Mr. Kolbe's findings of fact, conclusions of law and decision. Members, discussion?

Mr. Santiago: Quick question. I read through the transcripts and I just have a question. After two – it looks like over three years of issuing permits, 29 in all that were granted and approved, what changed? What changed? Why were they denied on the 30th application?

Chairman Tanaka: Well, apparently, what had happened was in the evidence, they had been mistakenly been given like three permits in the past. Now, what – the sampling that we had in front of us was, you know, I think there was 20-something permits that were granted to them. Now, at some point, it was determined that the Type III, they did not qualify for a Type III permit. So within the Department of Parks, they would have stopped issuing any more Type III permits. The other

– and whether it be – whatever permit type that would've been issued would only have been issued based on availability of the pools.

Mr. Santiago: And those permits were short term permits—those 29 permits that were granted?

Ms. Duell: Yes, according to the Type II-CC, you're allowed to request a year of permits in advance; however, Aquatics would only give us two months at a time. So, yeah, they were short term.

Mr. Santiago: And the last permit that was granted previously was back in 2011 sometime, November?

Ms. Duell: No, we had a permit from March through May of this year, of 2012, for only one pool out of the five that we usually teach – I mean, out of the three pools that we usually teach.

Chairman Tanaka: So according to Ms. Yamamoto's testimony, it was – there was – well, there was a change in County policy, apparently. And that the County would take on teaching swimming. So they basically cut off Valley Isle Aquatics. And that – well, their availability – the availability of the three pools that they had been using went down significantly. So there was no space. There was no times available for them so they weren't – that's the cause. Now, that's testimony given to us by Ms. Yamamoto. Any other questions? Discussion?

Mr. Tanner: Yeah, I read the transcripts. I read the executive session minutes. And the question before us is, was the Director's decision arbitrary and capricious? I haven't seen evidence that it was. Based on the information that the Director had at the time, based on the definition of and the requirements for a Type III, I would agree with the Director that Valley Isle Aquatics, at the time he made the decision, did not qualify. Whether it does today is a moot point. I mean, that's not what we're talking about. Based on the information that the Director had, was his decision arbitrary and capricious? I don't see evidence that it was.

Chairman Tanaka: Any other questions? Discussion? If not, then I'd entertain a motion.

Mr. Abbott: I would make a motion to accept Mr. Kolbe's findings of facts.

Mr. Giroux: When we get a second, does that include the denial of the exceptions to those facts?

Mr. Abbott: Yes.

Mr. Tanner: I would second that.

Chairman Tanaka: Okay. It has been moved and seconded. Any other discussion? With that, I'd ask for a vote. All those in favor, please say aye. Any opposed?

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

VOTED: To accept Mr. Kolbe's findings of fact to include the denial of the exceptions to those facts.

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

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

Chairman Tanaka: **The motion has carried. The proposed findings of fact, conclusions of law and order has been adopted prepared by Mr. Kolbe.**

Mr. Giroux: Yeah, we just need it finalized, then the Chair will sign that, and it will be served on the appellant.

Chairman Tanaka: Okay. Thank you. Okay, Item C, Unfinished Business, Trish?

C. UNFINISHED BUSINESS

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 \$500,000.00 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. My name is Paul Horikawa. Present today is Jonathan Ross, one of the applicants in this matter. And also – well, one of the other applicants is Sean Ross who had to work last night. He had to unload one of the boats so he couldn't be here today. He was attempting to be here, but I think they worked all through the night. But in any event, Mr. Ross is here.

By way of background, just so that the Board – as the Board reviews this, you may recall that on September 22nd, 2011, the Board approved the request for a variance that was requested by Mr. Ross and his brother. The Board imposed a requirement that the Rosses obtain an insurance policy that name the County as an additional insured. The policy amount was \$500,000. The indemnity agreement which the Board required was submitted to the County. The applicants had a very hard time obtaining the insurance that was required by the Board. And on March 6 of 2012, earlier this year, they had submitted a request to delete that requirement, and they also submitted the denials from six insurance companies. On April 26th, the Board took action on the request, but the result of the Board's action was that there was no action. There was a motion to grant the request, but I believe that there was a three-to-two vote. And under your rules, no action was taken and this matter was placed on your agenda as unfinished business.

