

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
October 25, 2012**

(Approved: 11/21/2012)

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, 1:41 p.m., Thursday, October 25, 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. To the meeting of the Board of Variances and Appeals, I'll now call the meeting to order. It is now 1:31pm. We have a quorum of six Members. First item on our agenda, Trisha?

B. VARIANCES

1. **SHELLY MADDIGAN and JOEL M. PARKER requesting a variance from Maui County Code § 18.04.020(D) which states that parcels that have undergone a consolidation/resubdivision under this subsection shall not qualify for this exemption with respect to any subsequent consolidation/resubdivision for the Maddigan Subdivision (a.k.a. Haleakala Acres, DSA File No. 2.3153) located off of Haleakala Highway (Crater Road), Kula, Maui, Hawaii; TMK: (2) 2-3-013:032 and 054 (BVAV 20120006).**

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

Ms. Kapua`ala: So just a quick update for the Board, I do have the ownership documents and authorization that was requested as of last meeting, and I have the two plats that are available for your viewing—the first subdivision and the current one that we're reviewing today. And we have Ms. Lesli Otani here again, a civil engineer with the Department of Public Works available for your comments and questions. Thank you.

Chairman Tanaka: Okay, thank you. Let's see. So Trisha, as far as procedurally and the application for variance, now all of our I's are dotted and T's are crossed?

Ms. Kapua`ala: Correct.

Chairman Tanaka: Okay, if you can – I guess if the applicant would like to – if you can fill us in to—? I was going over our – and I'm pretty much – where we left off. The reason for deferral was because of the fact that there were – there was the separate parcel, separate land owners. If you want to, maybe kind of backtrack and give us an intro again.

Ms. Shelly Maddigan: Thank you very much, Board. I appreciate that you have granted me this second chance to clarify what I'm asking for. Just to go back and bring us to date, I did submit my subdivision application in April of 2011, and I didn't receive my preliminary subdivision approval until February of 2012. Upon receiving my preliminary letter, the only requirement for the subdivision

process that I have not been able to provide is the requirement of a 120,000-gallon water tank and 2,400 feet of eight-inch waterline. So this has lead me – I've gone to all the departments, and it ended up I'm in your hands at this point. Nobody knew what to do. A lot of the confusion seems to come at our last meeting because I was asking for a freebie again, which was already done on this parcel, and I'm not asking for anything easy or free. I have gone through the process of supplying all – everything required for this subdivision until I hit the water tank requirement.

So my request is to undo the subdivision that was granted in 2003, and by doing this, I am adding no additional impact. Nothing changes other than I will be able to use and enjoy the full parcel rather than a small one-acre portion of the 2.63 acres. By using – by only having the one acre, it creates an accessibility problem that really there is no solution that I or anyone that I've spoken to, friends who are engineers, as far as being able to get emergency vehicles or construction vehicles up the way that the land is situated.

(I've never used one of these.) Apparently, this is the way the land is. This is the one-acre piece here. This is Crater Road, and there is an easement up this driveway. And then this is the easement that goes with the one-acre. It goes across the bottom here. And then this is – this whole area is a rather – well, it is – it's a cliff, and it goes – it's a very steep hill side. So, the only access that we were able to find a place to be able to get up to this part of the property is in this corner, and so there isn't much turning radius. The entire side along here of the property are great big boulders, so there was no way to go any further over or – and where the drive was, potential driveway, is right here, and it's very steep. And then when you get up here, there's a small – this from the back line here to right about here is the only flat area on that one acre. And then the rest of it is pretty steep-inclined. Another hazard for this driveway location is that the Wilkins' home is right here. If I should ever lose control coming down this driveway, or brakes, or anything, I will end up in my next door neighbor's bedroom and bathroom. And it's scary. I came down the other day with my truck in four-wheel drive, and it was raining, and I was a little bit scared.

My request is– And originally this parcel here, the 54 – the property line runs straight up here. And it was originally a 1.78-acre parcel that had our main home on it. And the driveway for that is right over here, so this is the driveway up to Lot B1, which is TMK 54. And an easement has been granted from that lot to use this driveway. And Kurt – when my husband did this subdivision, he added – consolidated this piece into the existing house site so that we would have land for an orchard. And really, we never thought about what was going to happen on this acre over here other than it was just there and we planted trees, some trees on it without the intent of ever really selling it or doing anything. I was just our homestead.

