APPROVED: 8/13/2015

BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
June 25, 2015

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Abbott at approximately, 1:32 p.m., Thursday, June 25, 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.)

Chairman Abbott: The meeting of the Board of Variances and Appeals will now come to order. It is approximately 1:32 p.m., let the record show we do have a quorum.

B. PUBLIC TESTIMONY

Chairman Abbott: At this point in time, if there's anyone in the gallery that wishes to give public testimony for one of the items, under the docket which they cannot do when the docket is called, you can come to the podium and testify now. Seeing none, we'll proceed.

C. APPEALS

1. KEITH KIRSCHBRAUN OF WRIGHT & KIRSCHBRAUN representing ROBERT E. COPP JR. AND DOROTHY M. MUNOZ Appeal of the Planning Director's Notice of Violation (NOV 2014/0013) for the zipline activity within the County's Agricultural District without a Special Use permit pursuant to §19.30A.060(H), Maui County Code, for property located at 2065 Kauhikoa Road, Haiku, Maui, Hawaii; TMK (2) 2-7-012:086 (BVAA 2015/0001)

    a. Stipulated request for continuance of hearing to July 23, 2015, by Appellants Robert E. Copp Jr. and Dorothy M. Munoz and Appellee William Spence, Planning Director.

Chairman Abbott: Will the staff read the agenda item and state the purpose of the application please?

Ms. Balberdi: *Reads item into record.*

Chairman Abbott: Is there a presentation?

Mr. Keith Kirschbraun: Good afternoon, my name's Keith Kirschbraun. I'm here on behalf of Robert Copp and Dorothy Munoz.

Chairman Abbott: Thank you.

Mr. Tom Kolbe: Good afternoon, Tom Kolbe on behalf of the County of Maui. At this time I'd just like to make a representation that I've spoken to Mr. Kirschbraun with regards to this appeal and we have agreed to continue this matter with the Board of Variance's approval to a date in July- July 23.

This case and the next case on the calendar are related. They involve the same property, although they involve appeals of certain NOV's from different property owners. I am going to be making a similar request to continue that matter also. Counsel for the second matter is present; if we can get to that one.

But at this point, we just want to ask for a continuance to have hearing on July 23rd instead.

Chairman Abbott: Ok. Any questions from the Board? Do we have a motion for a continuance?

Mr. Howard Kihune: Motion for continuance.

Chairman Abbott: Second?

Mr. Willy Greig: Second.

Chairman Abbott: We have a motion, and a second. Any discussion? All in favor? "Aye" please.

Members: "Aye".

Chairman Abbott: Any opposed? Thank you. **It's granted**.

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

VOTED: **Motion to approve request for continuance of hearing to July 23, 2015.**

(Assenting: C. Fukunaga, H. Kihune, W. Greig, J. Reyher-Colon, M. Kincaid)

(Excused: P. DePonte, T. Espeleta, R. Sung)

2. CALVERT G. CHIPCHASE AND CHRISTOPHER T. GOODIN OF CADES SCHUTTE LLLP representing D & S VENTURES, LLC Appeal of the Planning Director's Notice of Violation (NOV 2014/0013) for the zipline activity within the County's Agricultural District without a Special Use permit pursuant to §19.30A.060(H), Maui County Code, for property located at 2065 Kauhikoa Road, Haiku, Maui, Hawaii; TMK (2) 2-7-012:086 (BVAA 2015/0002)

   a. Motion to continue the hearing to July 23, 2015 by Appellee William Spence, Planning Director.

Chairman Abbott: Malia would you please read into the record Item under C-2, Please?

Ms. Balberdi: *Reads item into record.*

Chairman Abbott: Ok. Thank you. Go ahead please sir.

Mr. Tom Kolbe: Tom Kolbe on behalf of the County of Maui. Cal Chipchase for D&S Ventures LLC.

Chairman Abbott: Please a little closer to the microphone if you would.

Mr. Chipchase: Yes Chair.

Mr. Kolbe: Sorry about that. Well, in line with the case that we just continued to July 23rd, we'd be making a - - the County will be making the same request to continue this matter also, to that date for - -and further that we consolidate the two matters for hearing.

I believe that Mr. Chipchase may have some scheduling issues with the July 23rd meeting but that is the request of the County.

Chairman Abbott: Ok. Sir, please.

Mr. Chipchase: Thank you Chair. Mr. Kolbe's right about the scheduling issues. We initially thought that we had resolved the continuance issue by agreement among the parties to take the date into September. I've submitted some documents to that affect but, I think it's fair to say there's some confusion but it was our understanding- - twice- - that the date had been continued to September.

So based on that, both the manager and D&S and our expert witness, our archaeological and historic property's consultant are not available on July 23rd. I've been unable to reach my client the manager of D&S Ventures; he's in Europe to confirm if he's available in August. But I have confirmed that our archaeological and historic property's expert is

available on August 27th and at this point, I'd be willing to continue to that date and do everything I can to make sure that my client is also available on that date; and confirm with Mr. Kolbe, as soon as I'm able to reach him.

Chairman Abbott: Does this then mean that the first motion would be carried forth to the same date? Again, to keep them together?

Mr. Kolbe: I think that would be practical. I would just ask that we check with Mr. Kirschbraun about whether they would object to that. I know that the County intended for this to be heard in July, but I also don't think it makes a lot of sense for us to have a second motion to continue, if in fact the witness and the applicants …(inaudible)… So I'd ask Mr. Kirschbraun to - -

Chairman Abbott: Ok. Please do. Mr. Kirschbraun?