The Ross Family, this is Jonathan Ross's family, Sean Ross and his family, they're here before you today, and they request that the Board delete the insurance requirement. They would point out that the Mr. Ross has lived at the bottom of Huelo – Door of Faith Road, excuse me, since 1978. And at that time, he hasn't seen any accidents occurred on that particular roadway. He would also note to the Board that in the '80s, the Hololani Subdivision, which is a six-lot subdivision was approved by the County. And at that time, apparently, for whatever reason, the developer or the subdivider was not required to pave Door of Faith Road. Under normal circumstances, that's a requirement when you subdivide property, but for whatever reason back in the '80s, that was not imposed, and I would note that that particular project is located makai or oceanside of the Ross property. But nevertheless, I would note that in the interim, you know, from the time that we had met, the matter— They did go back to their broker, and he was able to shop – or he did shop the request for the quotation based upon what the Board had presented. And depending on what the Board does today, they – he was able to get a confirmation that Lloyd's of London would issue a policy. Yes, yes, Mr. Tanner. I mean, I was talking to Mr. Jencks about it and he was commenting about how it would probably be very expensive. I know – just my recollection and even reviewing the minutes of the Board, I think the Board was skeptical. So we asked Mr. Oka to do his best to get the policy. And, well, if the Board denies the request, we have to go and look at Lloyd's of London, and see if we can get the policy.

I would note several things, and the Board has various options, but we would ask that the BVA delete the requirement. And I would note a couple of things. I remember Jim had mentioned that other projects in the area had these insurance requirements. So I did go through the Board's minutes from the last three years to find out which project they were talking about. And I couldn't really figure it out, but one of the things that I would note is that the Board – this is by no way controlling on the Board, I mean, the Board has imposed – I think if you had to establish a rule, I think the Board's policy is, you know, you take these things on a case-by-case basis. I mean, I think that's the rule, but I would note that the Board, in other cases – well, in the minutes that I had reviewed had approved variances for subdivision or subdivision-type improvements without insurance requirements. And these cases would be back in 2009 when the Easton and the Wright case, which was in Hana, as well as – well, Malama Na Makua O Keiki, which was in 2010, they had roadway improvements, and the variance was granted without insurance requirements. The Stewart Brandel case, BVA 201000015, there was a requirement to improve Nahiku Road. The Board granted the variance without an insurance requirement. And there are several others. And so, I mean, we just point this out as – not as – I don't think it's controlling on the Board, but this is precedent.

One of the applications that I had found interesting was not a subdivision case, but it was a request for a variance from the University of Hawaii on Maui. And they requested a height variance for one of their projects. And what they – what the Board did in that case was they reduced the amount from the traditional one million dollars to one hundred thousand dollars, but they limited the time that the insurance has to be posted for ten years. And I think there was another case with a similar request.

When the Board makes its decision today, Mr. Ross is gonna have to obtain the insurance for the rest of his life. And the agreement is gonna be recorded, and that requirement is forever. So it's gonna be for his lifetime and his children's lifetime. The Rosses are proposing, as we note, as you may recall from the application, a five-lot subdivision. The intent – I mean, all of these lots are not on the County grid. They don't have water. They all have catchment systems. So what they would

like to do is keep the lots in the family. I think Jonathan's gonna give – keep one lot, give one lot to his son. Sean is gonna give one lot to his son, give to his daughter. And the other lot, they were gonna have it go to Mr. Izumigawa, who you may recall testified here. Mr. Izumigawa, for his kinda age, you know, he was in the 442. He needs– And his other daughter I believe is living on Oahu. And so Mr. Izumigawa needs someone to care for, so what they were thinking of doing is having a house built there so that Jill, Jonathan's wife, could take care of Mr. Izumigawa.

But we're here before the Board, and Sean is gonna speak to you in a few minutes, but I think – what they request before you is to delete the requirement. If you are not inclined to do that, to reduce the insurance request. Thank you.