So what I am requesting is that the original boundary line that goes straight up here, be put back. It's now over here. It's where the subdivision line is today. I'm asking to move this line back over to its original boundary position. Does that make sense? I have some in color, if it might help any. The pink is the one-acre parcel and the access to it. The blue is where we are today currently with the acreage that they have this on the board. What I'm asking– Thank you. And what I'm asking for is to put the boundary lines – undo the subdivision is what I'm asking for is to put it, the boundary line, back to where they were originally, which would then reinstate the 2.638 acres, which will allow me than access up this way onto the property rather than limiting me to this bottom where it's a very dangerous situation. And then this house and the property would be returned to the 1.78 acres that it originally was. This would then be returned to 2.638 acres that it originally

was. You have any questions?

Chairman Tanaka: Board members, any questions? Since— Oh, okay go ahead.

Mr. G. Clark Abbott: The person who owns Lot B1A, they currently – you have to – we'd had to have – we asked for release from them 'cause she didn't need the property or whatever.

Ms. Maddigan: Right.

Mr. Abbott: So I'm – nobody's is – is anybody going to accomplish or gain anything? It's not going to take anything away from her property?

Ms. Maddigan: No, no. She – when she purchased this, I was already in the process of the subdivision.

Mr. Abbott: So she knew this already?

Ms. Maddigan: So she knew this was happening at the time of purchase.

Mr. Abbott: And she has now?

Ms. Maddigan: And she has agreed to it. She signed the paper that I think you asked for. And there is a document that she is aware of this and agrees to it.

Mr. Bart Santiago: Is that a signed notarized document?

Ms. Kapua`ala: Correct. It's a— She is now a co-applicant in this application.

Mr. Santiago: Do we have any – a precedent case similar to this? A resubdivision or subdivision that was referred previously? . . . (Inaudible) . . .

Ms. Lesli Otani: This is Lesli Otani from the Department of Public Works. Actually, the variance before you today is not to undo a previous subdivision. Once the subdivision is done, the subdivision is completed. Once the Director of Public Works signs, it's finalized. The variance request today is that the Department of Public Works has a process called Ordinance 2372 where an applicant can consolidate and resubdivide into the same or fewer number of developable lots with exemptions from certain requirements in the County code. That process for subdivisions is one time only. And when this – the previous subdivision was done and finalized in 2003, the Maddigans at that time used their one time only option. So now what is before you is that they want to have a second Ordinance 2372 processing with the exemption to move the line again. So it's not undoing the previous subdivision. They still have to go through the subdivision process, but they're looking for the most favorable process than the regular subdivision process.

Mr. Santiago: Has this ever come up before?

Ms. Otani: We get requests for it, but this is to my knowledge, the first time that someone has come to the BVA for a second 2372, and that code came into effect in 1994.

Chairman Tanaka: Lesli, just to clarify just to make sure I'm on the same page, but what you're saying is that the subdivision already exists so this is a resubdividing? It's a subdivision on its own?

Ms. Otani: Yes. So the previous subdivision was done in 2003, and this file, File 2.3153, is a pending subdivision application. We are currently processing what Trish had up earlier as a regular subdivision process where the plan was routed to the various governmental, non governmental agencies, including, Water Department, and Maui Electric, State Health, etc. So if it was a 2372, the plat would not have gone to Water Department and some of the other agencies. So that's where she's saying their desire to not comply with the Water Department requirements. They want to use Ordinance 2372 a second time.

Chairman Tanaka: Okay, yeah, so the first time, it never went to Water, Electric. As far as Public Works is concerned, roadway improvements – how was this affected? What would their requirements be as far as roadway improvements?

Ms. Otani: Under Section 18.20 of existing streets, if you're going to consolidate and resubdivide three or fewer lots, and there's also language for churches and things of that nature, the Public Works actually doesn't require adjacent roadway improvements. So even if that may be an exemption under 2372, there's also another section of the code where you it's the same or fewer lots. However, in this case, Haleakala Crater Road is a State highway. So typically, Public Works doesn't have requirements anyway. We send it to the State for their review because it's a State highway.

Chairman Tanaka: Okay, so in this process, has it gone to the State Highways for review?

Ms. Otani: Yes, and in the 2372, it would also go to the State.

Chairman Tanaka: Oh, okay. So it did go to the State. And what was – what is Department of Transportation saying?