Mr. Kirschbraun: I came in here today thinking July 23rd frankly, to be honest. I don't think I have conflict on August 27th. Probably my client …(inaudible)…

I wanted to be firm, as firm as I can for their sake, because they don't have a lot of resources. So I don't want them to have to fly over and fly back to find out if or if not this is going forward. I think we'd be available for August 27th, if that's what the Board is inclined to do. I had thought it was July 23, but I guess not.

Chairman Abbott: I understand. Is the August date available?

Mr. Kihune: August or September?

Chairman Abbott: Yea, August or September? Apparently August 27th is the date . . .

Mr. Kirschbraun: That's the date we've been discussing?

Chairman Abbott: You also sir?

Mr. Chipchase That's correct Chair.

Vice-Chairman Fukunaga: Is it possible to authorize multiple dates as an option? Or does it need to be one specific date?

Ms. Richelle Thomson: It doesn't necessarily need to be a specific date. It could be as agreed. But you may want to set a date and then allow them to come to some determination on their own too.

Chairman Abbott: Well, I'll let you gentleman work this out.

Mr. Kolbe: Well, from the County's perspective, I think that we would prefer to have a date certain that this is getting continued on the record too and we would ask for that to

be- - I guess the August 27th date and not just as agreed just so we have a date. I think Mr. Kirschbraun would want that since his clients. . . I think are off island.

Mr. Kirschbraun: Yeah, actually I prefer a day that's certain. I just wasn't sure that's what we were going to do today. And so I think we would be available August 27th. And actually my clients would prefer something more certain. I guess the parties- -

Chairman Abbott: Please speak into the microphone.

Mr. Kirschbraun: I apologize. I guess we could always talk if something again became a problem. But my clients would prefer to have a date.

Chairman Abbott: Any questions from anyone? I'll call for a motion. Juanita please?

Mrs. Juanita Reyher-Colon: So if the 27th of August is not an agreeable date? Is there another date that we will be looking at?

Mr. Chipchase: Member, I believe the only hang up with August 27th potentially even is either if Mr. Kirschbraun's clients turn out not to be available or my client turns out not to be available. Otherwise that would be the date certain.

So in the event that either of those things happens, we haven't discussed an alternative date, as you can see there's been some mutual confusion I'll call it on what we're doing and when the dates are. But I think we're on the right track now. I think that August 27th most likely will work for everyone. I have no reasons today to think it won't, I just haven't been able to confirm with my client nor Mr. Kirschbraun.

But I think we can both do that as soon as practical, let everybody else know and if there is a problem, do our best to work that out among ourselves so that we don't need to come back in August for another motion like this.

Chairman Abbott: Understand. Everybody in agreement?

Mr. Chipchase: I don't have any further comments.

Chairman Abbott: Ok.

Mr. Kihune: Mr. Kirschbraun?

Mr. Kirschbraun: I have nothing further.

Chairman Abbott: Ok.

Mr. Kihune: Question?

Chairman Abbott: Question, please.

Mr. Kihune: For the applicant. Where are we in regards to the Notice of Violation? Has it been ceased and desist? Or where are we at with that right now?

Mr. Kirschbraun: From my client's perspective, which are Mr. Copp & Ms. Munoz, they're not involved in the zip line activity at all. They just happen to be co-owners of the property in question. They actually had a court case involving Mr. Hoyte, Mr. Chipchase's client. We have a motion pending before the court to enforce our settlement agreement. Which is scheduled for July 8th but it may get pushed back a little bit for the same reason, which is his client is away.

Our settlement agreement is to basically split up the area of the property, so we have nothing to do with them, and they have nothing to do with us, hopefully on the property. We have no zip line on our area of the property. And that's pending in front of the court right now for July 8th.

So that's our perspective on it and our clients were supposed to be- - they were sued as a result of this by a neighbor. They want nothing to do with the zip line. So that's their perspective on it. I don't know if that answers your question.

Mr. Kihune: Well, on the actual business itself, where do they stand? Are they actively still utilizing that zip line? Or is that ceased and desist?

Mr. Chipchase: Sure, I'll be happy to comment a little bit on that. I can't comment on the lawsuit, I'm not involved in that aspect of it. I don't represent D&S in that matter so I'll just defer to Mr. Kirschbraun on that status and what's going on in that action.

As to this Appeal, we believe that the Notice of Violation was issued based on ...(inaudible)… of fact or abuse of discretion. The property is a historic site recognized by SHPD as a historic site. We're in the process of applying for and obtaining a preservation plan from SHPD to preserve that site.

The zip line and other tours of the property are accessory to the preservation retention and improvement of that historic site. So we believe that …(inaudible)… I just don't want to mistake a fact by or abuse the discretion by the director.

So the use that- -the principal use, the preservation retention and improvement of that site continues and in fact, they are progressing to get a preservation plan from SHPD. As part of that, the tours do continue. And so I understand from the Department's perspective the desire to move this to a conclusion before this body as soon as possible.

We have offered and I understand that the rules provide for an opportunity to sit down with the Department to discuss ways that we might be able to bring this to a shorter conclusion; which may be as Mr. Kirschbraun explained, subdividing the property and then applying for CUP that the County believes we lack. Even though we don't think it's required.