Mr. Jonathan Ross. Good afternoon. I'm Jonathan and my brother is working tonight, and I took off of work. We – Mr. Oka, Leonard Oka, which is part of the Sons and Daughters that my wife and her father are all involved in, is our agent, and he found a policy for about \$3,000 or something a year. As Paul said, that would be forever through Lloyd's of London. Our auto – my brother's and my auto insurance go back from when we first started driving. It's a company in Honolulu. We didn't want to give up our Liberty Mutual insurance to try – you know, it was mentioned that we could possibly get it under our car policies. I didn't see giving up something we've been with for 30 years to go hunt somewhere else. That agent, John . . . (inaudible) . . . , in Honolulu denied us verbally. We couldn't get him to get it in writing, for some reason. Then when the company I work for, supervisor for, went with our bonding agent to try and find the insurance in Honolulu. They ran up against Lawrence – Leonard, who had been shopping. So they turned it down. They said they can't do this while he's shopping for it. I guess that's how insurance agents work. So basically, Leonard went back and found something that's gonna cost a lot of money. And our intentions weren't to have to sell a lot, yeah, because we're not developers. It's gonna cost us money, the whole thing. Since 1992 we've been trying to get this. Thank you.

Chairman Tanaka: Thank you. I guess either – well, what was that number?

Mr. Ross: It's like \$2,800. I gotta get the paper. I didn't give it to Paul. I was off-island when Leonard found it. You know, I was working. I was down south working on a job, on Wake Island, for the air force thing. Leonard e-mailed it to my wife or we got it at that time. I just got back. Started another job. I can get it and give it to him. It was about \$2,800, almost \$3,000.

Chairman Tanaka: Okay. That's all I–

Mr. Ross: That is for the two – you know, that was for the whole lot. I think it comes with the property. I'm not sure how it works.

Chairman Tanaka: Okay, thank you. Okay, Board Members, any questions for–?

Mr. Tanner: I don't have any questions. I remember this well and the discussion that the Board had prior to the vote on this. I think I was the one that made the original motion. I think the requirement for the hold harmless insurance policy for the County is there for a reason to attempt to limit the County's liability, and the decisions that we make, and that's important. It doesn't eliminate it by any stretch of imagination. It just limits it there. I think there are times when exceptions can be made. I personally believe that this is one of them. I think the applicant has shown that he's made great efforts to meet the requirement of the variance that was granted. He was unable to short of

great expense. Actually at the last hearing, it wasn't even a matter of that. He couldn't find it at all. Now he's able to find it, but it sounds like at a great expense. So I would be prepared to make a motion to add Maui County as an additional insured on a policy with the minimum amount of \$500,000 be deleted from the granted variance.

Chairman Tanaka: Okay. Still in discussion. This is – I guess, I'm speaking directly to our new Board Members. This is something that comes up with every variance that we end up – or that we grant. We'll grant a variance to allow them to not pave the road or whatever. And with the granting of the variance, we'll say that the applicant will – there will be a hold harmless agreement drawn up, a legal document saying that by us, by the Board, giving them a variance, the County is not responsible for – you know, so that basically, so the County cannot get sued by the granting of the variance.

Board Members that have been on the Board for a while with me, I've said this many a times that typically, if – I'll lean toward no insurance requirement. My personal feeling is that I would prefer if we were gonna force the applicant to spend money, I would prefer them to force them to spend the money to make the improvements rather than giving it to an insurance company. God, I hope nobody sells insurance in here. So in various times over the years, I've made that statement. But again, also, it also goes with the amount of risk or risks that may be involved with a granting of a variance. If we leave a dirt road a dirt road, and a fire truck comes through, if it had been paved, the fire truck would get through, no problem. If it wasn't paved, it stormed the night before, the fire truck went off a cliff. I mean, that's extreme. We'd say chances are it'll never happen, but that's exactly what insurance is, you're giving them money for something that you hope that never happens. So I just wanted to get that – well, especially, to the new Members. That's my feeling. So in this case, in your opinion, you'd have to weigh that. We granted a variance so that the roadway improvements did not have to meet the standard. So I guess just mirroring what Mr. Tanner had to say.

Mr. Santiago: As I recall, the pictures of the roadway depicted a very well maintained road with well maintained shoulders, and what have you. And it's a testimonial to your efforts. And I think initially when the motion came up, I was against putting on the insurance clause into it. With the effort that you've put out trying to secure that insurance, I would side with Mr. Tanner, your leaving that requirement.

Chairman Tanaka: Okay. Other Members, any other comments?

Mr. Abbott: I have a question. On a hold harmless agreement, who signs the hold harmless, and who does it protect? Do the property owners sign it to protect the County?

