

APPROVED: 6/10/2015

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
April 9, 2015**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Deputy Corporation Counsel Richelle Thomson at approximately, 12:46 p.m., Thursday, April 9, 2015, 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.)

Ms. Richelle Thomson: Good afternoon everyone. My apologies for the slightly late start. This is Thursday, April 9, 2015, Board of Variances and Appeals meeting. It's now called to order.

B. PUBLIC TESTIMONY

Ms. Thomson: We're going to take this slightly out of order. Do Public Testimony directly after the election of the officers for the 2015-2016 Commission Year.

C. ELECTION OF OFFICERS FOR 2015-2016 COMMISSION YEAR

Ms. Thomson: So, if any member has a nomination for a Chairperson, please go ahead and make that motion.

Mr. Howard Kihune: I make a motion to nominate Mr. Clark for our Chairperson.

Mr. Teddy Espeleta: I'd like to second that nomination.

Ms. Thomson: And do you agree? You can decline.

Mr. Clark Abbott: Oh no. If they can stand it, I can.

Ms. Thomson: Are there any discussion on the motion? Seeing none, I will call for the vote. All in favor say "Aye."

Members: "Aye."

Ms. Thomson: Any opposed? The motion is unanimous. Welcome Chair.

Mr. Abbott: Thank you.

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

**VOTED: Motion to nominate Clark Abbott as Chairman for the 2015-2016
Commission Year.**

(Assenting: T. Espeleta, C. Fukunaga, H. Kihune, W. Greig, R. Sung)

(Excused: P. DePonte)

Ms. Thomson: Thanks. And you can go ahead and do Vice-Chair.

Chairman Clark Abbott: No, you please do the Vice-Chair.

Ms. Thomson: Keep on going? Alright, if any member has a nomination for a Vice-Chair for the 2015-2016 year, please go ahead and make that motion.

Mr. Kihune: I'd like to make a motion to nominate Mr. Chad Fukunaga as our Vice-Chair.

Mr. William Greig: I'd like to second.

Ms. Thomson: And do you agree Chad?

Chairman Abbott: He's thinking about it.

Mr. Chad Fukunaga: Are you going to attend every meeting?

...Laughter...

Mr. Fukunaga: I accept.

Ms. Thomson: And is there any discussion on the motion? Seeing none, I'll call for the vote. All in favor say "Aye" please.

Members: "Aye."

Ms. Thomson: Any opposed say "Nay". Motion passes unanimously. Congratulations gentlemen.

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

VOTED: Motion to nominate Chad Fukunaga as Vice-Chairman for the 2015-2016 Commission Year.

(Assenting: T. Espeleta, H. Kihune, W. Greig, R. Sung)

(Excused: P. DePonte)

...Applause...

B. PUBLIC TESTIMONY (Continued...)

Chairman Abbott: Onward and upward. On Public Testimony, except for Contested Cases under individuals who cannot be present when it is presented, may speak now, because when it is

presented, you can't re-speak. So if you have anything to say from the Public, say it now. Other than that we're together.

Seeing none. Staff, would you announce the item and present?

D. PUBLIC HEARING

- 1. ISAAC PUTNAM of THE MAUI HIGH PERFORMANCE COMPUTING CENTER representing HIGH TECHNOLOGY DEVELOPMENT CORPORATION and the STATE OF HAWAII applying for a variance from Maui County Code (MCC) §19.33.060(A) to allow a photovoltaic carport structure to be located 26 feet and 2 inches from the property line when a 60 foot building setback is required; for property located at 590 Lipoa Parkway, Kihei, Maui, Hawaii TMK (2) 2-2-024:002; (M. Balberdi)**

Mrs. Malia Balberdi: Hello, my name is Malia Balberdi from the Planning Department. *Reads item into record.*

Chairman Abbott: Thank you. Will the applicant, please come forward and speak into the mic? And state your name please?

Mr. Joe Dratz: My name is Joe Dratz, I'm a Program Manager at the Maui High Performance Computing Center. I'm here on behalf of Captain Isaac Putnam. He's on the mainland training; he's the Director of Operations at the Maui High Performance Computing Center.

So, on this first line, you'll see slightly dated overhead of the Maui Research and Technology Park. The new Maui Brewing Company Building is now here. It's pretty cool if you go visit. The MHPCC is located in two buildings. There's this lower building

here and Building 550 Lipoa and then Building 590B Lipoa. And you'll actually notice an existing photovoltaic array there.

Our plan is to install panels on the roof of these two buildings as well as a carport structure on this edge of the property line. So, this is just a slightly different angle. But it's just a closer look and the carport is a really light outline in blue here, where that carport's going to go.

This is just a rendering and the carport- -you can see it a little better- - I don't know if we turn the lights off, if it'll be a little easier to see for the members of the Board. There we go, it's a little easier to see.

. . . This is the access road. It's a little easier to see, so that's that.

Mr. Raymond Sung: Just for frame of reference, can we go back to that previous slide please? One more. Thank you. Which direction is the Piilani Highway. The top or the bottom?

Mr. Dratz: Piilani Highway is at the bottom. Elleair Golf Course is right here.

Mr. Sung: Ok, got it. Thank you.

Mr. Dratz: And then this is just a rendering of what it looks like. . . what the property looks like now from this north. . . essentially northern corner. And if you were to stand on the sidewalk and look at the property. That's what it would look like and that's just a pixelated version of the sidewalk.

So, that's all I've got for the visuals. Essentially the purpose of the technology park is to really push technology in Maui and keep that sector going. And there is already a lot of PV projects in the park. And this one is in keeping with the mission of the park and will not cause any degradation to the ...(in audible)... So, that's all I've got, if there are any questions.