So far, we haven't been able to do that. But that I think is fairly represents the status of or with the operation of where we are today.

Mr. Kihune: Ok. Thank you.

Chairman Abbott: Mr. Kolbe?

Mr. Kolbe: No, I think everything Mr. Chipchase said accurately reflects the County's position that this is an ongoing violation and then that's why there's some immediacy to get the hearing done. Why we'd like the date certain on August 27th.

Chairman Abbott: Any questions from the Board? Do we have a motion? I'm sorry, Corp Counsel?

Ms. Thomson: Just so we can keep the record clear, since we did go ahead and adopt the earlier- - the initial matter by motion, perhaps the motion could be to reconsider the date that we set for item C-1. And to reconsider that so the date for item C-2 continuing both to August 27th, that would probably be the clearest way of doing that.

Mr. Kolbe: You know I don't know if - - the other thing I would just ask is if possible. . . maybe we could go ahead and consolidate the two hearings for one hearing because in this case neither parties has moved to intervene in the other parties appeals. I don't even know if that's - -So I would ask since it involves the same conduct on the same property by different owners that they also consolidate for that hearing.

Chairman Abbott: So it's my understanding then if a motion is made to defer this first motion to include the second motion to make both motions due to be discussed on August 27th? Does that make- -everybody understand what that is? And the Counsels are all . . . everybody's all in agreement?

Mr. Kihune: I'd like to make a motion- -

Chairman Abbott: Mr. Kirschbraun?

Mr. Kirschbraun: Well, I can't say that my clients particularly - - I haven't discussed it with them on consolidation specifically . . . and the reason I say that is because they don't consider themselves to be in the same boat with regard to this piece of property and with regard to the zip line.

So in their view they're not in the same boat. In their view they're innocent co-owners of the property. If the Board decides to consolidate to make in simpler to make it more convenient or whatever then obviously that's up to the Board and we don't strongly object to that. I just want to make a point that my clients don't consider themselves to be in quite the same boat. They're not operating the zip line on the property.

Chairman Abbott: But, Mr. Kirschbraun do you have any objections to consolidating both of these are they concerning the same thing?

Mr. Kirschbraun: Well, again from our perspective we have a different case then they do, we really do. Because from our perspective the Notice of Violation is for operation of the zip line and we don't operate a zip line on the property.

So that's my point. I understand that sometimes for convenience . . . sometimes things are handled certain ways. But I just want to make it clear from our perspective they actually consider their appeal to be a separate matter in terms of their position.

Ms. Thomson: Just for the Board's information, consolidation . . . it's BVA Rule 12-801-47, so, 'The Board upon its own initiative or upon motion as had been made by the County, may consolidate for hearing of for other purposes, or may contemporaneously consider, two or more proceedings which involve substantially the same parties or issues which are the same or closely related if the Board finds that the consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business, etc.'

So if the Board on its own or it can grant the County's motion to consolidate that was made orally today. So that's just for your own information.

Mr. Kihune: Comment Mr. Chair.

Chairman Abbott: Please Howie,

Mr. Kihune: I think from Mr. Kirschbraun client's standpoint, I think without him knowing that they would be acceptable to a consolidation; I would rather see this as two separate cases. And I'm willing to only making it fair to his clients. Because without them being here to make that decision, I think we would put them in a situation that would be - -that could hurt their case itself in some ways. And I want to make sure that it's fair.

Chairman Abbott: Yes, I understand.

Vice-Chairman Fukunaga: I think it should be kept separate. They have different arguments, they could have different outcomes. I think its best to keep it separate.

Mrs. Reyher-Colon: Yes, I believe the same.

Ms. Thomson: Just so we can keep everything clear, there has been an oral motion made for consolidation, so if the inclination of the Board is to deny that motion, we should go ahead and put that on the record. So, denying the motion to consolidate.

Mr. Kihune: Was there a motion to consolidate?

Ms. Thomson: Yes, Mr. Kolbe made an oral motion.

Mr. Kihune: Oh I'm sorry. My apologies.

Mrs. Reyher-Colon: I'll make the motion to deny the consolidation of C-1 and C-2.

Chairman Abbott: We have a motion.

Mr. Kihune: Second.

Chairman Abbott: We have a second. Any discussion? All in favor of the motion say "Aye."

Members: "Aye."

Chairman Abbott: Any opposed? The motion is carried.

Ms. Thomson: Just going back to the C-1 and C-2, if you would like to hear both of them on August 27th, the way that you should probably rephrase the motion would be to reconsider the prior decision made on C-1 and defer both C-1 and C-2 to August 27th.

Mr. Kihune: I'd like to make a motion to reconsider C-1 as far as a continuance and combining C-1 and C-2 to litigate on August 27th.

Chairman Abbott: Ok, we have a motion.

Mrs. Reyher-Colon: I'll second it.

Chairman Abbott: We have a second. Any discussion?

Vice-Chairman Fukunaga: Just to clarify when you say combine the two, they're just - - you don't mean that literally? We're just moving the two to that date?

Mr. Kihune: Exactly, not consolidating, combining the date for the hearing.

Mrs. Reyher-Colon: Can I ask a question of the party?

Chairman Abbott: Please.

Mrs. Reyher-Colon: Mr. Kirschbraun, would it be beneficial if your case be heard on the 23rd of July? Or in August?