Ms. Otani: Their comment to us, which we added to the preliminary approval, was "provide proof that existing access conforms with current driveway standards." So they were reviewing the driveway access.

Chairman Tanaka: Okay, and we had a picture from before. Is the current driveway – I guess driveways, does it meet standards?

Ms. Otani: I wouldn't know. I don't review that because we send it to the State.

Chairman Tanaka: Okay. Okay so, Board Members, just so we're all clear, the difference between the original subdivision under Ordinance 2372 versus now, the additional requirements that go along with resubdividing, any parcel can be – the one time only consideration under 2372 has passed. You could subdivide this over and over and over again if you're willing to go through the process. Now, so it's– Board Members, we're clear on that? If there's, I guess, discussion?

Okay, let me just throw my two cents in here. Now, the application for variance, our typical requirements of geographic conditions– Let's see. They are detrimental to public health and

safety, appropriate zoning. There are – I mean you could argue both for and against, either way. So I guess – you know, Bart, you talked about anything – if this – if there's ever been precedence set. This Board looks at everything on a case-by-case basis. So although, you know, you could argue again, unique or special geographic condition, the next door neighbor may be separate special geographic condition. So that's what we have to – we as a Board have to consider and ultimately decide.

Mr. Santiago: I have a question on the subdivision law or criteria. So the subdivision happened with a previous owner, if the new owner was wanting to do a subdivision, does the rule – the criteria of not being able to subdivide a second time go with the land or with the ownership?

Chairman Tanaka: No, the land. The land has that. So if it – if whether or not this is granted, and whether or not – or whatever configuration it's sold, if you – if the new owner wanted to subdivide it in a different way, they would have to go through the process. Correct, Lesli?

Ms. Otani: Yes, the 2372 stays with the land.

Chairman Tanaka: Yeah.

Ms. Otani: But just to clarify, the previous subdivision was also done by the Arthur Gene Maddigan to revocable living trust, so it's the same property owner as before.

Chairman Tanaka: Yeah.

Mr. Rick Tanner: Do we have anything new since the last time this came up with regard to letters: either support – in supporting or opposed to?

Ms. Kapua`ala: No, sir, the Planning Department did not receive any more letters in support or opposition.

Mr. Tanner: Thank you.

Chairman Tanaka: Okay, okay. As part of our – what we went through at our last meeting, when we deferred this item until today, we had actually opened and ultimately closed public testimony. Being that we are reviewing this again, I guess I'd open I'd it up if there's anybody – anyone here who wishes to testify on this matter. If you can, please just come forward. Please sign your name. We'll admit you to three minutes.

Mr. Richard Pohle: Thank you. We are here as neighbors. We are in that parcel.

Chairman Tanaka: Sorry, could you identify yourself, please?

Mr. Pohle: I am Richard Pohle. My wife is . . . (inaudible) . . . Pohle. And we are owners of that 3.47-acre parcel. We are basically neighbors. We've known the Maddigans for years. We knew Higgins and we know Shelly. And I just want to say she's a fine person and I wanted to give my support along that line. Thank you very much.

Chairman Tanaka: Thank you.

Mr. Charles Jencks: I'll go next. The name is Charles Jencks. I'm here testifying in support of the Maddigan family on this matter. Just a little bit of history so that you have something to think about in the context of this request. When I was the – I was the Deputy Director of Public Works at the time that the bill was passed in '94 to modify the subdivision code to allow for a process whereby people could consolidate and resubdivide in many cases to adjust the lot line. For example, in Kapalua, there was a – I remember one exact – one example. There was a lot in Kapalua that had a wall that had a pretty severe encroachment. And the applicant – the landowner came in to subdivide with his adjacent owner's approval to straighten out this encroachment. And by the time this poor man was done, he ended up needing to improve a thousand feet of roadway and spend, you know, millions of dollars on really nothing that had to do with the encroachment.

So what we did was we looked at the subdivision code 'cause there was no guidance. Before this was really no guidance on this. We looked at the code and developed this Bill 2372 that would allow people to come in and file for an expedited review, if you will, on a request for a lot line adjustment to straighten things out that just didn't seem right: encroachments, those kinds of things.

And a number of people used it for that 'cause it was a quicker and easier way. They didn't need as much money and time. And they didn't have to go through this rather torturous process with the Engineering Division of Public Works asking for things they simply didn't need to do or couldn't simply afford.

The other part of this was that we had a lot of requests for people who wanted to – who wanted, let's say, a parcel who had three or four smaller lots and that they were non-conforming that they wanted to realign and make it consistent with zoning. So we said, okay, look, you know, if you have – let's say a half a dozen lots, and you want to take those lots and reconfigure them, end up with the same lots as you – that you came in with, well then, what's the harm? You should be able to do that, and not have to straighten out Haleakala Highway, or do whatever else you had to do to get that done. So that seemed to work pretty well.

The emphasis on the one time only, I must tell you I'm 64 going to be 65 in a few months, I remember this fairly clearly. The idea on the restriction was to keep people from not doing this continual resubdivision and resubdivision. That's what that was keyed on, not the idea that if you had a lot line that you wanted to realign, you couldn't do that if you had to another time. However, the bill is what it is, and Lesli is correct—it's a one time only opportunity for you. In this case, I mean really, let's think about it. This woman had a subdivision done, used that option, moved the lot line, and now because of a tragedy in her family, her husband passes away, she's now got to take care of her financial matters, now has to move the line back. In a simple subdivision request, which Lesli described fairly accurately, she's now got three million dollars of off-site water tank and water line improvements. It just doesn't seem logical or right.

So if you go back to the original time of the bill, which was to help people move lot lines, you're not ending up with any additional lots here. I don't think you have many complaints from the neighbors. It seems logical. And I understand – I'm a planner by education, background. I understand where the variance is. I understand that there are criteria that need to be met. However, I think you need to look at extraordinary cases as well. Financial hardship is not a reason to grant a variance;

however, there's, you know, the humanitarian aspect of this. It's not that difficult. It's really straightforward. I just think you ought to consider that in your deliberations. And you may be hard-pressed to find an analog for this or another example, I understand that, but this seems pretty straightforward. And I don't think you'd be going out on a rope here by following along and giving her this one time. And I would also say that as far as I know, she's not asking for another one time. She just wants to straighten up this lot line. I think letting her do this would straighten it out. Thank you. Any questions?

Chairman Tanaka: No. Thank you.

Mr. Sherman Dudley DePonte: I'm Sherman Dudley DePonte. And I'm at 17529 Haleakala Highway. I'm a next door neighbor to Shelly and I'm also a licensed, professional land surveyor. I do this kind of stuff on a daily basis. That's, you know, that's what I went school for and that's what I do for basically to helping people get their dream and live it. What happened here on her land is – was a fast put together lot line, you know, move it. I don't think it was – when I look at it, and excuse me about this, but I think it wasn't professionally looked at how it can be accessed, 'cause I live next to her. My driveway is a steep driveway. Her terrain is a lot more steep. So getting to her property, it's tough to work. She can work, but it's really tough to make it work. Having little bit more land to work with, and swinging the driveway, you know, making it roll up in. And an engineer will tell you that, not me. It will make it a lot easier to access. Emergency vehicles can get up there without too much difficulty. If you look at how it's shaped, how it is shaped now, it's like a narrow driveway. And going up and making those turns is just not easy.

In any case, the – when we were mentioning the State, State requirements for their driveway approach, whatever that – in that part, it's the original. It was there from before. So there's no – shouldn't be anything on that. As far as the rules, you just heard the rules how it was set up by Charley Jencks. And I respect him for coming up here and playing – putting it straightforward to you and how – why it was there. There's been a lot of abuse through the years. I've seen it because I've done land – a lot of things. In this case, it's not abuse. It's something that just happened. It was overlooked. And it needs to be fixed. And we can fix it, and you can fix it, and help her out here.

The requirements for water, we – I don't know if you got the handout. This is what is requirements from the Water Department. And we have Paul over here, I guess, in here, but in any case, I went through, and I actually highlighted the areas. The orange area that you see there that they're going to require us to change from a six-inch waterline, or a 2½-inch waterline, or whatever it is, and they want us to put in over– You gotta– What do we have there–4,410 feet of eight-inch waterline that we have to put in, and also, a 70,000-gallon tank additional on that land above in Haleakala Ranch. We need to do a land acquisition now because the Water Department, when they were doing – they had a lot line adjustment also, a one time deal, and now that puts us in a position with Haleakala Ranch that we're going to have a problem moving the water tank lot and making it a little bit bigger to accommodate the people that is in that area, us, for fire protection that the County set that standards up. We did not.

And if you look at the fire protection also, they're trying to put us with 120,000 gallons of water. One of the things I brought to the council was I called the Fire Department and had them come up to put out a bonfire right above our place, which is right there where that tank is. It took them over half

an hour to get there. That's on testimony and it's realistic.

Now what happened is when we go to Geico and ask them how – you know, can I get insurance for this? They won't even give me insurance on that. I had to go to State Farm and some other guys on the insurance's side because we're more than 15 minutes away from the Fire Department. What that tells you is that by the time you do an emergency call after you find out that you do have a fire in your house even if you have your fire alarms and get it up there, that fire protection is – they're gonna be smothering your ashes – you know, the ashes from that house.

So fire protection, I have a different look at it. Maybe we should have sprinkler systems when it's that far away from the Fire Department. And that might work a little bit better and not require us to put in big tank or big lines that is outrageously – you know, eight- inch waterlines coming down. Like we had six-inch waterlines that accommodated us. Took care of us for years.

The thing is requiring this woman right now or this landowner to do all of that requirements it's sort of like requiring me where I'm coming through now and I'm going to do a three-lot subdivision for my children. Now I'm required to do something. She's putting it back. She's not putting another stress on the County. I'm going to put on a lot of stress because I've got two more meters. That's where – that's where it comes in that okay, I've gotta do some improvement. I've gotta do something about this three million, the 3.8. There's no way I can afford it to do all that before I get my subdivision. And that's how the Water Department.

So requiring her now to do that just because she's going to put it back to another line, I think that lot line adjustment should be looked at again. And in the Mainland we called it a "Lot Line Adjustment." What it does is the line, you know, it was a wall or something that was encroaching or into somebody else's property. We wanted to take care of it the fast and easier way was the lot line of adjustment. And that's why that law was created. And Charley was smart enough, and helped us put that in 'cause there was a lot of problems with that. Now the thing is, the one time thing, it should not be that way, but we gotta change that too.

In instances when Charley was in there, we had this voice. We could voice to the Director and it was a case-by-case instance. And he would look at it, and he could see the problem, and he would help us. And in this instance, I'm sure you heard his testimony. He would help as far as getting this through the County. Now we need something like that and I hope you people can help her. Any questions?

Chairman Tanaka: Board Members, any questions for Mr. DePonte? Actually, I have one.

Mr. DePonte: Go ahead.

Chairman Tanaka: The exhibit, or this map that you gave us outlining the additional connections, was this – the Water Department would have put this requirement on this subdivision: an additional 70,000-gallon tank and all of this infrastructure?

Mr. DePonte: That's the requirement. That's the requirement to get her – that's to accommodate what they call is the fire protection now in that area. Any one of us could do a subdivision, which this is what we're calling now a subdivision, full subdivision what they're calling it, that's the

requirement. And even if though she's not adding meters, that's the requirement. If I'm wrong, we have our Deputy Water Director that's going to be able to clarify that.

Chairman Tanaka: Okay, thank you. Is there anyone else that wishes to testify on this matter?

Ms. Barbara Hanger: Hi. My name is Barbara Hanger. I'm a resident on Haleakala Highway, 17630, and just a neighbor across the street speaking in favor of the variance that I don't feel what she's asking would impact the community negatively in any way. And that the charges that it would cost for what the requirements they're asking would be exorbitant for what the request is.

Chairman Tanaka: Thank you.

Ms. Kathy Toda: Hi, I'm Kathy Toda.

Chairman Tanaka: You can speak into the mic.?

Ms. Toda: Sorry. I'm Kathy Toda and I am an owner on Crater Road as well.

Mr. Abbott: She's going to have to use that hand mic.

Chairman Tanaka: Yeah, okay, sorry, because you're being recorded and this is on record.

Ms. Toda: Oh, okay. Sorry. Is this better? So I'm Kathy Toda. I'm an owner on Crater Road as well as. I also own the Lavender Farm above and I lease from Haleakala Ranch. And Shelly is our neighbor, and a very dear friend, and she's gone through a lot. And I'm just here in support of whatever she's asking for, for the variance.

Chairman Tanaka: Thank you.

Ms. Toda: Thank you.

Chairman Tanaka: Thank you. Anyone else who wishes to testify? Seeing none, we'll now close public testimony. Board Members, discussion?

Mr. Tanner: You know I certainly have sympathy for the circumstances that you find yourself in, but when we look at the request, and judge that against the criteria, which we're obligated to do with all the information that's been provided, with what we've heard from all of those present in the County, I would have to say at this point, I would not support approving the variance.

Chairman Tanaka: Okay. Board Members?

Mr. Abbott: Well, with all do respect, I feel that this person has done just about everything that they can possibly do to accommodate and solve a problem that was not necessarily her making. And as the person who bought the house has released and agreed to the new boundary line, nobody's gaining, nobody's losing, nobody's doing anything, I can see no reason not to. It's only a one time thing. I mean, I seriously doubt with the access that's available to that property, you're going to subdivide it again when it's already so steep you can't get a four-wheel drive vehicle up it.

Chairman Tanaka: Okay. Trish, you have—?

Ms. Kapua`ala: Thank you, Mr. Chair. May I kindly ask that when the Board makes their decision, if they could help me to provide an accurate decision and order, a final written decision and order by addressing the criteria? The Department of Public Works did not comment as to how the criteria was met or did not – the applicant did not meet it. So I would need your help so that I have something that can stand up in the court of law. Thank you.

Chairman Tanaka: Okay. Thank you. Let me put my – throw my thoughts into that. I understand what Rick had said. Well, Mr. Jencks testified that this is something very simple, and logically, I agree. I mean this is something very simple. This is just changing a line on a map. This Board has the duty to review and to justify it. Now, when we talk about some of our justification where the action of previous owners, well, I could argue for and against. The previous owner being Ms. Maddigan's father—

Unidentified Speaker: It's her husband.

Chairman Tanaka: Oh, sorry. Sorry about that. But, it's – I mean, so you could argue previous owner versus same owner, still Maddigan, the same name on a legal document. Again, I spoke to you earlier of a special geographic condition that she may have that a neighbor may not have although it's literally, right up against each other. So again with that said, let's discuss this. I would like to, for myself, get to a point where we can justify the granting of this variance. Board members?

Mr. Abbott: Well, we could address it from a safety issue, if she's forced to use that wretched driveway system that's she's described coming in an L-shaped driveway to get to her property, that's health, safety, and welfare, whatever you want to call it even if it's stretching it a little bit. But the Pohles who have the house, that driveway would eventually empty into if she slid off the road and into their bedroom. They don't seem to be objecting. So I – with everything that I've been able to see, to ascertain, nobody that has property touching the property we're talking about now is complaining.

Mr. Tanner: It's not in the criteria.

Mr. Abbott: It's not in the criteria, but it involves the entire neighborhood.

Mr. Tanner: I understand that.

Mr. Abbott: Yeah. So nobody's going to get hurt. Nobody's going to get improved.

Mr. Santiago: Isn't there exposure from a County's standpoint for having granted the previous subdivision creating that hazard? We do have to keep that in mind from a safety standpoint. I mean, we make decisions that impact community safety. You know, it's—

Chairman Tanaka: Yeah, actually, Lesli, here's a question for you. When I look at – well, this actual survey that was done a while back anyway, I don't know when the original survey was done, but the original subdivision in 2003 that was granted, it would appear as though – now when – by creating that flag to the lot, it would appear as though extensive grading, extensive retaining walls

and drainage would be required to do it safely. Is that something that's even considered as part of when you're reviewing subdivision?

Ms. Otani: Our role is to check with minimum compliance with the Maui County Code, so if they meet minimum compliance, and typically, which is actually in Title 19, the flag has to be 12 feet wide, you know if they're meeting the requirements for roadways and such, we grant it. So if they meet the code, we would grant it. So, 24 feet is in excess of the code requirement of 12. And quite frankly, land on Maui is expensive. There's a lot of either smaller lots or lots with steeper slopes and such. I mean, you know, if they meet the code then it's an administrative decision to grant the variance. It's up to the applicant. You know it's up to them how they wanna design their lots as long as they're meeting the code. And the end use of it, is also with them when they sell the property.

Chairman Tanaka: Okay, lets – let's try and attack this. Well, actually Board Members, we've heard from three of us, basically. If there's – if you see anything or I'd just like for our record and for our purposes, what do you think?

Mr. Ray Shimabuku: Mr. Chair, I would agree on your comments as far as trying to figure out a way to grant the variance. I would be in favor of that. I like the idea of Mr. Abbott's concern for the safety issue and I think that's very important. So I would be in favor of granting the variance.

Chairman Tanaka: Okay. Okay, any other questions or discussions? Otherwise, I will entertain a motion.

Mr. Abbott: Well, I'll make the motion. I would say let's accept the variance with a hold harmless and whatever else is necessary. Let's just get – let it be over.

Chairman Tanaka: Gene, along the way with that motion, we would – excuse me, we need especially for the Decision and Order for our justification for the granting of the variance. As we have discussed, I would be able to argue that there is a special geographic or physical condition that goes along with the lot. Now, extraordinary hardship that would result from compliance with the Ordinance– Sorry. Trish?

Ms. Kapua`ala: No, thank you. Rather than just stating the criteria, could you please provide evidence that's in the testimony and in the record, rather than just in the conclusion, please tell me what facts you're using to base that conclusion on.

Mr. Santiago: You can cite the financial hardship of 3.8 million. . . . (inaudible) . . .

Chairman Tanaka; Yeah, Trish, I understand what your saying, but is it – how do I–? Procedurally anyway, sorry.

Mr. Shimabuku: Mr. Chair? Well if you look at the map, as far as the physical and geographical situations, I know for me I understand the map where the grading is very – it shows on the map and how you can see the terrain, actually. So I think that would be one of the things that Trish would be looking for other than what you were reading on the paper.

Chairman Tanaka: Yeah, actually can we--? I mean, ideally, we'd like to hear a motion that goes with -- and addresses each item before we actually get a second and take a vote on this. Now, Gene, to continue on, if you would like to attempt your motion again. Along the way, it has been stated by the applicant and with our -- through our public testimony that sites -- you know, the -- as well as the applicant's application itself, if you could possibly amend your motion or add to it.

Mr. Abbott: Thank you, Mr. Chair. The only thing we -- as Mr. -- Ray, Mr. Shimabuku -- Ray said -- Excuse me, I'm a little flustered right now. As Ray said, there is the process of 3.something million dollars for a line. That's a financial hardship to move a line that nobody's using the property now. There's a safety problem in access to the property. There's a convenience of -- thing. And there seems to be a -- no reason not to other than it's a first time it's ever been done before. But this Board is designed for this particular purpose, and I have yet to find a reason why we cannot. There's physical danger. There's economic danger. There's no danger to the property and there's no danger to any of the property around it. I don't know how to put in -- I don't know -- I'm not aware of how to put it into words as is requested, but if someone can help me, I'd appreciate it.

Chairman Tanaka: Trish?

Ms. Kapua`ala: Thank you, Mr. Chair, and, James, could you help me out? I'd like to help the Board and protect the Board by deleting the justification of the 3.x amount million dollars as a hardship because the Board cannot grant a variance based on financial hardship. It should be a land-based approval and not a circumstantial applicant-based approval. So if I may, I'd like Mr. Giroux to help me on that, or else the Board, if they could--

Mr. Abbott: But we also have the special geographical considerations too.

Mr. Santiago: I think that's primary.

Ms. Jacqueline Haraguchi: I think the geographical condition is primary stating the extremely different terrain that exist there for her to go up the driveway, and the danger of it when she goes into the property where it's existing now rather than where she wants it to be.

Mr. James Giroux: I guess your Criteria One, I guess that's easy as far as the driveway, right?

Ms. Kapua`ala: Yes.

Mr. Giroux: And for two, what you're connecting with is that in order to eliminate that danger that the cost -- and again, we're stating that cost alone is not the hardship. What would make it extraordinary is the three million dollars then would take away from the ability to actually use the property as it supposed to be used for the -- in this case, for a dwelling for a single applicant where the property would then not be able to be used for the simple enjoyment of housing. So I think that's as close as I can get to what the discussion is.

Chairman Tanaka: So James -- well, I mean we're stuck on that. Seems as though were stuck on that one item--extraordinary hardship. If--

Mr. Giroux: And again you need to focus on how the -- this property, what the intention is, is to have

a dwelling or somebody to have housing on it. So if the hardship is going to cause the fact that you are not going to be able to use that property for its intended use then it would fall under extraordinary hardship.

Chairman Tanaka: Okay. Now that's something that we – well, I mean, that actually was stated by the applicant that as is, it would be unreasonable to say that a single family dwelling unit could be constructed on that one remaining one-acre parcel.

Chairman Tanaka: Okay. On the floor in front of us now, we have a motion to approve. Is there a second?

Mr. Santiago: I will second it.

Chairman Tanaka: Okay, it has been moved and seconded. Now for the record before we take the vote, we need to clarify our justification for the granting of the variance. I will attempt this. Again, through the applicant's application and evidence as stated where the parcel or the subdivision is located and there are special geographical and physical circumstances affecting the property. We have just discussed extraordinary hardship in that the subdivision, the 2003 subdivision as granted, would become an extraordinary hardship to construct on that remaining one-acre parcel. Through testimony from neighbors and the applicant, the circumstances– Sorry, let me back track. That the affecting property is not the result of previous actions pertaining to the subdivision, meaning that it is actually the applicant's husband. Also, the granting of this variance shall not be detrimental to public health, safety and welfare of those in the vicinity of said area. And it is appropriately zoned for this variance. Okay with that being said. We have a motion and a second. All those in favor of approving the variance, please say, "Aye." Any opposed?

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

VOTED: To approve the variance as discussed.

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

(Dissenting: R. Tanner.)

(Excused: T. Espeleta and B. Vadla)

Chairman Tanaka: **The motion – the variance is granted on a five-to-one vote.** Thank you very much.

Ms. Maddigan: Thank you very much. I really appreciate . . . (inaudible) . . .

Chairman Tanaka: Thank you. The next item on our agenda—approval of September 27, 2012 meeting minutes.

c. APPROVAL OF THE SEPTEMBER 27, 2012 MEETING MINUTES

Mr. Santiago: Motion to approve.

Mr. Shimabuku: Second.

Chairman Tanaka: It has been moved and seconded to approve. All those in favor, please say "Aye." Any opposed? None.

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

VOTED: To approve the meeting minutes of September 27, 2012 as presented.

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

(Excused: T. Espeleta and B. Vadla)

Chairman Tanaka: Next item, Director's report. Status, Trisha?

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: I just have to report that Judge McConnell accepted the appointment, and we've been trying to schedule a prehearing conference for the Aloha – Spirit of Aloha Botanical Gardens. And Mr. Honig will be appealing again for three – four other – I think six other NOV's that he received for use.

Chairman Tanaka: So it is going to Judge McConnell, but yet we will still have a–?

Ms. Kapua`ala: You will still have more appeals coming. And this one would be for a notice of violation, which cannot be appointed to a hearings officer. You must hear yourselves.

Mr. Giroux: Is that a zoning NOV? Is that why–?

Ms. Kapua`ala: Zoning NOV. I believe there's also SMA NOV's in there as well.

Mr. Giroux: We wouldn't be the Board to hear the SMA?

Ms. Kapua`ala: Not the SMA, correct.

Chairman Tanaka: Zoning?

Ms. Kapua`ala: Correct.

Chairman Tanaka: I hate those. Okay, because it'll be the same – do we have jurisdiction again– zoning issues? Actually we would have to– Alright.

Mr. Giroux: And I think that's because we just amended those rules in order to fast track those types of reviews for–

Ms. Kapua`ala: For notice of violations.

Mr. Giroux: For zoning issues.

Ms. Kapua`ala: For any notice of violation whether it's zoning, or building, or any other department. Any violation pertaining to building, zoning, or subdivision, yes, you are the hearing officer and we try to fast track it that way.

Chairman Tanaka: Anything else that's foreseeable or is that going to appear at our next meeting?

Ms. Kapua`ala: Probably. He has a 30-day deadline to appeal and he was served those NOVs the last time you saw him. Other than the variances, we are very busy. So you're gonna see very tight schedules coming up in the near future as far as hearing – appointing hearings officers, motions coming to you from appeals, and then, of course, the regular variance hearings.

E. NEXT MEETING DATE: Thursday, November 8, 2012.

Chairman Tanaka: Okay. And our next meeting is November 8th? Okay. Anything else? With that, meeting adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:29 p.m.

Respectfully submitted by,

CHALSEY R. K. KWON
Secretary I

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Chairman
Rick Tanner, Vice-Chairman
Ray Shimabuku
Bart Santiago
Jacqueline Haraguchi
Patrick De Ponte
G. Clark Abbott

Members Excused:

Bernice Vadla
Teddy Espeleta

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Others:

Trisha Kapua`ala, Staff Planner, Department of Planning
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel
Lesli Otani, Civil Engineer, Department of Public Works