Chairman Abbott: Questions from the Board?

Vice-Chairman Fukunaga: Can you explain the thought process as to sighting of the PV array? At that location it appears as though there's a parking lot to the west?

Mr. Dratz: Yeah, that parking lot there.

Vice-Chairman Fukunaga: Why not place it there?

Mr. Dratz: So, the entire complex is owned by the State of Hawaii, through HTDC- High Technology Development Corporation, holding on subsidiary the State. Only this Building 590B is leased through contract to the Air Force, for the purposes of the Maui High Performance Computing Center and the building means are right here.

So the parking lot for the purposes of the High Performance Computing Center is this little section in the trees and this eastern section. So we don't have access to this and as well as the conductors would be a bit longer.

Theoretically we could try to modify the lease but in terms of efficiency and being on property that's already purposed for the MHPCC. . . that was why that location was chosen.

Chairman Abbott: Am I correct in my assumption that of the three buildings, the closest one to the right hand edge-the larger one, that one. . . the parking lot would be to its-- in that area there?

Mr. Dratz: Yes, that is a --

Chairman Abbott: And what are those three sort of existing chunks or blocks or squares?

Mr. Dratz: Those are air cooled chillers. So the computers have a lot of heat. They're each a hundred ton units.

Chairman Abbott: Ok. So the parking lot would be built around them? Or circumventing them? Or?

Mr. Dratz: This is the existing required fire lane. These are the . . . and you can actually see little lines of where the single width parking stalls poke out. Just under this edge of the parking structure.

So essentially, the piers for the parking structure will be in place just behind the existing curb. And then the parking structure will provide shade for vehicles to park under. So it will not take out any need parking spaces.

Chairman Abbott: Ok. So the roof of the parking structure will not cover those hooting ...(inaudible)... towers?

Mr. Dratz: It will not.

Chairman Abbott: It will not. Ok. And the access from the parking structure to the building is where?

Mr. Dratz: Actually the front- - the main access of the building is here.

Chairman Abbott: So they would have to park and walk around the other end of the building.

Mr. Dratz: As they do currently.

Chairman Abbott: They do?

Mr. Dratz: There is an access here as well. But it's due to the security of the facility. There's a single access, unless it's under maintenance or something and there's someone watching it. So ordinarily most of the workers will park here, the 24 hour staff.

And then actually the vehicles you see here are vehicles used by the air force to go up to the summit for the duty cops and a few others. So they use that primarily for that parking. But it can be used for any purpose.

Chairman Abbott: So if I'm following your train of thought there, then the structure is not actually being built as a parking structure covering. It's actually being built to hold the photovoltaic panels.

Mr. Dratz: Well, it's being built not to remove any existing parking and allow for those spaces. Since the staffing at MHPCC has gone up a fair amount in the last year, so we need every spot we can get at this point.

Chairman Abbott: I'm just questioning the liability, feasibility, because if that's used mostly by the U.S. Air force for transportation to and from the summit. Is it potentially always full? Empty?

Mr. Dratz: There are always vehicles there. But yeah, sometimes more or less.

Chairman Abbott: Ok.

Mr. Dratz: The parking lot at A is often empty. It just depends on how much of the space the State has leased.

Chairman Abbott: Ok. Thank you.

Mr. Kihune: I got a question. How much power is this whole system going to generate for the operation there?

Mr. Dratz: This section including the PV at Building B, the carport and this total of 275 kilowatts and then they'll be another 235 on Building 550. Approximately 500 total.

Mr. Kihune: Quick question. Dumb question maybe. But, could you not expand the existing photovoltaic site that you have there? Or is that not possible? Just a question.

Mr. Dratz: Well, that depends on the park partners. They have been a little tight with our lease. Obviously, it's a little bit out of the scope of this request. But we are on a five year lease there and they do intend to sell that parcel to somebody--

Mr. Kihune: At some point. . .

Mr. Dratz:--in a larger configuration, we're just leasing an acre at this point. So the way federal funding works is a little harder to purchase things than to rent them. It's just colors and types and money. So obviously the partners want to sell that lot. But currently there's a five year lease and hopefully that can be extended.

Mr. Kihune: So, at some point when that photovoltaic farm does go away, how much kilowatts is that going to decrease the current, or what you're planning?

Mr. Dratz: Well, hopefully it doesn't go away. But if it should, then that would be a 100 kilowatt hit.

Mr. Kihune: Oh, ok. Now, the total kilowatts that you have for the system that you're planning including that, is that enough power to run the - - or is that more to reduce your energy cost?

Mr. Dratz: That's primarily to reduce the energy cost. The load over 24 hours is significantly greater.

Mr. Kihune: Ok, great. Thanks.

Mr. Sung: So how long is your facility's current lease?

Mr. Dratz: Well, that's an interesting. . . This facility is leased by the Air Force under a five year lease and this one is actually month to month. But we're working on a longer lease with the Army Corps of Engineers.

Mr. Sung: But, if you're on a month to month... then theoretically, that might end at some point soon and there would be a structure there within the building setback, absent a variance or with a variance, even after you're theoretically gone.

Mr. Dratz: So there's a signed agreement between the State of Hawaii and the Air Force that covers either leaving it in place or making the installation State property. Or making . . . or having the Federal Government remove it or repurpose it.

So, that was a little interesting obviously that the lease situation was a little tricky and it's mostly around the operations and maintenance contract at the center. I don't know if anybody follows that news. But it's been sort of an ongoing process.

Mr. Sung: And is the center comfortable with proceeding with the plans to construct this carport and the PV system, even given your month to month?