Mr. Kirschbraun: I think August 27th is fine, I think that'll be alright- -as I said I wasn't prepared for that date today but I think it'll be fine. And we don't have a problem with it being heard on the same day, we just didn't want it to be considered the same case per se.

Mrs. Reyher-Colon: Ok, thank you.

Mr. Kihune: Question?

Chairman Abbott: Howard?

Mr. Kihune: Would it make any difference Mr. Kirschbraun for your clients that you be heard first or second?

Mr. Kirschbraun: Well, we were scheduled to be heard first, I think we'd just assume we'd be heard first. I appreciate the question.

Mr. Kihune: Ok.

Chairman Abbott: Any further discussion? Max?

Mr. Max Kincaid Jr.: Mr. Kirschbraun goes to court on July what is 3rd?

Mr. Kirschbraun: July 8th.

Mr. Kincaid: July 8th and if it resolves, is that going to kind of take away the cloud on section C that we're discussing?

Ms. Thomson: No, that's not going to resolve the BVA Appeals. It's separate.

Chairman Abbott: So are we all on the same boat? We have a motion and a second. All in favor say "Aye."

Members: "Aye."

Chairman Abbott: The **motion is carried.**

It was moved by Mr. Kihune seconded by Mrs. Reyher-Colon then,

VOTED: **Motion to reconsider C-1 as far as a continuance and combining C-1 and C-2 to litigate on August 27th**

(Assenting C. Fukunaga, H. Kihune, W. Greig, J. Reyher-Colon, M. Kincaid)

(Excused: P. DePonte, T. Espeleta, R. Sung)

Mr. Kihune: Alright, see you August 27th.

Mr. Chipchase: Thank you.

Mr. Kirschbraun: Thank you.

Mr. Kolbe: Thank you.

Chairman Abbott: Thank you.

D. COMMUNICATION

3. **ISAAC HALL** representing **DANA NAONE HALL** in the matter of the following variance application which was heard and approved by the Board at its May 14, 2015 public hearing:

   JEFFREY MURRAY, FIRE CHIEF, representing **THE COUNTY OF MAUI, DEPARTMENT OF FIRE AND PUBLIC SAFETY** for a variance from §18.20.040(B), Maui County Code, "Existing Streets" to delete the road widening requirement on East Kuiaha Road from the existing 15 feet to 20 feet and to delete the 300 minimum linear feet of shoulder grading which is required by code, for the property located on East Kuiaha Road, Haiku, Maui, Hawaii; TMK (2) 2-7-007:008 (BVAV 2015/0006)

   a. Petition to Intervene in the variance.

   b. Motion to reconsider the Board's May 14, 2015 approval of the variance.

Chairman Abbott: Staff, please read the item D please into the record.

Ms. Balberdi: *Reads item into record.*

Chairman Abbott: Thank you. Mr. Hall if you'd like to step to the podium please and present your- -

B. PUBLIC TESTIMONY (Continued…)

Mr. Isaac Hall: Chair, I believe there's some public testimony.

Chairman Abbott: You want public testimony first?

Mr. Hall: Yes.

Chairman Abbott: Ok. We'll have public testimony.

Mrs. Dana Hall: Good afternoon Mr. Chair and Board members. My name is Dana Naone Hall and I am testifying in support of a Petition to Intervene and Motion to reconsider filed on my behalf.

Corporation Counsel would have you deny my motions based on meeting a virtually impossible standard of notice for all but those living immediately adjacent to the project area or directly across Hana Highway.

This property was purchased by the County in 2007. It took four years before a draft Environmental Assessment was prepared. I submitted timely comments on the EA in

2011. The environmental review process which precedes by law, any other governmental approval and entitlement has not been completed.

Therefore the County is illegally implementing the Haiku Fire Station project by obtaining approval for a variance from road widening and shoulder improvements on East Kuiaha Road. It is important to note that the need for a variance was never disclosed in the Environmental Assessment.

As the commenter on the draft EA, I am entitled to a response from the preparer prior to the filing of a finding of no significant impact. Or as would be appropriate in this case the filing of the preparation notice for an Environmental Impact Statement.

In either case, I would not expect to be standing before you prior to the completion of the Environmental review process. Nor would I have been expected to scour the classified ad section of the newspaper for the past 4 ½ years for a public notice on a variance for the Haiku Fire Station.

There are significant impacts that would result from this project as currently planned. These impacts must be fully identified in a proper environmental document before we go any further. Piece mailing the approval process, is only likely to result in longer delays of the project. Thank you.

Chairman Abbott: Thank you. Any other Public Testimony? Mr. Hall?

Mr. Hall: Thank you. Good afternoon Chairperson Abbott and other members of the BVA. My name is Isaac Hall and I am representing the petitioner Dana Naone Hall. Before you for action are two motions, the Petition to intervene and a Motion to reconsider.

It's not true that we are too late as it's being suggested to you. The truth is that it was too early for the BVA to act on this matter. There is no final EA or EIS yet. And there is no Change in Zoning that has been granted by the Maui County Council.

There were no oppositions to these motions until today. The applicant has now filed an opposition, this opposition is too late. Petitioner's motion was filed and served on June 12th. The Petitioner's Declaration was filed on June 18th. I spoke with Mr. Kolbe on June 19th on Friday about him filing an opposition and he never did file one until this morning.

Your rules set out when they're due, five days after service, Section 12-801-31. This opposition that was filed does not refute or even analyzes the cases that we are relying

on. It encourages you to deny our motions based on positions that are without any support in the law.

Petitioner respectfully requests that you grant both motions. Clearer areas of law were made that the BVA should correct now without requiring a citizen's appeal to circuit court. There's no EA or EIS to A, the BVA in this decision making on May 14, 2015 in violation of Chapter 343. An EA was required for the Haiku Fire Station project. The purpose of

an EA is to integrate the review of environmental concerns with existing planning process use of the State and Counties to alert decision makers, including yourselves to significant environmental affects which may result from the implementation of certain actions.

There are no action provisions within Chapter 343 to insure that decision makers, such as you, have a completed environmental document before you when you make decisions on discretionary approvals. And it's quite clear from our case law that variances of discretionary approval, you are an agency, this law applies to you.

The Hawaii Supreme Court has subscribed the environmental review process in price verses Obayahsi Corp. and what it has made clear is an environmental document must be accepted before the proposed action or project can proceed with the permitting stage. Now I'm quoting them.

They have to finish that before you go on to issuing permits or approvals. And so you can't go on and file for a subdivision for instance or file for a variance and get a variance before you have that EA, before you and you do not have that.

The second legal error that you can correct now and we hope you will. Is that this project is not consistent with zoning. Test number five for this particular variance is the property has obtained an appropriate zoning designation. Section 18-04-030A of the Subdivision Ordinance, states "The Director shall not approve any subdivision that is not consistent with the County General Plan, Community Plan, State Land Use Classifications and Zoning."

It is admitted in the Staff Report that the property has not obtained an appropriate zoning designation. A Change in Zoning is required. No change in zoning has been approved by the Maui County Council. It is not enough to claim as you'll see in the Staff Report that an appropriate zoning will be obtained at some time in the future. That's what it says under your test number five.

It doesn't say there is an appropriate zoning now. It says, "We think we're going to be able to get an appropriate zoning at some time in the future." But none of us know whether the Maui County Council will or will not change the zoning for this project at some undetermined time in the future. So those are two clear reversible errors of law that were committed on May 14th that we should be able to sit here and talk together and correct through these motions.

There are additional reasons why Petitioner is not too late. They are, Maui County Council has not selected this site for a fire station including the helipad and I think that's something that's gotten lost here. We're not just talking about a fire station; we're talking about a fire station that has a helipad with helicopters taking off in the agricultural district.

Second, there's no money to proceed with this project in the County budget. The Maui County Council has not allocated one cent in the current budget to build any portion of the Haiku Fire Department. So, there's no rush, there's no problem with our taking time

to come to a reasonable decision here. The third is, that the BVA has not taken a final vote in this matter and I'll come back to this issue.

Now, let me address why you could and should grant our Petition to Intervene. There are two bases under your rules for granting the petition that we filed. The first of course, Petitions to Intervene ordinarily based on your rules should be filed before the first hearing, which is before May 14, 2015. That's ordinarily.

Then there's another provision that says untimely provisions will not be permitted except for good cause, except in no event after the Board has taken the final vote on the matter before it. And I don't want to deal with that. What is the final vote? There has been no final vote taken by the BVA.

The applicant in its opposition suggests that your final vote was on May 14, 2015. This may have been the law prior to 2013, but it's not the law now. The Hawaii Supreme Court decided the case of Sierra Club be Castle and Cooke Homes in 2013. The State argued in that case, what the County is arguing in its opposition here. That the final vote was the oral vote, like the one you took on May 14th and that the adoption of the D&O was simply an administrative or ministerial act.

The Hawaii Supreme Court disagreed in the Sierra Club, Castle and Cooke case in 2013. They said the oral vote of approval, like your May 14th vote, was not the final vote for agency action. The Hawaii Supreme Court held in 2013 at the final vote or action of an agency is the vote to adopt the D&O

The D&O in this matter has not been prepared, hasn't appeared on the agenda. You have not taken a final vote, you have not taken a vote on the D&O. So that you have not taken a final vote in this matter. That's what the law in the State is now. So that means that for good cause you can grant our Petition to Intervene.

There's a second bases here, and that's found in Section 12-801-18D, has to do with extensions of time. And it says, whenever a party is required to file a pleading, like a Petition to Intervene, and the Board may permit the act to be done after the expiration of the specified period where the faired act is clearly shown to be the result of excusable neglect. So now we're talking about whether there was excusable neglect in this case.

Any neglect here was excusable. And this requires us to look at the kind of notice that's given in these proceedings. Your rules allow for notice by certified mail and they allow for

notice by publication. And this is what my wife was referring to. Your rules require certified mail only to the owners and lessees adjacent to and across the street from the subject property. And in this case, the subject property was construed to be the 29 acres that are for the Haiku Fire Department project.

So the people that got the notice by certified mail were people that live across Hana Highway let's say. People who live on the other side of East Kuiaha Road. The people that live around the project, but not - -the problem with that is when the application involves a road, this type of notice is hardly calculated to reach the users of the road.

The ones that are most affected by the variance. Everyone else including the regular users of the road is served by constructive notice. That is notice by publication. Our public courts have had a chance to tell us what they think of constructive notice or notice by publication. In city court Mortgage Inc . De Bartalome (?) are intermediate courts said of notice by publication.

Service by publication contemplates the fact of no notice at all. That means, they don't even think anybody that gets served by publication gets it. The U.S. Supreme Court in Mullane V. Central Hanover Banks said that "The odds of that the information would never reach the person served by publication are large in deed." And in fact that's what happened here, we got served by publication.

As the Hawaii of public court recognized this was no notice at all. Petitioners our court recognized did not receive this notice by publication. As such, Petitioner did not know about the filing of a variance application, she didn't know about the May 14th hearing on the variance application. Petitioner did not find out about the variance until a chance on Sunday, June 7, 2015. She took prompt action, diligent action after finding out about the variance on June 7th.

On Monday, June 8th, on her behalf I went to Land Use and Codes and reviewed the subdivision file. On June 8th the same day I went to review the variance file at the Zoning office with the help of the Zoning officials. And I want to thank the staff at both offices for making the files available to me at the time so that I can review them, and promptly do something.

So after June 8th, finding out what happened, on Friday on June 12th, I filed a Petition to Intervene and Motion to Reconsider. This is important because what the Hawaii Supreme Court has always looked at is if you let notice like this where you didn't get any notice, after you found out, did you take prompt action or didn't you take prompt action to try to do something to make yourself a party.

Now if Petitioner had been served by actual service by certified mail and simply failed to file a Petition to Intervene after receiving actual notice, that might be a different matter. In other words if you served me by mail, it was certified, I signed it and then I simply just threw it away or didn't do anything or didn't file anything by May 14th after the certified mail told me to do that; sure that's excusable neglect.

But if you served me by publication, which our court say is like getting nothing at all. You didn't get notice at all and because you didn't even know about it, didn't do anything and then discovered it on Sunday, June 7th and then by June 8th went down to these offices and then by June 12th filed a motion, that's excusable neglect and that's taking prompt and diligent action which is what is required.

The Hawaii Supreme Court has had a chance to speak many times on what's excusable neglect and the most recent court case by the Hawaii Supreme Court on excusable neglect is County of Hawaii versus Ala Loop Homeowners, where they said basically that once the person discovered they had to do something and they took prompt action in a

month and a half, that was excusable neglect that they should've been allowed to be permitted to be a party to the law suit.

And in that case Ala Loop, they reviewed all of the other cases about excusable neglect and they said, "Well, this case isn't like those other cases." And they cited Hopp the accessory distributer, where there was inexcusable neglect because council waited nine months to seek an extension. That's ok, you wait nine months, that's an inexcusable neglect.

The Hawaii Supreme Cout in Ala Loop cited another case. Pogiya (?) versus Ramos 1994 case. Somebody waited three years to try to become a party in the proceeding and the court said "That's an inexcusable neglect."

But the latest court, this Ala Loop case is 2010, they said even waiting a month and a half is not- -that is excusable neglect, they should allow them to be parties. We waited five days or four days before filing our motion. That is clearly excusable neglect under your rules.

There is a case that followed the Ala Loop case, State of Hawaii …(inaudible)…which is not a published opinion but it was decided by the ICA in August 31, 2012, where they held that is was an abusive discretion not to set aside a default. In other words not allow them to be a party. That there was no inexcusable neglect. And the reason there was no inexcusable neglect is because there was a meritorious defense or claims existed. There was no prejudice to any other party and that the party had taken action to become a party before final action was taken.

And in this case again, your final action is not May 14. It's when and if the Decision and Order gets to you, which it has not happened. So final action has taken here.

The California cases where likewise that say, lack of actual notice of the proceedings- - which is in our case, we didn't get actual notice. Actual notice would've been notice by certified mail, we didn't get that. Lack of actual notice, that constituters excusable neglect.

So any failure to file a Petition before May 14 was clearly excusable as a matter of law because the notice to us was by publication and Petitioner acted promptly to be admitted as a party through intervention once having discovered the proceedings.

Good cause exists as well, as I said before, one of the tests for where the good cause exists is whether there's any prejudice to any existing party. There isn't any prejudice by allowing us to become a party now because your action was premature on May 14th anyway. You shouldn't have acted on May 14th. You didn't have the EA and the Zoning wasn't yet consistent. Shouldn't have acted anyway and the other reasons why there's no prejudice is because council hasn't even selected that site to a change in zoning, there's no money to proceed with the project and the BVA hasn't taken a final vote on it.

Now the question of whether we presented meritorious defenses or claims, I think we've outlined that in our motion that were not presented properly addressed on May 14th. There were clear errors of facts that were made on May 14th that we think need to be corrected.

I think we need to remember this is a County agency seeking to exempt itself from improvements for public health and safety purposes that are regularly required of private applicants.

And I want to look at the subdivision requirements which the Fire Department seeks to excuse itself from. Requirement one is where pavement on existing streets providing access to a subdivision is substandard in width. For non-existing, sub divider shall install pavement to a minimum width of 20 feet. And the other requirement which is basically if it's a four lot subdivision the length of those improvements and shoulder improvements has to be 300 feet. So they swap to exempt themselves from those requirements to make East Kuiaha Road a safer road.

There's some misstatements in there about East Kuiaha Road however. The existing pavement width above the junction of the two easements is actually 12 feet not 15 feet. They talked about a segment of East Kuiaha above the intersection of those- - Yes sir?

Chairman Abbott: Could we please get to the intervention to the intervene? This is. . . I know what you're trying to do but let's get to the point where the intervention.

Mr. Hall: I'm trying to show we have meritorious claims.

Chairman Abbott: I understand.

Mr. Hall: Do you want me to skip that?

Chairman Abbott: No. The part what we're looking for is the Intervention.

Mr. Hall: But this part of showing. . . I think maybe I know what you mean. Anyway, we think the variance shouldn't have been granted. There are factual reasons why not. We think the County - - I'm just going to summarize it at this point.

The lower part of the road, those improvements could easily be made where there's that so called portion of the road where it drops off at both sides. It's very problematic, it's dangerous as it is. Subdivision's going to add more traffic and we need to do something to make it a safer road.

Now I think I know what you're talking about so I'm going to go ahead to - -

Alright, Petitioner has met the test for Intervention. First off, Petitioner has standing, Petitioner travels on the portion of East Kuiaha that joins the Haiku Fire Station twice a day at least six times a week. Subdivision is going to add more traffic to East Kuiaha Road. Not only would the two of the lots . . . three of the lots actually have access on East Kuiaha Road of the four lots. And I believe that the Fire Station even though it does. . .the main access is on Hana Highway, if it's going to go mauka …(inaudible)… it is going to go mauka on East Kuiaha Road. And I think the increased use with the pavement width as it is, is just going to make it more dangerous then the road already is.

So, in the case of Sierra Club v. the Department of Transportation, the Hawaii Supreme Court said, those that are regular users of roadways who have standing raise these sorts of claims and Petitions to Intervene and they rely on the East Diamond Head Association case.

And I know there's sometimes an objection that these . . . the interest that the Petitioner is asserting are not different from the public or other members of the public. But actually that's not the law in the State of Hawaii in any event. In the case of Akau v. The Ohana Court, all you have to do even if the injuries are the same as other members of the public. If you are among the injured you have standing, and that's the case here.

Petitioner has been harmed by the actions of the BVA. She's alleged that if this road is not made safer and if there's more traffic added to it, it's a potential threat to health and safety. She's alleged this harm through procedural harm with not having an EA. And Petitioner's position is not the same as any party that's already admitted to the proceeding. That usually means that if there's multiple interveners, is if there's some other intervener that's taken the same position as her. There isn't any other intervener taking the same position as her.

Petitioner has no other way to make sure East Kuiaha's Road is made safer and that the County does not excuse itself from the requirements of which it is able to comply. So she doesn't have any other remedies. The admission of the Petitioner will not render the proceedings inefficient or in unmanageable.

Should you grant the Petition in appoint of a Hearings Officer, there are ample provisions in your rules that allow that Hearing Officer to reign in the proceedings and make the proceedings. . . control the proceedings.

The participation in these proceedings by Petitioner will assure the development of a complete and accurate record and correct the factual and legal errors that have already taken place. This is very important because the existing record can't support a variance. And Petitioner has information about this segment of East Kuiaha Road. BVA should take into consideration in making its decision.

I would've said those. But I didn't think you'd want me to say what they were. But if you want me to, I will. I mean that the road is narrow and the Petition states that staff didn't

take any position on any of the allegations that were made. The claims about drainage were not supported in any way. The cross figures that were presented to show that it was difficult for the County aren't signed by anybody. It's not made by an engineer, on and on like that. And Petitioner's Intervention will serve the public's interest represented by compliance with Chapter 343 and the test for a variance.

So, based on all of that I would ask that you - - respectfully ask that you grant our Petition to Intervene.

Chairman Abbott: Thank you very much. I'm sorry we were putting the course before the carts. You were explaining the Intervention before we even got to it.

Mr. Hall: I understand.

Chairman Abbott: Mr. Kolbe?

Mr. Kolbe: Thank you. I can probably cut down on this. But I want to address a couple of - - First off, the application currently pending and that has been voted on, there hasn't been a Decision and Order yet issued in this case. And at this point, the County wants to withdraw its application for the variance.

So to that extent, it renders the Petition to intervene move because there's no longer an application pending and we would ask the Board to take no further action on that. However, I just want to address one or two issues here. The reason for this is not the Petition to Intervene; it is the County doing so in its own interest.

However, the Motion for Reconsider and much of the issues that Mr. Hall raised in his Petition to Intervene and his Motion to Reconsider, are not to be considered by the Board of Variances in terms of this records. And the reason for that is because he's not yet a party and the Motion for Reconsideration or the Motion to reconsider is something that ought to be considered only if this body believes that an Intervention is appropriate.

We have filed an opposition based on the timeliness of this Petition and we respectfully disagree with Mr. Hall's positions with regards to what use to happen prior to this Board

considering the variance. And whether or not there was any error in the BVA's consideration of this without an Environmental Assessment.

And so to the extent that the County does not and has not weighed in and addressed all of the issues …(inaudible)… We haven't addressed them because they're really not properly before this Board. Nevertheless, this is a withdraw of the application for the variance and to that extent I think any further action to this matter …(inaudible)… by the County taking its action. Or excuse me, I should say applicant Jeff Murray not taking this action.

Chairman Abbott: Thank you. Corporation Counsel? My only question is does the Board need to approve a withdraw or does it not- -

Ms. Thomson: I think at this time I'd like to request that we go into Executive Session to discuss the Board's options related to the withdraw of the application for the variance and the Petition to Intervene. So the legal issues and the Board's options related to those. So if possible, I'd request that a member make a motion to go into Executive Session.