Mr. Giroux: Yeah, the hold harmless basically is signed by the applicant, and filed with the Bureau, and it runs with the land along with the variance. And it protects the County from a third party that might sue the applicant in light of any injury that comes from a possibility that would come up out of us granting the variance. So basically, most hold harmless include language that indemnify, defend, and hold harmless the County from any lawsuit. And again, part of the insurance is that hand-in-hand, the insurance would pay for the lawsuit. Whether you win or you lose, the lawsuit itself is paid for through the insurance.

Mr. Abbott: And have we established that this is a private road or a public road?

Unidentified Speaker: Gray area.

Mr. Abbott: This is a very gray area because if the public can use it and there was an accident by a citizen of the County, then they can be—

Mr. Tanner: It's not a County-maintained road, put it that way.

Mr. Abbott: Then they can sue the County.

Mr. Tanner: Sure, oh, yeah, regardless.

Mr. Abbott: They're not gonna sue the property owner.

Mr. Tanner: Sure, they would.

Chairman Tanaka: They'd sue the — well, they'd sue the property owner and add the County, the State.

Mr. Horikawa: Did you want a response to that question?

Mr. Abbott: I'm just—

Mr. Horikawa: Oh, okay. I'm sorry. I didn't mean—

Mr. Abbott: I'm just trying to find out where we sit.

Mr. Horikawa: On the maps that are maintained by the State, they show the — this as being two things: either a County road or a government road. That's kind of where it's at. They did, as part of the subdivision requirement, the County— I believe the County's position is that their portion of the road is not a County highway, a County road. But when they got the subdivision approval, they had to contribute, I believe, five feet along the frontage on both sides of the road. So that deed was, I believe, given to the County, and it was recorded. So the County may or may not own a portion of the road. I don't think the Council has accepted the roadway yet, the roadway dedication. But as noted, they have their committee that's been going on for 30 years. The members down there contribute and they do the maintenance. If there's any negligent maintenance issue that comes up, they're gonna be named as the parties, because the County doesn't do maintenance in this area of the road. That's for sure.

Chairman Tanaka: One of the things as far as lawsuits, right, I mean, you know, we've all heard of a lot of frivolous lawsuits. McDonald's paid millions for — 'cause their coffee was hot years ago. But — so back to what I was saying about the insurance, there are greater chances of lawsuits in certain cases, and they're virtually close to zero chance of lawsuits in certain cases. So we have to look at them individually. Now, in this case, and — well, in this case anyway, there's that gray area. And what they have been doing and what they have been doing for 30 years now has been sufficient. And I believe in the last 30 years, there have been no accidents. And I also believe in the next 30 years, there won't be any more, any accidents. So again, we need to weigh it individually. And one of the things — well, another thing again for the new Members, and I've stated this before, the hold harmless agreement is a legally binding document. It goes with the — it's

recorded with the Bureau of Conveyances. It goes with the variance as well as the land. Now, so legally, the County is held harmless by that variance. But inevitably, if there is a lawsuit, typically, the lawsuit will go to, you know the property owners, the County, the State, everyone, anyone and everyone. And potentially, by this Board typically, in the past adding on a million-dollar insurance, along with the hold harmless agreement, that becomes costly to the applicants. Again, if it's a five hundred million-dollar lawsuit, whether you have a hold harmless agreement and a million dollars insurance, it's— Okay, so that's why. Like I said, I would – if there was something that we're gonna make the applicants spend money, I'd rather see the applicants spend money to make some improvements rather than to an insurance company.

Mr. Abbott: No, I concur. I'm just very concerned with the drug problems, and all the dingbats that are on the road, and everything else. It's just – it's a point of contention. I understand their point of view. Believe me, I do. And I'm with them, but there's – all it takes is once. So I don't know. I'm just trying to find out who owns the road and who's gonna be responsible for it. I know the person in the accident is gonna sue the homeowners and then countersue or include the County. I know that.

Chairman Tanaka: Any other questions or discussions regarding this? Then I'd entertain a motion.

Mr. Tanner: Chair, I'd make a motion that the requirement to add Maui County as an additional insured be deleted from the granted variance.

Mr. Santiago: And I'll second.

Chairman Tanaka: Okay, it's been moved and seconded to delete the insurance requirement retaining the hold harmless agreement, correct?

Mr. Tanner: Correct.

Chairman Tanaka: Okay, with that being said, I'd ask for a vote. All those in favor of this deletion, please say aye. Any opposed?

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

VOTED: To delete the insurance requirement retaining the hold harmless agreement.

(Assenting: R. Tanner, B. Santiago, G. Abbott, R. Shimabuku, P. De Ponte, T. Espeleta, J. Haraguchi.)

(Excused: B. Vadla.)

Chairman Tanaka: **Motion carries.** Thank you.

Mr. Ross: Thank you. Appreciate it.

Ms. Kapua`ala: Excuse me, Mr. Chair? Oh, I'm sorry. Go ahead.

Mr. Ross: I just wanted to add one thing. When the guy walked off the cliff and died, the Fire

Department came down, turned around in our yard in that area, helicopter in the yard, everything was good. You know, I talked to Kono and those guys, and it's— Too bad the guy went off the cliff. And that was during a storm, rainy time. So it was January 1st, whenever that guy went off right down.

Chairman Tanaka: Okay, thank you. Trish?

Ms. Kapua`ala: I wanted to ask Mr. Horikawa to prepare the order, if that's possible. That's a decision of the Board that needs an order.

Chairman Tanaka: Oh, yes, yes.

Mr. Horikawa: We're gonna revise . . . (inaudible) . . .

Chairman Tanaka: Yeah, it is that simple, yeah? I mean, revise, just redo it and take out the—

Ms. Kapua`ala: Thank you.

Chairman Tanaka: Okay. Next item, approval of June 28th's meeting minutes.

D. APPROVAL OF THE JUNE 28, 2012 MEETING MINUTES

Chairman Tanaka: Oh, yes, the 28th when the Chair showed up late. Okay, approval of those minutes. We need a motion.

Mr. Tanner: I make a motion to approve the minutes.

Mr. Abbott: Second.

Chairman Tanaka: It's been moved and seconded. All those in favor, please say aye. Any opposed?

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

VOTED: To approve the June 28, 2012 meeting minutes.

**(Assenting: R. Tanner, G. Abbott, B. Santiago, R. Shimabuku,
P. De Ponte, T. Espeleta, J. Haraguchi.)**

(Excused: B. Vadla.)

Chairman Tanaka: **Meeting minutes approved.** Director's report. Status, Trish?

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: Yesterday we had a mediation meeting with Judge McConnell regarding the— What

is the project? The Linex appeal, an appeal for a Molokai property. So they're still going to attempt to come to a resolution, so no contested case hearing is set yet. That's the only update I have for you.

Chairman Tanaka: Now, in that case, Trish, is there a target, or is there a deadline, or a—?

Ms. Kapua`ala: Yeah, actually, Judge McConnell does not like to leave open-ended appeals, appeals to be open-ended. So there is a deadline for a future teleconference or meeting in person. I don't have my notes, but sometime in August. So they have – the applicant, the appellant, has up until that time to work with DSA. And if they get a favorable conclusion from DSA, then Planning will back off, and then the thing goes away.

Chairman Tanaka: Oh, okay, okay.

F. NEXT MEETING DATE: Thursday, July 26, 2012

Chairman Tanaka: And our next meeting date, okay, so as far as we know, the 26th is—

Mr. Santiago: . . . (inaudible) . . .

Ms. Kapua`ala: Yes, I believe so. You'll get notification from Tremaine as to whether or not that Thursday meeting date will be canceled. But as of now, we have some new applications to complete and schedule for public hearing, but that needs to be like 30 to 45 days in advance. So at this point, we have no items to bring to your attention that requires action.

Chairman Tanaka: Okay. Alrighty. Anything else, Board Members? Thank you very much for your efforts today. The 27th, hopefully, it goes smooth.

Mr. Shimabuku: I have a question. As far as the hearings officers for the first two items, how would that work out now? Do we meet on a special date for that? How will that work?

Chairman Tanaka: No. Well, for the first item, that Piilani, we have been declared the hearings officer, and we will act as hearings officer on that case on the 27th.

Mr. Giroux: So we need a quorum.

Chairman Tanaka: As far as off the top right now, it looks like most or all of us will be available on the 27th? Alrighty. Nothing else? Meeting adjourned. Thank you very much.

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at approximately, 3:41 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
Teddy Espeleta
Gene "Clark" Abbott
Patrick De Ponte
Jacqueline Haraguchi
Bart Santiago (1:34 p.m. to 3:41 p.m.)

Members Excused:

Bernice Vadla

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