Mr. Dratz: Absolutely. Very . . . yes, all the leadership is very anxious to get this thing done and working on it.

Vice-Chairman Fukunaga: In your application, it's noted that strict compliance would not allow us to meet the . . . well, strict compliance with the setback requirements, would not allow us to meet the Federal contract requirements of the Green Computing Initiative Project. Can you describe what that is and how it impacts your application?

Mr. Dratz: Well, there are always many dependencies in dealing with these projects and the particular . . . this particular project is funded by the Army Corps of Engineers and contracted by them out of Huntsville Engineering and Support System.

And the Air Force operates the Computing Center. But the Army Corps setup is in contracting requirements and the carport was in there. When that decision was made, it was understood that Federal projects, are exempt from Building Permits.

And it was a little bit of a roundabout way how I ended up here. We got a letter from the Planning Department saying that we didn't require permits. But, responded with just . . . what we thought at the time was an fyi. . . that we we're intending to put the carport within the known setback. And that ...(inaudible)...exchange of memos which has landed me here.

So that was originally . . . it was unplanned that we would have to go for a variance for it to put the carport in place. I thought we were set with the permit exemption.

Chairman Abbott: May I ask a question from staff please? What is staff's taking or what is their position on this? We're hearing a lot of- - between the governments, the federal

Government and somebody else and somebody else . . . that this might be approved, that-that might be approved.

And to what extent does the Planning Department have control over this? I mean it may be an ambiguous question. But it seems like we're circumventing everything around the Planning Department and there are a lot of papers going on that I don't- - we have no access to.

Mr. John Rapacz: Thank you Mr. Chair. I don't see any issues for the Planning Department other than those that pertain to Zoning. And the issue pertaining to Zoning would be the setback issue.

So regardless, I guess ultimately of who holds the lease or for how long. What we're concerned about is the structure in the setback and that's why they're in for the variance.

Chairman Abbott: Thank you. Does the staff have any letters of support or opposition to this project?

Mrs. Balberdi: There were three letters of support.

Chairman Abbott: Those are the ones that we have in our file here.

Mrs. Balberdi: Yes.

Chairman Abbott: But no opposition?

Mrs. Balberdi: No opposition.

Chairman Abbott: Thank you. Anybody have any other questions from the public? John?

Mr. Rapacz: Mr. Chair, thank you. Just one item of clarification, which we did just briefly discuss with the applicant. You'll notice that in your site plan L-1, it's not quite clear where the property line is, that the setback and/or the carport structure being measured from.

If you look kind of in the upper right corner of the lot, you'll see where it says 60 foot setback. . . and notice where the cross diagonal lines are, where that 60 feet is measured from. And then just below that, you'll see where it says 26 feet 2 inches and note where those diagonal marks are that show the span of that distance.

And you'll notice that the 60 foot outside point is much further out than the 26 foot 2 inch outside point. And the applicant has explained that there is . . . basically there have been some overlays of plans and/or maps of surveys. So it isn't completely clear, but I wanted to point out--again just for the record--that even if the property line is at that outside line where the 60 foot setback is, receiving the variance at 26 feet 2 inches, will still accomplish what the applicant needs.

So, in a sense we're looking at a minimum distance. The carport might be further from the property line than indicated, which means it would still be in compliance with the variance. So it doesn't affect the variance at all. I just needed to note that issue for the record.

We did note one other item. And I'm not sure if it's shown, but maybe we're just not seeing it. In your other plans, your A-1 for example. You see that the supporting column on the overhead portion of the panel or of the support is close to the right end. It's not centered and there's a short

overhang on that right end and a long overhang on the left end. And it's not clear on site plan L-1, what that orientation is.

So, as you drive into the overhead . . . are you going by the post immediately or is the post further in closer to the property line?

Mr. Dratz: So the way this is-- sorry I'm talking a little close. If you'll notice, there's actually just curb and soil on either end. So, each post is set back a few feet and then the PV's cantilevered just a bit towards the road and a bit on the other end.

So on this side, there's curb right there. So as you pull into your spot, the post is here and then on the other end it's similar. It is running wild at the end.

Mr. Rapacz: Ok. So the post is towards the outer end of the structure? The end nearer the street?

Mr. Dratz: Correct.

Mr. Rapacz: Ok. Thank you.

Mr. Sung: Are the panel's cantilever this way, so that as you're pulling in as a car into the spot, the panels and the roof are slanted this way or are they slanted that way?

Mr. Dratz: They're slanted towards the east, mounted flat. So they're slanted toward the road.

Mr. Sung: Slanted toward the road? Like. . .

Mr. Dratz: Yeah. Towards Haleakala.

Mr. Sung: And then the car pools into it like this way?

Mr. Dratz: Yeah. Exactly. They're tall though. They'll look very much like the carports at the Kihei Pool.

Mr. Sung: One more question please. So, looking at that graphic as well as on page L-1, what if anything is across the street from where the carport is proposed to be?

Mr. Dratz: If you notice the slope is obviously going mauka-makai. And so this lot is set essentially at the level of the top of the carport. So it's not going to affect the view.

Mr. Sung: Is it just dirt right now?

Mr. Dratz: It is dirt right now but it is the planned future Kihei Charter School.

Mr. Sung: Oh.

Mr. Dratz: Right. Yeah. There's a sign on this corner.

Mr. Sung: And to staff, has the Kihei Charter School express any kind of communication, one way or the other? In support or opposition?

Mrs. Balberdi: No, they have not.

B. PUBLIC TESTIMONY (Continued...)

Chairman Abbott: Is there any public testimony from any source? Anybody like to speak?