Chairman Abbott: I make a motion to go into Executive Session.

Mr. Kihune: Second.

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

Members: "Aye."

Chairman Abbott: Thank you. The **Board will now go into Executive Session**.

Mr. Hall: Is it ok for me to ask a question?

Ms. Thomson: Sure.

Mr. Hall: If he's withdrawing the application, isn't that the only thing to discuss?

Chairman Abbott: With all due respect, none of us are lawyers on here, that's why she's here to advise us on our proper job.

Mr. Hall: Well, then I'm asking Richelle.

Ms. Thomson: I think we will be able to quickly answer that and I doubt anticipate Executive Session will be too long.

Chairman Abbott: Thank you.

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

VOTED: Motion to move into Executive Session

(Assenting C. Fukunaga, H. Kihune, W. Greig, J. Reyher-Colon, M. Kincaid)

(Excused: P. DePonte, T. Espeleta, R. Sung)

EXECUTIVE SESSION…. @ 2:27 p.m. to 2:36 p.m.

Chairman Abbott: The Board of Variances is now back in session. I'm opening the floor to comments or motions at this time.

Mr. Kihune: Mr. Chair? I'd like to acknowledge Mr. Kolbe with regards to the withdraw of their application for a variance regarding the subject property. And with that being said, also with that action there should be no other further proceedings regarding the Petition.

Chairman Abbott: Thank you. Ok. We'll just move on then. Thank you very much.

E. ADOPTION OF FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION & ORDER (D&O)

1. Having voted on December 11, 2014 to approve the variance for the Puuomalei Tract Subdivision variance (BVAV 2014/0003), the Board will consider and may adopt the draft Findings of Fact, Conclusions of Law and Decision and Order.

2. Having voted on January 22, 2015 to approve the variance for the Waiakoa Homestead Subdivision variance (BVAV 2014/0007), the Board will consider and may adopt the draft Findings of Fact, Conclusions of Law and Decision and Order.

Chairman Abbott: Alright, moving on to Item E on your agenda. Ok. Richelle.

Ms. Thomson: Ok. Just preliminary remarks. On adopting the Decisions and Orders, because we have two new members who may not have been presented when those decisions were made, what you need to do just for the record is affirm that you have had the opportunity to review the meeting minutes and the other documents that were apart of that record.

So that you can say that the Decision and Order accurately reflects the record. So that's really what the Decision and Order is a formalization of the decision made and to adopt it you need to have read the records that it made it up. If you have not have adequate time to review the record, please state so now otherwise we can move ahead to those two items.

Mrs. Reyher-Colon: I was just going to ask to not be apart of voting.

Ms. Thomson: We need five. So as long as- - both of you can't abstain. Have you had the opportunity to review the record on either one of those?

Mrs. Reyher-Colon: I have.

Ms. Thomson: And have you also Max? Ok. Then you don't have to abstain. If you have reviewed the record adequately and the Decision and Order reflects the record, then I would go ahead and vote.

Chairman Abbott: Do we have a motion?

Ms. Thomson: No go ahead and have staff read the item into the record.

Chairman: Ok. Staff would you please read the Item E into the record please?

Ms. Balberdi: *Reads item into record.*

Chairman Abbott: Thank you.

Ms. Thomson: So if the two Decision and Orders do adequately and accurately reflect the record you could move to adopt the D&O's. If there are any corrections or if you feel that they don't adequately reflect the record, then we should discuss that.

Chairman Abbott: Call for a vote?

Mr. Kihune: Motion to accept and approve the D&O's.

Chairman Abbott: Second.

Ms. Thomson: Is that the both of them? Or just one?

Mr. Kihune: Both of them.

Chairman Abbott: Motion to approve and accept both of them has been made and seconded. Any discussion? All in favor?

Members: "Aye."

Chairman Abbott: Any opposed? None. **Motion is carried.**

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

VOTED: **Motion to adopt both Decision and Orders as listed under Item E.**

(Assenting C. Fukunaga, H. Kihune, W. Greig, J. Reyher-Colon, M. Kincaid)

(Excused: P. DePonte, T. Espeleta, R. Sung)

F. APPROVAL OF THE MAY 14, 2015 MEETING MINUTES

Chairman Abbott: Now we'll go into the approval of the minutes. Does anyone have any corrections or changes to the minutes for May 14th?

Mr. Kihune: Motion to accept.

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

Mr. Greig: Second.

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

Members: "Aye."

Chairman Abbott: Any opposed? Ok.

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

VOTED: Motion to approve the May 14, 2015 meeting minutes.

(Assenting C. Fukunaga, H. Kihune, W. Greig, J. Reyher-Colon, M. Kincaid)

(Excused: P. DePonte, T. Espeleta, R. Sung)

G. NEXT MEETING DATE: THURSDAY, JULY 9, 2015

Chairman Abbott: Next meeting, July 9th. Is that correct?

Ms. Balberdi: Yes it is.

Chairman Abbott: Ok.

H. ADJOURNMENT

Chairman Abbott: At this time, meeting's adjourned.

There being no further to come before the Board, the meeting adjourned at 2:41 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
Howard S. K. Kihune
William Greig
Juanita Reyher-Colon
Max Kincaid Jr.

Members Excused:

Patrick De Ponte
Teddy Espeleta
Raymond Sung

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
Nancy Mahi, Secretary to Zoning Administration Division
Richelle Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel