

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
AUGUST 8, 2013**

(Approved: 8/22/13)

A. CALL TO ORDER

The meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Rick Tanner at approximately, 1:32 p.m., Thursday, August 8, 2013, 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 Rick Tanner: The meeting of the Board of Variances and Appeals will now come to order. Let the record show it is 1:32 p.m. and we have a bare quorum. Will the staff read the first item on the agenda into the record?

B. UNFINISHED BUSINESS

- 1. RICK and DEBRA STRINI requesting a variance from Maui County Code, §16.04B.010 and Uniform Fire Code (1997), Article 9, §902 to delete the requirement of providing a 20-foot wide all-weather surface road, by adding a compacted gravel apron of five feet (5') on both sides of the existing 10-foot wide concrete road of Manawai Place, for the Manawai Homesteads Subdivision (DSA File No. 2.2806) located at 263 Manawai Place, Haiku, Maui, Hawaii; TMK: (2) 2-8-003:041 (BVAV 20130006).**

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

Chairman Tanner: Thank you. If the applicant will come forward and speak their name into the mic.?

Mr. Rick Strini: Rick Strini.

Chairman Tanner: Sir, are you agreeable to the waiving of the reading of the staff report?

Mr. Strini: Yes.

Chairman Tanner: Do you have a copy of it? OK. Thank you. So at this time you can give your presentation.

Mr. Strini: Well, at the last meeting I was to go out and do some more research on the property, and the roadway, and whatnot. We determined that the roadway is in need of some sort of restoration and improvement. So we're requesting now to defer the road improvements with an amendment to the County . . . an agreement between the County and us to defer the road improvements until the County takes over the road and we all pay our fair share. It's a little bit of a change as to what we went into this variance for, but in the research, it sounds like the best way to go as the other four subdivisions did also. So that would be . . . we'd be in compliance with them and everybody else further along so we could all get the road improved.

Chairman Tanner: OK. So my understanding is you're not opposed to making the road improvements; you would just like more time to do so?

Mr. Strini: To defer it, yeah. There was some agreements already in place called three lots or less that are already in place with the other subdivisions. And ours would just be a new version of that, more contemporary, submitted with the County. Worked with the County on that. And we would, you know, just defer the payment till that time until we do the whole road at once.

Chairman Tanner: To refresh my memory, of the Board, who was here for the original presentation of this variance? You weren't here?

Mr. G. Clark Abbott: I don't remember, I'm sorry. I probably was, but it doesn't ring a bell.

Mr. Strini: There was a lady here and there was a gentleman that was sitting here.

Chairman Tanner: Yeah, Jackie was here and Bart was here.

Mr. Strini: So I had Wayne Arakaki . . . you know, I consulted with him on this and he also wrote this letter to you guys. It explains it a little bit better. We're not disagreeing with the fire, the fire plans, we just wanna defer them.

Chairman Tanner: OK, yeah, and we've got that letter. This is, I guess, an unusual request for the Board of Variances and Appeals. Doing deferrals is not something we normally do on a road improvement. We'll defer a hearing or a variance, but to offer some type of variance for a deferral, I'm just not sure how we would go about that if the Board was willing to do that. And I'm not sure what the other options are either.

Mr. Howard S. K Kihune: Mr. Chair?

Chairman Tanner: Yes?

Mr. Kihune: Maybe Corp. Counsel can assist us. I mean, are we within our jurisdiction to allow for a deferral? Is there a timeframe on this deferral? Does something trigger their improvement at some later date?

Mr. Michael Hopper: Mr. Chair, the three lots or less agreements was a formal provision of the code. It allowed subdividers of three lots or less to defer improvements until such time as the County itself did improvements on the road, and then would assess the landowners for those improvements. That code section has since been deleted from the code. It's no longer there. That's probably why there were some recorded on the properties that are mentioned. I don't know if that's true, but it's been represented. The code section, I think, was eliminated in about 2008. So that's no longer an option under the code.

The request is a variance. Now, I don't know if there's ever been a variance granted with a condition that says that upon something else happening, essentially they have to comply with the code. I don't know that. That would be kind of an unusual condition. Normally, a variance would exempt from the property from having to comply with the code basically, forever. And there can be

conditions to mitigate that. There could be insurance conditions, indemnity conditions, hold harmless conditions. I don't know offhand. And this is the first, as I understand it, notice that you have gotten that there's a request to defer the improvements instead of what they're requesting the variance was and on the agenda is to delete the requirement all together. So that's a bit different. I don't know if staff has any background on whether or not . . . or if anything like that has been done before to kind of write in a deferral agreement that's not allowed under the code as a condition of the variance approval, or even if the Fire Department or the staff has any recommendations with respect to that . . . with respect to something like that. I can tell you that the agreements, the three lots or less agreements, had specific wording on it required by the code. It would be recorded. And I do not know of any that have been actually collected on because you then have to assess the future owners of the lots, and then only when the County actually does the improvement which may or may not happen because that all depends on County funding and priorities for the improvements down the line.

Mr. Kihune: Quick note: this is a private road. So how does that affect . . . ? That code no longer is in existence so . . .

Mr. Hopper: Yeah, the code, I think, would be for I think any subdivision, public or private, still has to do improvements. Now, they might not dedicate the road as part of that subdivision, but they would still need to improve it to standard as a subdivision condition which is why you've got the requirement. The ownership would whether or not it's dedicated to the County or not. I would say if it's a private road then it's probably unlikely the County would . . . I mean, the County, I don't think could ever, until it's dedicated, do improvements on that road. There's some exceptions to that, but generally, the County doesn't do improvements on private roads. So it would definitely be very . . . it would be indefinite as to when the improvements would be done, if there was a deferral, until that . . . Well, you could look at any types of options and conditions, but it's just unusual, and I wouldn't know exactly how to go about doing that in a decision and order or as a condition. Again, I don't know if staff has anything to add, but I do know the history of the three lots or less language was in the code previously and now it's no longer in the code. Council deleted it as a requirement. And so three lots, two lots, you still have to do your improvements unless you're, I think, a family subdivision, large lot subdivision. There's some other exceptions, but not just 'cause you're three lots or less.

Mr. Ray Shimabuku: I have a comment, Mr. Chair. With that said, I'm curious to see or hear what the department has to say as well, but yet we still are like on unfinished business, and the request for the variance is still there. So we're kinda being sidetracked which makes it more confusing at this point. I don't know if we need to get back and stay on the unfinished business to get it completed, and then maybe bring this up at a later date or something.

Mr. John Rapacz: Thank you. Good afternoon. John Rapacz. I'll let Trish describe in her experience, other instances in which deferral issues came up, deferral requirements. I did have a couple other concerns. One being whether . . . since this appears to be an amendment to the original request, number one would be whether an amendment to the request should be filed. And number two concern, I guess Corp. Counsel might address this, is whether our agenda has now properly noticed this revised request. The third item being I did notice in both of the letters submitted, it wanted to defer and pay fair share when the Manawai Road is being fully improved, but I think that it being a private road, I don't know that the County will ever be fully improving it.

So I don't know whether this is even a viable . . . even if there were still such a thing as a three-lot agreement, I don't know if it would be . . . something like that would be viable. Trish, maybe you can address other instances in which a deferral has come before the Board?

Ms. Kapua`ala: Two comes to mind. The most recent one being Jason Kim's property. It's an auto . . . not auto repair. They do body work off of Vineyard next to Tasty Crust. And he was required to dedicate land to the County and process a subdivision, and with that, do the road improvements. And he was . . . Wayne Arakaki, being his engineer, was successful with this Board in getting a deferral of that requirement. So when the County does decide to improve Vineyard Street . . . no, Mill Street, he will pay his fair share. That was a Public Works requirement and not a Fire requirement, but is similar talking about street improvements. And Wayne Arakaki also represented another applicant. The project is not fresh in my head, but I do remember two instances both with Wayne Arakaki representing the landowner.

Mr. Hopper: I think what you're looking at is a request for a variance subject to a condition. They're asking for a variance subject to the condition that's not a permanent variance. I'm not familiar with the cases Trisha had mentioned whether it was done by condition, or if the actual variance request was simply to defer until a future date as part of the variance request. I'm not necessarily comfortable formulating such a condition offhand without looking at at least those examples.

If the Board wants to grant the variance, and believes that the justification for the variance has been met based on the standards, I don't think there'd be a problem with granting the variance if again, the Board finds that the standards have been met. But to go through the mechanics of a type of deferral agreement, since this is the first I'm hearing this, and because the publication was for a deletion . . . And I suppose you could argue that a deletion is certainly more of a substantial deviation from the code than a deferral would be. So I suppose you could argue that the notice was certainly adequate because anyone concerned about a deferral would be encompassed in those concerned about an outright exemption from that code section.

I'm just not certain how we would go about either an amendment to the application or a condition. And I'm not necessarily comfortable on advising you how to do that right at this meeting with this information just being handed out at today's meeting. That's difficult for me to advise on. So certainly, I think everything is set up for the Board to make a decision on the variance one way or the other based on the Board's conclusions, but to go about formulating a condition like that would be difficult for me. And I know I'm not the Board's typical advisor, but that would be, I think, a difficult thing to do at this time just on the floor, orally.

Chairman Tanner: I would add that I'm not comfortable moving forward with a variance to defer. If the applicant is interested in moving forward with his request for a variance for a deletion from the code, or not deletion from the code, but a variance from the requirement of the code, I think the Board can do that. Based on the fact that we have different people here than the original one, we would need to go through the presentation again so you can make your case for that.

Mr. Strini: Yes, well, I didn't bring new photographs and stuff, unfortunately, 'cause I didn't think it would get this complex. I thought it was a . . . it would be a little simpler. But should we put this off again another time?

Chairman Tanner: To me, that may be the best option.

Mr. Strini: Because if I'm gonna stick with the original idea, the original concept, there is some arguments that would lean in my favor, I think. So part of that is in terms of photographs and the existing street because I've discovered a few things and researched. And I did discover that the four lots at the end of the street are subdividable, but highly unlikely of ever getting a subdivision. And that was a question this gentleman came up with.

Chairman Tanner: Right, I recall that, yeah.

Mr. Strini: So that changed our approach a little bit because that's a reality, but sort of not a reality according to the subdivision office. So, yes, I guess we should we have . . . reschedule another hearing, and I'll bring in some more photographs and a little bit more argument.

Chairman Tanner: OK. So the applicant is requesting an additional deferral. I think I'm in agreement with everybody else, I don't like to defer things, but I also wanna see everybody get as fair a possible hearing as they can. And I don't know that we can do that today.

Mr. Abbott: Mr. Chairman, question, if we go ahead and vote on the variance as is presented as it is without all these justifications and other information that's come up and out, would we be wiser to go ahead and deny the variance and have it resubmitted with all of the additional information that's been brought forth at this particular time so there's . . . 'cause we're just gonna rehash and rehash and rehash one particular thing? It should be started as a whole new project rather than a circumvention of the whole thing.

Chairman Tanner: If the variance is denied, the applicant's not allowed to come back before the Board on the same item for . . . what is it? A year?

Ms. Kapua`ala: Correct, unless it's a substantially different request.

Mr. Abbott: Right, and this would be.

Chairman Tanner: Well, I mean, you might be right. If we defer and come back again, is your intention to go back to the original variance request with the new information that you have?

Mr. Strini: Yes.

Chairman Tanner: OK. So then that's the . . . so you're not coming back to say I want a variance to defer. You're coming back: I want a variance from the code and here's my information.

Mr. Strini: Yeah, well, yeah.

Chairman Tanner: OK.

Mr. Hopper: Mr. Chair, I would also . . . any Member that misses a portion of a hearing under HRS is required to review the record. So as far as minutes, getting the minutes out there, all Members should be able to get access to the minutes, and the application, and review everything they need to prior to the meeting. It doesn't require that all Members be present for every portion of the hearing, but it does require that the Members have the ability to have read everything in the record.

So if any Members again out there don't have access to something or don't have access to minutes, it would be really important to get them . . . the minutes and everything before the meeting. I think that's normally done, but I think that's important. If the applicant wants to present additional information and the Chair's OK with that, that can happen as well. I think it may be a good idea to cut off the record at a certain point and say, OK, our hearing will conclude as of this date, and we'll have a vote thereafter unless it's a deferral based on something the Commission would like. That's an option so you don't have to continue to have the hearing, but I'm just noting that that's happened in the past that Members would have to be up to speed on the record, and so to make sure that every Member has that opportunity so you wouldn't have to defer again in the future, or require the applicant to re-present everything from the beginning. It's a common issue. Many boards have it. And that's why HRS has a section on it, but just that as a comment. But I think it's fine to defer.

Again, this is a deferral that's based on HRS . . . based on the Rules, 12-801-22(D)(4), the 60-day within the close of the public hearing timeframe does not apply because a deferral's being requested by the applicant. Just wanted to get that on the record so there's no automatic approval in this case because the deferral's being requested by the applicant. That apparently is what happened at the last meeting as well. But just to get that information out there.

Mr. Strini: I was actually prepared for this meeting until I got this letter from Wayne Arakaki. So I was kinda following his lead on this. So at the next meeting, I'll just have my pictures and my arguments, and I'll be ready to get a vote.

Chairman Tanner: OK. Trisha, do we have some dates?

Ms. Kapua`ala: Mr. Strini, how soon would you be ready?

Mr. Strini: I'd like to do it right away, I mean, as soon as possible, just get carried on.

Ms. Kapua`ala: We can take this to the next meeting: August 22nd.

Mr. Strini: OK.

Chairman Tanner: That's available? OK. So if that's agreeable to you, August 22nd, 1:30.

Mr. Abbott: Will that give them time to get all the paperwork out to all the Board members to re-review everything?

Chairman Tanner: Well, the minutes are available online, certainly.

Ms. Kapua`ala: I think the minutes have not been adopted yet. So I think certainly Tremaine can give you a draft copy. And for you, Clark, a copy of the original application.

Ms. Tremaine Balberdi: You'd get it by then.

Chairman Tanner: We'd have it by then? OK. All right. Excellent.

Mr. Abbott: I just wanna make sure.

Chairman Tanner: Yes, sir?

Lt. Peter Davis: So could I get a clarity of what the deferral is about so that if in the case there is a condition, I think it should be the Fire Department that opposes the condition, if there's gonna be a deferral of the road improvement, if that's where we're heading toward.

Chairman Tanner: No, no, no. We're not talking about a deferral of the road improvement. We're talking about a deferral of the hearing to determine a variance on not meeting the code. Trisha?

Ms. Kapua`ala: Does that mean that the deferral is not being considered? It's just a deletion, an outright deletion?

Chairman Tanner: Correct, correct. And that's my understanding from the applicant. So the applicant's gonna present his presentation with the new information that he has, photographs and so forth, looking for a deletion of the code in his case, not a deferral or anything like that. So it would be the same as the first hearing except he's got more information now.

Lt. Davis: OK. That's fine.

Mr. Hopper: And I would think for . . . if the applicant . . . I wouldn't say the applicant wouldn't have the right to request a deferral, but I think that should be done through a new application, perhaps, a new variance application saying deferral, or reapplying and saying this is for a deletion, or on the alternative, a deferral or something like that. I'm not saying it would've been illegal to place a condition on there, but I can guarantee you it would be cleaner if that's gonna be requested to do that as a new application. And if the applicant doesn't want to request that at this point, that's fine, too, but it would be, I think, at the next meeting, based on the Chair and the applicant, you're gonna be considering basically a garden variety variance to excuse compliance with this section of the code based on the application that was submitted.

Mr. Strini: Correct.

Chairman Tanner: Trish?

Ms. Kapua`ala: Mr. Chair, I apologize in advance to complicate things. I have in front of me, the decision and order from the Yoshizawa Subdivision, the Mill Street Variance. And you can see here on the public hearing notice that was published and served to adjacent properties, Mr. Yoshizawa asked for a deletion of a requirement to dedicate approximately, five feet of his property to an improvement with curbs, gutters, and sidewalks for his subdivision. So he asked for an outright deletion. And what the Board did was approve a variance with the condition that the applicant shall submit to the Department of Public Works, a deferral of road-widening and road improvements agreement, and shall record the executed agreement with the Bureau of Conveyances. So in effect, what happens is the agreement is signed and recorded, and at that time, we sign off, or the Public Works would sign off on the subdivision. Obviously, when the road improvements happen, the applicant could withdraw its variance, ask a request . . . request to withdraw . . . (inaudible) . . . variance. So in effect, that's how it would work.

Mr. Hopper: Well, if that happened in a previous case, A, I don't know what the form of that

agreement would be. And B, this is a different type of deferral. This is for all subdivision approvals, not just a dedication of a road-widening lot which may be more typical. If you're gonna go down that route, I'm not saying that's necessarily the ideal way to do it, to notice it as a deletion and then as a condition, have a deferral, but in addition, I would want to consult with the Department of Public Works on drafting that type of agreement. I'm their Counsel, and would probably be involved in that. And I'm not sure exactly how we would begin to draft that.

Ms. Kapua`ala: In this case, it was a Public Works requirement and this agreement was drafted. It didn't exist. It was drafted for this variance. In this case with Mr. Strini, it's a fire requirement. And I think Fire's Counsel should work with the department to come up with such an agreement. So this is . . . it's apples and oranges in a sense, but the process, I believe, could be similar.

Chairman Tanner: What's the date on that?

Ms. Kapua`ala: The decision and order was signed on December 21st 2011.

Chairman Tanner: OK. Is this something that a deferral needs a vote or . . . ?

Mr. Hopper: To defer to the next meeting?

Chairman Tanner: Correct.

Mr. Hopper: Well, you could have a vote on it, but obviously if the Board doesn't want to go forward with it, you'd either have to . . . if there's not enough votes for it, you would either have to . . . what you could do is say if there's no objections, we will defer to the next meeting as discussed. If someone objects, then you gotta take it up to a vote. If no one objects, then that's a unanimous consent and you can defer it that way, in my opinion.

Chairman Tanner: OK. So at this point, I'm gonna ask if there are any objections to deferring this hearing. No objections. The hearing is deferred. Thank you, Mr. Strini.

Mr. Strini: Thank you.

Chairman Tanner: OK. The next item on the agenda would be the approval of Board minutes for July 25th 2013.

C. APPROVAL OF THE JULY 25, 2013 MEETING MINUTES

Chairman Tanner: Do I have a motion to approve?

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

VOTED: To approve the July 25, 2013 meeting minutes as presented.

**(Assenting: H. Kihune, G. Abbott, R. Shimabuku, T. Espeleta,
R. Tanner.)**

(Excused: J. Haraguchi, P. De Ponte, B. Santiago, C. Fukunaga.)

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

E. NEXT MEETING DATE: Thursday, August 22, 2013

Chairman Tanner: OK. The next meeting date will be August 22nd.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:00 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Rick Tanner, Chairman
Howard S. K. Kihune
Ray Shimabuku
G. Clark Abbott
Teddy Espeleta

Members Excused:

Jacqueline Haraguchi, Vice-Chairman
Bart Santiago, Jr.
Patrick De Ponte
Chad Fukunaga

Others:

John Rapacz, Planning Program Administrator, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
Michael Hopper, Deputy Corporation Counsel, Department of the Corporation Counsel
Peter Davis, Lieutenant, Fire Prevention Bureau