Mr. Gerry Smith: Good afternoon. My name's Gerry Smith and I'm the Director of Business Development for the Maui Economic Development Board. Maui Economic Development Board is located in the Kihei Research and Technology Park and as such is a very close neighbor to the Maui High Performance Computing Center. In fact, you can see our building to the left side of this.

We support this variance because it's both a good and positive thing for the tech park. Maui's at the epicenter of all things energy as demonstrated by almost 350 attendees at the Maui Energy Conference, which was held just two weeks ago. And 70% of those attendees were from outside of Maui.

Photovoltaic is extremely recognizable as a renewable energy technology. And Maui is currently recognized as the world leader. Photovoltaic is already widely utilized by many buildings throughout the tech park and you can see that we have photovoltaic on our roof. This roof here and the new Brewery, which is not in this photo, also has a large number photovoltaic panels.

So more use of PV throughout the park should be both encouraged and supported. That more renewable energy should be utilized prominently at our tech park is simply a given. The MHPCC is often referred to as the anchor of the Maui Research and Technology Park, and this PV installation is important to the continued of liability to the supercomputing center as an activity of national significance in the Research and Technology Park.

Thank you.

Chairman Abbott: Thank you. Any other comments, questions, information? I do have one question. I'm sorry, that concludes Public Testimony. I'm learning...give me a chance.

D. PUBLIC HEARING (Continued...)

Chairman Abbott: On the parking structure, how is . . . the controlled entrance. . . the traffic flow, is it in the center? I'm trying to determine if it's going to create a traffic hazard, in and out of the traffic parking. The new . . . supposed traffic area.

Mr. Dratz: Ok. It's a little hard to see, actually some of these trees have been since removed by the State. But the entrance . . . the main entrance to the parking lot is here. And the auxiliary entrance is here at the back. This is entirely fire lane, except for these parking spots here and so it won't affect any of the traffic passing through.

Chairman Abbott: No intersections or anything will be . . . ?

Mr. Dratz: No, this is entirely curbed and then grass.

Chairman Abbott: Thank you. May we have the staff's recommendation at this point in time?

Mrs. Balberdi: The Planning Department, we submitted a letter of-- in our Staff Report, we had our recommendation with-- we recommend that if the variance is granted, it should only be applicable only to the request as approved by and as reflected in the record of by the Board.

And the Hold Harmless Agreement, the standard Hold Harmless Agreement . . . is not what we usually give to the other applicants, is different when the State of Hawaii is the applicant.

Chairman Abbott: I understand.

Mrs. Balberdi: Because they're self-insured. So I wrote it . . . this is what was recommended by the Attorney General.

Chairman Abbott: Thank you very much. Any further questions from the Board?

Vice-Chairman Fukunaga: I have a question for staff. So, if we were to approve this variance, is it specific for this particular user and this particular structure?

Mrs. Balberdi: Not the user, but the structure, yes.

Vice-Chairman Fukunaga: So say if someone else were to take over the lease. A private entity, then they would not then be required to provide an indemnity?

Mrs. Balberdi: Correct. Well the- -

Chairman Abbott: John?

Mr. Rapacz: Thank you Mr. Chair. That's an excellent question and one that I don't think we had thought out. That because the variance would continue on, if there's no longer a government tenant, there might be consideration given to requiring the standard Hold Harmless and Insurance for any private or commercial tenant.

Mr. Sung: Question for Corporation Counsel. So, is it possible to . . . if this Board were to grant a variance to condition the continuing effect of the variance on the availability of an indemnity and Hold Harmless from any private party that might be a successor occupant of the premises with that structure in place?

Ms. Thomson: And I think that could easily be worked in. So you could. . . the variance could be approved as recommended by staff and then with an additional condition that if the property is leased or ownership transferred to a private entity, that the standard indemnity and Hold Harmless Agreement would apply at that point.

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Mr. Sung: Thank you.

Chairman Abbott: Yes?

Mr. Dratz: I'm not sure if this is on. But to make one point. Both structures on the TMK are owned by the same . . . built and owned by the State of Hawaii. So at HTDC, so the chance that they would change ownership is quite low. And in this case they do rent to a lot of tenants. But the indemnity or lack thereof is being provided by the State. Not the tenant.

Ms. Thomson: So what the applicant is saying that we can just condition on a change of ownership then. Rather than a change of the tenants. Cause if the property ownership changes hands and it is then owned by a private entity then we could require indemnity insurance in our normal fashion.

Mr. Sung: Yeah. And in my reading or viewing of the situation, I think that's not even really the relevant trigger. It's not so much the change in occupancy or the change in ownership. It's just whether the equivalent of an indemnity from the State, continues to remain in force in favor of the County.

If and when that goes away, then the variance goes away unless there's a replacement indemnity and Hold Harmless. So we really don't care about. . . theoretically, if a private party were to come as the new owner or the new occupant and the State were willing to stand by its agreement to give the equivalent of an indemnity and Hold Harmless, then great we don't really care.

But if and when the state says "Hold on, conditions have changed, were not going to stand behind what we previously gave in support of the High Tech Center"; then that's when our variance would go away, unless a private version of the indemnity and Hold Harmless were to come into force. Right?

Ms. Thomson: We could do it that way, but I think that what I would probably recommend is not having the variance expire or terminate on that, given that circumstance. But just that the requirement change from currently, will require as staff recommends and that the State has agreed in the Staff Report.

And if the ownership changes, we can do it as a two part. You know, here is what's required now, if ownership changes, this is what would take the place of the State's indemnity requirement.

Mr. Sung: Well, and then I think what I'm saying is that rather than that second part being, "if the ownership changes" it's just "if the State no longer stands behind its equivalent of the Hold Harmless and indemnification", because really that's what we care about, not so much the ownership.

So, theoretically if the ownership didn't change, but the State were to rescind, its equivalent of indemnification and Hold Harmless, then we'd have nothing. Even if the ownership never changed. So that's really what we're concerned about. Which is that we'll accept what the State is offering to provide?

And if at some point, that no longer applies, then we'd want the indemnification and Hold Harmless from somebody. Right?

Mr. Rapacz: Just a thought. I'm sorry Mr. Chair.

Chairman Abbott: No, please.

Mr. Rapacz: We haven't seen this situation. I understand the distinction you're making, but I think that whatever condition regarding indemnity is attached to the variance, if the property owner were to no longer comply with that condition, whether it were a government agency or a private owner. Then they would be in violation of the conditions of the variance and we would ask the Board to terminate the variance, for failure to comply with conditions.

I don't think that we need to set that out separately as a condition in each variance. So I would agree that the situation of the State simply changing its policy or somehow no longer standing by its indemnity could occur. But I think if that were to occur, it would be treated the same way as any holder of the variance would be treated.

And we would bring it to the Board and tell the Board that there's a violation of the conditions and see what the Board wishes to do about it.

Mr. Sung: I understand what you're saying. With all due respect, I would feel more comfortable in granting the variance at the outset, knowing that we have a built in condition that sets forth the expectation and understanding of both the State and the County and the High Tech Center.

So if I were to make a motion, I would propose that we make it expressed and clear up front. Thank you.

Mr. Rapacz: Mr. Chair, I have no objection to that, the staff is fine with that.

Chairman Abbott: Any other questions or comments from anybody?

Vice-Chairman Fukunaga: I have a question.

Chairman Abbott: Please.

Vice-Chairman Fukunaga: So, as I read in this report prepared by Planning. It basically allows for a photovoltaic carport structure. So I'm not quite sure what the exact definition of a carport structure is and I don't know if it's tied to this specific drawing that's provided. But I think that we should somehow be clear that it's limited to a carport structure, that doesn't have any walls on the sides.

In a sense, not being able to create walls on the sides to look like a harden structure and not an actual enclosed building. I think that the sense is that you want something that's just a shade and somewhat with that open feeling.

Mr. Sung: And Mr. Fukunaga, I think that we would be able to clarify that by just saying "as set forth on the drawing as page S-2", it's that kind of structure that this Board would be approving a variance for.

Vice-Chairman Fukunaga: Are you saying we should tie it to this specific drawing?

Mr. Sung: Correct, on page S-2.

Vice-Chairman Fukunaga: Can I ask the applicant if they would be ok with that? Because it would then not allow for changes to the drawing itself.

Mr. Dratz: Well, it would be nice to. . . you know if something comes up. . . there's a utility or something and we have to move. . . you know ship it over a few feet - - not towards the street. But having it tied to an exact drawing, I don't see any problem with it now. But limiting all the ability to move it, a few feet one way or the other, might make a little more of an issue.

I would say that putting something in there that says "it won't have any walls" is totally fine.

Mr. Sung: Or we could say something to the effect of "substantially incompliance or inconformity with the drawing and the application and all material respects".

Ms. Thomson: That's exactly what I was going to recommend.

Mr. Rapacz: Mr. Chair.

Chairman Abbott: Please.

Mr. Rapacz: I don't mean to belabor this issue but some of the most common and largest challenges the staff has is interpreting what substantially means. So if there is a specific concern or a specific limitation that the Board would wish to impose, it would be helpful to identify that.

So if for example, it is that the end walls or front walls shall not be enclosed or the opening shall not be enclosed. It would be helpful to state that.

Mr. Sung: Are you also looking for a percentage of . . .

Mr. Rapacz: That's the discussion analysis we have to go through when we are just told that. . . or when the condition just reads that it's substantial.

Mr. Sung: And in previous experience for the staff and the department, what's the percentage range that figures not substantially ...(inaudible)...

Ms. Thomson: How about that the applicant shall . . . well, we can work on the exact language... "In substantial compliance with the representations and made before the Board as to the open air carport structure, whose purpose is to support photovoltaic panels". You know, so you could take. . .

Mr. Sung: In all material respect?

Ms. Thomson: Yeah.

Chairman Abbott: My approval as it were, I would say let's . . . if the variance is granted. Approve it as exactly as it is shown on the plans we have received. Because if we add caveats or whatever . . . you might change this wall or change that wall or do something. . . You're voiding the variance. I mean it's got to be a specific thing. It's either approved as it is or it's approved with- -

Mr. Sung: And come back for a modification request.

Chairman Abbott: Right. They have to come back for another variance. But let's not get carried away here. Let's keep it simple. This is what they've requested, this is what should be considered or granted or not granted.

Additional structures are another thing down the future. And I understand what you're saying and you're absolutely right. Because any modification to this structures other then what's shown in here is a violation of the variance. Is that not correct?

Mr. Rapacz: That's correct Mr. Chair. If the members would look at page 16 of the report which is the second page of the Recommendation. So second to last page of the Staff Report and Recommendation. And what we are recommending is that the Board

adopt this and how it reads now is the variance is approved with the following conditions.

Letter A-The variance shall be applicable only to the request as approved by and as reflected in the record of the Board. So what you're saying now is correct, that's how we would interpret it. It would be based on exactly what's been submitted and nothing else.

Chairman Abbott: Thank you. Ok. Do we have a motion or is there further discussion? The Board will entertain a motion.

Vice-Chairman Fukunaga: Wait just a minute. Let me review this.

Chairman Abbott: Or further discussion.

Vice-Chairman Fukunaga: Give me a minute here.

...Long pause...

Vice-Chairman Fukunaga: So these drawings is pretty specific to . . . well, it calls out a specific module I believe. It says 168 sun power 327 watt module with optimizers. So if we're going to stick to exactly what's on here, they can never switch out panels to the different type of panel.

I don't know to me that's pretty rigid. I don't know if we want to go that far. Personally I would be ok with just saying "an open air carport".

Chairman Abbott: It brings to me. . . it brings a question up to me, if they have to update, redo or change photovoltaic system to a newer more efficient photovoltaic system, that would not require any change in the structure itself to the best of my ability. I mean to change a photovoltaic panel is not the same as tearing down two walls and building another roof.

Mr. Sung: We're not really concerning ourselves with the PV system; we're concerning ourselves with the structure on which the PV system would sit. Right?

Vice-Chairman Fukunaga: If we're saying they have to follow these drawings though, it's calling out the specific module.

Mr. Sung: The drawing of the structure? As opposed to the drawing of the structure and this specific PV system on the structure?

Vice-Chairman Fukunaga: The drawing that's submitted.

Mr. Sung: So then we can the drawing of the structure as opposed to the drawing of the structure and the PV system? No?

Vice-Chairman Fukunaga: Well then you're admitting taking out one- - I believe it's one in the same. . .

Mr. Sung: Look at page A-1. It references the PV modules, rails and the mounting hardware and the brackets, the beam support ...(inaudible)... etc. But it doesn't say the specific model for lack of a better description.

But you're looking at it a possible ... (inaudible)...

Vice-Chairman Fukunaga: On the third drawing . . . page L-1

Mr. Sung: I see, it says 168 sun powers, 327 watt modules with optimizers.

Mr. Howard Kihune: Comment Mr. Chair.

Chairman Abbott: Please.

Mr. Kihune: Again I think we just got to remember, staff has mentioned that we're only here to determine the setback and what they put on that roof at some point is whether it changes because of better product at some point or your best material.

We're only dealing with the setback. So I think we just need to address that and you know. . .If I were to make a motion as planned, you know at some point if they want to change the PV's on top because again. . . for the better product. Then that should be their ability to do that.

Mr. Rapacz: Mr. Chair. Just in quickly looking through the site plan and the other drawings. I see only that one indication of specifically what type of panels they are. And so I think it would be acceptable to staff if the applicant were to simply remove that label from its submittal.

Mr. Sung :...(inaudible)...

Mr. Rapacz: Yes. The label that indicates 168 sun power, 327 watt modules with optimizers. If that label had not been in the submittal or if it were removed from the submittal then I think it would take care of its problem and we would be left only with the structure and its dimensions.

Mr. Sung: Is that applicable with the applicant?

Chairman Abbott: Is that acceptable with the applicant?

Mr. Rapacz: I'm sorry Mr. Chair, just the point being there's no need to identify that in this submittal.

Mr. Dratz: It just depends on timeline. So we've got to go back modify drawings and then come back. Or if we can get a determination now and fix the file.

Mr. Rapacz: Mr. Chair, if i could. . . I think a representation by the applicant at this point that it wishes to withdraw that label from that submittal would be acceptable to staff. It'll be on record.

Mr. Dratz: We wish to withdraw the label.

Chairman Abbott: We're getting there. Ok. Any questions? Any other information? Would someone like to make a motion?

Mr. Sung: I'll take a shot.

Chairman Abbott: Repeat please.

Mr. Sung: I'll take a shot at it. Mr. Chair, I make a motion to with reference to Department of Planning Staff Report and Recommendation to the Board of Variances and Appeals hearing date April 9, 2015 and specifically pages 15, 16 and 17 of that report, with the recommendations. I move that we approve the application for the variance inconformity with the recommendation of the Department of Planning as set forth on pages 15, 16 and 17.

And further conditioned with what we discussed previously, relative to the conditioned . . the continuing effectiveness of the variance being conditioned on the availability of either the equivalent of an indemnity and Hold Harmless from the State as set forth on page 16, I believe of the report.

Or in the event that-that agreement of the State is no longer in effect, then in the actual indemnity and Hold Harmless in the standard matter.

Chairman Abbott: We have a motion. Do we have a second?

Mr. Kihune: Second.

Chairman Abbott: Is the Board. . . I'm sorry. John, is the Planning Commission acceptable with the way the variance or the approval has been stated? Does it cover all that you need for your records?

Mr. Rapacz: Yes, but I would like clarification from Corp Counsel I guess. What I heard was that the variance would continue in effect as long as the indemnity continued to exist. To me that would imply some type of automatic termination of the variance. And I don't know if that can be done without Board action.

In my experience so far I haven't seen any variance terminate without Board action.

Ms. Thomson: You're right; it probably would take Board action. Because the Board would have to determine that-that condition wasn't being complied with at some point in the future.

Mr. Rapacz: Yes. And that's what I was referring to earlier when I said the normal course would be-it would be reviewed as to whether there was still compliance with the condition.

Ms. Thomson: Right. I'm almost thinking that we might not need to modify to include a special caveat to the indemnity and provision that's recommended by staff. Because if that condition were no longer satisfied, it would come back to the Board. And probably at that point what would be say a private entity took over that parcel. They would probably come back because the State would no longer want to indemnify a private action. And we would replace the requirement with the normal insurance and Hold Harmless at that point.

I'm not sure that we gain anything by adding kind of a caveat to the condition as written.

Mr. Sung: So maybe then the . . . rather than it be conditioned automatically on the . . . rather than the continuing affecting condition automatically on the effectiveness of that State agreement, it would be continuing on until either the County receives notice from the State that it no longer stands behind that agreement or when the County makes a determination that the agreement of the State is no longer in effect?

Either way, someone tells us or we make a determination that's no longer there and that's when we say we need the private indemnification and Hold Harmless in its place.

Ms. Thomson: I think what would happen and kind of as a practical point. Is if the property changed hands and the State sold it. I think that the State's attorneys would go through the documents and they would make sure that the private entity assumed

the State's responsibilities. Or that the State would come back to the BVA and say "We're selling the property and we no longer intend that this condition apply".

So either the variance would terminate or the new entity would have to come in and request a modification.

Mr. Rapacz: Mr. Chair, thank you. I agree and I think also that even if the State were to . . . while it still owns the property change its policy about indemnification the same would happen. Just so

long that we understood that there was a change in the policy. It would come back to the Board essentially as non-compliance with the agreement.

Mr. Sung: Right. So either way the State would inform us or we would make a determination from other factors that we no longer have the State's backing on that requirement?

Ms. Thomson: Yes.

Chairman Abbott: We have a motion with all of the who's and where's and whats and everything that's been discussed.

Ms. Thomson: So there has been a motion and a second. So the motion right now is the property of the body. Do you want to amend the main motion, to remove that extra caveat?

Mr. Sung: I'm not sure that's necessary. Cause we've clarified it now.

Ms. Thomson: Well the motion was to approve as recommended by staff with the caveat. So, we actually need to remove that caveat if you don't want to approve that motion.

Mr. Sung: I can remove that caveat and modify at a modified caveat with the understanding that we just made.

Ms. Thomson: Ok.

Mr. Sung: Ok? Alright. So we're going to remove the original caveat and insert a modified caveat that as an additional condition the continuing effectiveness of the variance, would be until such time as the State notified the County that it's no longer standing behind its agreement.

Or if the County makes a determination that the agreement of the State is no longer in effect. At which time we would require the private indemnification and Hold Harmless.

Ms. Thomson: My recommendation would be not to add that language to it. Because for the reason that if the State no longer upheld its agreement to indemnify. It would be in violation of the variance. So the variance could be terminated on those grounds that it was not being complied with.

So, I don't think that we have to additionally condition it.

Mr. Sung: How often has the County ever terminate a variance under those kinds of circumstances?

Ms. Thomson: With the State I'm not aware of. . . I'm not aware of that. But it would be . . . we could do that. You know the State is applying for the variance, so if they didn't comply, it would be like any other landowner.

Mr. Sung: My expressed concern is that there might be something that falls into the cracks or between the cracks. At that later juncture. So, to me it's better to be upfront about it and just say what the expectation and the understanding is and then grant it in that way. And that will be a

very good reminder for the folks who are taking care of any transfer later on to say added to the checklist of "hey, get the replacement indemnification and Hold Harmless".

That's my explanation.

Ms. Thomson: Just for discussion sake. We could leave the language as is and then add part B to it. That says that "if the property shall ever change ownership, that the standard indemnity and insurance provisions that we currently have would apply."

Mr. Sung: If the property changes ownership or if the State notifies the County that it no longer stands behind that agreement or if the County makes a determination that the State's agreement is no longer in effect.

Ms. Thomson: We could try that.

Chairman Abbott: Here we have a re-modified motion. Do we have a second?

Mr. Kihune: Comment.

Chairman Abbott: Comment, please.

Mr. Kihune: I think for clarification that we should just restate the entire motion.

Chairman Abbott: Please.

Mr. Kihune: Clean and neat so that it's understandable. Cause right now it's in pieces.

Mr. Sung: Ok. So should I withdraw that motion and make another motion?

Ms. Thomson: Or perhaps staff or John can take a stab at restating the motion so that we're all on the same page.

Mr. Sung: Or shall we take a recess and work on the language and read it into the record?

Mr. Rapacz: Mr. Chair. I did not hear the last part of the discussion. I was reading carefully through the conditions. So I would not be able to restate it without a recess or something.

Mr. Sung: I would request a five minute recess or so and then we could work out the language to make sure that everyone's ok.

Chairman Abbott: Or should we go into executive session?

Ms. Thomson: No, I don't think we need to go into executive session on it. But, we should do this on the floor? Since its Board action.

Chairman Abbott: So a five minute recess?

Ms. Thomson: No.

Chairman Abbott: Continue on.

Mr. Rapacz: So Mr. Chair, essentially what the recommendation consists of is adoption of Findings, Conclusion of Law and ultimately approval of the variance. The only aspect of it that seems to deviate from what's recommended on pages 15, 16 and 17, is if in some way the State does not meet its agreement to indemnify as stated in part B in the Recommendation.

Whether the variance would then automatically terminate or whether it would simply become a violation of the variance terms and thus be brought to the Board for review. That I did not hear the resolution of.

Mr. Sung: And John I think that the last thing that Corp Counsel Thomson and I, I think we agreed on . . . was that the trigger would be either a change in ownership of the property. Or the State notifies the County that it no longer stands behind its agreement. Or the County makes a determination that the State's agreement is no longer in effect.

Those sort of three . . . three ways . . . any one of those three triggers would basically be the trigger for the termination of the variance.

Mr. Rapacz: Mr. Chair. And when you say termination . . . do you mean that the variance would automatically terminate or when you say termination do you mean that it would be brought to Board to consider termination?

Mr. Sung: No, I mean automatic because that way . . . with those three prongs . . . people responsible for what happens are going to know that they have to put on their checklist to take care of the replacement or substitute for what the State has currently given up.

Mr. Rapacz: I understand.

Mr. Sung: Because there's no gap and the State's going to stand behind it or you're going to get someone else to put us in the same place without a gap and covered for us.

Mr. Rapacz: Right I understand.

Mr. Sung: Sort of like getting gap coverage from a title company almost.

Mr. Rapacz: So Mr. Chair I would again, defer to Corp Counsel on whether a variance may terminate automatically without Board action. And that I just don't know the answer to.

Ms. Thomson: I don't think that it should terminate automatically. I think that-that could be a trigger for Board review. Any of those three conditions that you named. Either a change in ownership or the State fails to comply with the conditions. Or the State notifies the County that it will not comply. Any of those would require the Board -- a re-review of the Board. And possible consideration of termination.

The reason that I don't think it should automatically terminate, is that we would need to give the owner a chance to respond. Rather than a determination strictly by staff or the Board, without any opportunity to respond.

Mr. Sung: But wouldn't it be the owner's responsibility if it's planning any kind of action to insure that the County is kept protected, before hand?

Ms. Thomson: I think that it's such a condition though. It's not black and white. It's not one of those things where you can go at, take a look at something and automatically know that it's being complied with or not complied with.

So it's the kind of condition that I don't think should have an automatic termination attached to it. I think that it would need further Board action to terminate. It's just an additional step, but then we're assured that the parties all have their process rights.

Vice-Chairman Fukunaga: Chair.

Mr. Rapcaz: Mr. Chair. Oh, sorry. Go ahead.

Vice-Chairman Fukunaga: I'd like to say something. There's a lot of discussion going back and forth on this amendment and I'd just like to say, I'm comfortable with the way it's drafted by staff.

No disrespect to Mr. Sung, but I don't think we need the additional language. I don't think I would support the modification.

Chairman Abbott: Do we have to make a re-motion?

Ms. Thomson: No. So if there's no further discussion on the motion that's currently stated we could vote on it and it could pass or fail. And then we would move on to perhaps a new motion.

Mr. Sung: I'll withdraw the motion and then someone else can make a motion.

Vice-Chairman Fukunaga: I'll make a motion. I make a motion to approve as per Staff's Recommendation . . . as stated in Staff's Recommendation, their report.

Mr. Espeleta: I would like to second that motion.

Chairman Abbott: Seconded. Any discussion? It's been moved and seconded. May I have a vote? All in favor "aye."

Members: "Aye."

Chairman Abbott: Any opposed?

Mr. Sung: "No."

Chairman Abbott: We have four ayes and one no. Does that mean it fails?

Chairman Abbott: I vote aye. Motion is carried, the **variance is granted** correct? Thank you very much.

It was moved by Vice-Chairman Fukunaga seconded by Mr. Espeleta then,

VOTED: Motion to approve variance as stated in Staff's Report and Recommendation.

(Assenting: C. Abbott, T. Espeleta, C. Fukunaga, H. Kihune, W. Greig)

(Dissenting: R. Sung)

(Excused: P. DePonte)

Mr. Kihune: Thank you for your patience.

Chairman Abbott: Thank you for all your help and cooperation.

E. APPROVAL OF THE FEBRUARY 12, 2015 MEETING MINUTES

Chairman Abbott: Ok. Next agenda item is the minutes or Director's Report or whatever else. I wasn't at this meeting, so I can't tell you anything about the meeting, so somebody else will have to take it. Approval of the minutes for the February 12th meeting.

Mr. Kihune: I make a motion to approve.

Chairman Abbott: Do we have a second?

Vice-Chairman Fukunaga: I second.

Chairman Abbott: We have a second. All in favor?

Members: "Aye."

It was moved by Mr. Kihune seconded by Vice-Chairman Fukunaga then,

VOTED: Motion to approve variance as stated in Staff's Report and Recommendation.

(Assenting: C. Abbott, T. Espeleta, C. Fukunaga, H. Kihune, W. Greig, R. Sung)

(Excused: P. DePonte)

Chairman Abbott: So motion carried. **Minutes are approved.**

F. NEXT MEETING DATE: Thursday, May 14, 2015

Chairman Abbott: Next meeting date is April- -

Mrs. Balberdi: Mr. Chair, it's actually May 14th, the April meeting was canceled.

Chairman Abbott: There is no April?

Mrs. Balberdi: So April 23rd is canceled.

Chairman Abbott: So the next meeting would be May 14, 2015. There's no other further things for the Board?

Mr. Kihune: Comment. I will be traveling so just giving you a heads up now.

Chairman Abbott: Our Board is getting short. So everybody's gotta help. We only have seven members. They're supposed to approve two in May.

G. ADJOURNMENT

Chairman Abbott: Ok. Meeting's adjourned.

There being no further to come before the Board, the meeting adjourned at 1:49 p.m.

Respectfully submitted by,

Chalsey Kwon

CHALSEY R. K. KWON
Secretary to Boards & Commission II

RECORD OF ATTENDANCE

Members Present:

G. Clark Abbott, Chairman
Chad Fukunaga, Vice-Chairman
Teddy Espeleta
Howard S. K. Kihune
William Greig
Raymond Sung

Members Excused:

Patrick De Ponte

Others:

John Rapcaz, Planning Program Administrator, Department of Planning

Carolyn Cortez, Staff Planner, Department of Planning

Malia Balberdi, Staff Planner, Department of Planning

Chelsea Rabago, Staff Planner, Department of Planning

Richelle Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel