

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
October 22, 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, 1:30 p.m., Thursday, October 22, 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 Clark Abbott: The meeting of the Board of Variances and Appeals will now come to order, it 1:33 p.m. Let the record show we do have a quorum.

D. APPEAL OF NOTICE OF VIOLATION

1. **CALVERT G. CHIPCHASE AND CHRISTOPHER T. GOODIN OF CADES SCHUTTE LLLP representing D AND 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 MCC §19.30A.060(H) for property located at 2065 Kauhikoa Road, Haiku, Maui, Hawaii; TMK (2) 2-7-012:086 (BVAA 2015/0002); (M. Balberdi)
 - a. Thirty day status report regarding filing of permit application.
2. **PETITION TO INTERVENE FILED ON OCTOBER 13, 2015, BY ANTHONY L. RANKEN AND SAMUEL P. SHNIDER** representing **PETER ROHRER in D AND 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 MCC §19.30A.060(H) for property located at 2065 Kauhikoa Road, Haiku, Maui, Hawaii; TMK (2) 2-7-012:086 (BVAA 2015/0002); (M. Balberdi)

Chairman Abbott: At this time I'm going to rearrange the schedule just slightly to call items D and E; which are going to be rather - - I'm sorry D1 and 2- -which will give us more time to go through the exhibits for the variance.

So Mr. Kolbe if you would step up and take us through D1 and 2, we'd appreciate it.

Mr. Tom Kolbe: Good afternoon, Tom Kolbe on behalf of the County of Maui. I believe that we had set this status hearing to let you know whether or not a County Special Use Permit has been applied for; I can confirm that it has been applied for...inaudible... and Mr. Fasi is the Planner assigned to this particular project.

So based on that and the understanding that we want to see whether or not that Special Use Permit is granted, I guess I would request that we continue this matter for a period of six months so we can see what happens and also Mr. Shnider's here for you to regarding the Petition to Intervene.

Chairman Abbott: Ok. Do we have to get Board approval?

Ms. Richelle Thomson: (...inaudible...)

Chairman Abbott: Oh ok, we'll take them both together.

Mr. Samuel Shnider: Regarding Item 2, I would advise the Board that we are comfortable with also deferring our Petition any ruling on our Petition as long as the Special Use Permit application is in process, and if that process is actually stopped or the application is withdrawn then we will return with our Petition and ask that it be ruled upon at that stage. So we're comfortable with deferring this action.

Chairman Abbott: Ok. I'm sorry could you state your name for the record please?

Mr. Shnider: My name is Samuel Shnider I'm an attorney I'm appearing for Peter Rohrer.

Chairman Abbott: Thank you Mr. Snyder. Does the Board need to vote?

Ms. Thomson: (...inaudible...)

B. PUBLIC TESTIMONY

Chairman Abbott: Is there any testimony on either of these two items from the audience? Ok seeing none...

D. APPEAL OF NOTICE OF VIOLATION (Continued...)

Mr. Raymond Sung: Do we have to make a motion one at a time or - -

Ms. Thomson: You can handle them together.

Mr. Sung: Ok. In light of Mr. Shnider's (...inaudible...) I would move that the concern of the NOV Appeal and the motion to intervene be (...inaudible...) up to six months so long as the permit application is being diligently prosecuted or processed and in the event that the application is done or (...inaudible...) or the permit process is (...inaudible...)

Chairman Abbott: Speaking for. . Is that a motion?

Mr. Sung: Yes.

Chairman Abbott: Ok, we have a motion. Do we have a second?

Mrs. Juanita Reyher-Colon: I second.

Chairman Abbott: Any discussion? I have a small discussion. I think six months is way too long. I think this is being dragged out far more than is necessary. I would suggest we shorten the time frame down. I think this has been postponed and changed and postponed and changed and deferred and whatever more than enough. I think we really should get things down and let's get it established. I would say three months.

Mr. Sung: I'm amendable to amending my motion?

Ms. Thomson: Since it's already on the floor, what you actually have to do is offer a motion to amend to change the time frame to a three month deferral.

Mr. Sung: I hereby move to amend my entire motion to change the time from six to three months.

Chairman Abbott: Is that sufficient?

Ms. Thomson: Yes.

Chairman Abbott: Do we have a second for the amended motion?

Mr. Pat DePonte: Second.

Chairman Abbott: Ok. Again, any discussion?

Vice Chairman Chad Fukunaga: The Special Use Permit process can take a long time. I think it may take longer than three months. Maybe six months sounds like a more appropriate time period.

Mr. Sung: They can come back though right?

Vice-Chairman Fukunaga: That's true.

Chairman Abbott: Any further discussion?

Mr. Howard Kihune: I have comments. I'm a little bit concerned that we have this operator still operating and in violation while this all goes on. So, this is what really kind of irks me as a member that this can happen while he goes through a Special Use Permit application and the neighbors have to sit through this anywhere from three to nine months. I don't think it's fair to the community and my comments . . . I think there should be something done to stop that.

Mr. Sung: What do you propose?

Chairman Abbott: Speak up please- -

Mr. Kihune: Because he's operating illegally to begin with.

Mr. Sung: What do you propose then- - going ahead with these NOV Appeal Hearings?

Mr. Kihune: Well reluctantly I'll probably vote yes, but my comments are made that we can't allow these kind of things to happen. This person is in violation, been in violation for many many months; hasn't paid any fines. Wanted an attorney so he could stifle and get everybody stepping backwards trying to go through a process to get a Special Use Permit After-the-Fact. So, I'm just not agreeable to what is going on.

Mr. Sung: Well touching up on Mr. Kihune's and question for corporation counsel or staff. Is the Special Use Permit process one that would address the existence of the current violations and fines or penalties that have been pursuing and will the applicant need to pay up in full or agreed upon amount in order for a Special Use Permit actually be applied for or granted under whatever perimeters or (...inaudible...) there might be?

Ms. Thomson: I can answer at least part of that. It's too distinct for us - - so the Special Use Permit application would be going forward. The NOV is for past actions, so it's up and through the date of NOV. As far as whether or not if they're granted a Special Use Permit - - would that affect potential settlement of an NOV . . . possibly. That would be something that would have to be worked out at a later date.

Mr. Sung: So, if a Special Use Permit were to be granted it's not clear whether the applicant would actually need to pay the previously assessed fines and penalties? - -

Ms. Thomson: Being that- -

Mr. Sung: - - I understand but if it is then I would suggest that we don't defer on an NOV appeal and we let that go on parallel paths with the Special Use Permit application process. Does that make sense?

Mr. Kihune: It does.

Ms. Thomson: Being granted a Special Use Permit for an activity going forward would not affect the NOV out right. So something else would need to happen to resolve the NOV.

Mr. Sung: Right. But in the meantime, nothings being done if we defer that, so with that understanding I would actually make a motion to withdraw my previous as amended motion for granting a deferral and would welcome someone else taking a motion if they do it right to actually move forward with the NOV appeal process.

Ms. Thomson: Part of what you should consider though is that the department which has brought the NOV against the landowner is requesting deferral, so the agency issuing the NOV is requesting deferral of hearing on the appeal.

So the appeal is obviously the landowner appealing the Department's NOV. So if the enforcing agency is requesting a deferral you might want to give deference there. But perhaps- -

Mr. Sung: May we speak with counsel for the requirement on that?

Ms. Thomson: Sure.

Mr. Sung: So Mr. Kolbe, explain to me what the rationale or actually deferring the NOV still process while the Special Use Permit application process is going on if in fact the Special Use Permit application process doesn't directly address the existence of the (...inaudible...). What happens with the (...inaudible...)

Mr. Kolbe: I'm going to try to answer that in kind of a reverse order . . . (...inaudible...) will continue to an issue is made. So to that extent the Director could ultimately at the end decide that there is a violation- - that you guys found that violation. And then there's a process by which they can reach a settlement in terms of what actual fines have been paid. The daily fines quickly get up into the astronomical numbers (...inaudible...) and it's not uncommon for the department to engage in some type of process if the violator can figure that question out.

But the fact that I understand Mr. Kihune's concerns is that this business continues to operate. The legal questions in this case if you read the moving papers are fairly complicated and for that reason,

the County wanted to take the position to see whether or not (...inaudible...) by having the operations legal by virtually having them have this Special Use Permit.

And so, the County has agreed with the violators to try to fix that issue first. Obviously from my moving point as you can tell that we believe a Special Use Permit is necessary for this type of an operation on agricultural land; and that's why we issued the NOV.

I think that if this goes to the Maui Planning Commission and it is parallel being addressed with the BVA and I think there's a good chance to Planning Commission wouldn't consider the application until they find out what happens with the BVA.

Mr. Sung: Even though one looks at the issue prospectively and the other one looked at it (...inaudible...)?

Mr. Kolbe: I think that the fact that they are continuing to operate, may be something the Planning Commission probably would consider. Having said that, they either will meet the standards for the Special Use Permit or they won't and I believe that if we don't defer the enforcement action that I think it's going to derail the Special Use Permit.

Now, I think the Board can say "Ok, yeah that's fine with us." And that can happen. But the flip side of is that at this point if the County, for a number of reasons- -some of which I don't really want to get into on the record- - wishes to see whether or not a Special Use Permit or County Special Use permit can be granted so that we can in essence fix the legal problem.

And whether that gets approved or not approved, is something that this Board doesn't necessarily need to worry too much about. The BVA's Notice of Appeal is getting dismissed, even if they get the Special Use Permit; they may come in and ask for - - in light of the fact they are not legal, some decrease or minimization of the fines. But that's a process that we'll go through at that point.

The Maui Planning Commission's granting or not granting it doesn't get rid of the NOV, it's going to be back here in front of you guys in one way or the other. And so, if your concerns are if he chooses to operate, if you for instance decide that you're not going to defer hearing on this particular matter, I note that the counsel for D&S Ventures aren't present.

So if we go forward with the hearing today my guess is since they're not here for the defendant it's going to wind up in circuit court on the basis that - - over some procedural error in terms of going forward with the hearing without them being present where staff is comfortable.

I can't say what the court would do with that but I think before we get too far down that road, I understand the concerns about an operation that's at least on its face, illegal in the law. I would suggest that the better way to do this is know that the concerns are there- - the neighbor who provided a public testimony. . . Mr. Rohrer (...inaudible...) he has counsel, he's ok with us deferring the issue on this particular enforcement action. There really isn't a lot of (I guess) prejudice to anyone in deferring this hearing to allow Planning Commission's application to go forward.

If you want a tighter range in terms of making sure that those are going on or if you want to insist on D&S Venture's counsel being present at the next hearing, I don't have any objections to whatever it is . . . but at this point, we would ask that at least if this stays or gets deferred to some date in the future so that these issues can be resolved.

I can address it in a way that's not going to get us into the hot waters. 3 months- - I can make my requests so that you guys can consider three months deferral of this application or one month, I would leave it up to you but those are my comments. And the county does have some interests in seeing Planning Commission rule on this Special Use Permit prior to (...inaudible...)

Mr. Sung: Thank you. Appreciate it.

Chairman Abbott: Richelle?

Ms. Thomson: I just wanted to add also that if we moved forward with a hearing on the NOV, the issue here of deciding is whether or not the department issued the NOV properly or improperly. That makes you have to make a decision on the other line law. Did they apply the law correctly? That he applicant is applying for the Special Use permit.

That probably should be allowed to play out before we get into whether or not they need a permit or not; because that's the underlined question that you would be answering here. So, I think that there are - - it's a better process to let the Planning Commission and you're right, if it's stalls, you're retaining jurisdiction, you're not getting rid of jurisdiction or dismissing the appeal or anything, but I think that there's probably more downside to hearing the appeals sooner than the Planning Commission's action.

Mr. Sung: Do we have the ability or discretion (...inaudible...) position on any granting or extensions?

Ms. Thomson: You mean such as continuing to come back or? - -

Mr. Sung: Well I was thinking more in the lines of that (...inaudible...) regarding the past fines and penalties may not be waived by the department without coming back to the BVA?

Ms. Thomson: I don't think we would get into that kind of substantive conditions because then you're making a decision really on the appeal and on the level of the appeal. So I would not make a condition like that. You can make other conditions such as you have- -you know come back and report on the status.

Mr. Sung: I will then express on the record my concern as to the possibility that if the department winds waiving 100% (...inaudible...)

Ms. Thomson: The caution on that is that we have not been through the appeal hearing so we don't have the evidence before us to be able to make a determination of whether the NOV was properly or improperly issued at this point. We have feelings and intuition and a lot of testimony by neighbors but we should refrain from judgment until we review all of the evidence.

Chairman Abbott: One piece of information I would like for the Board's records is Mr. Kolbe did suggest or did say that Mr. Rohrer was in favor of this deferment- - if you want to use that- - and I would personally like to see a letter or from his attorney or someplace where he has agreed to this; because with his vociferous reaction and presentation to the Board, I think we should have it. I want to know that he's in favor of this.

Ms. Thomson: That's Mr. Shnider's client- -he's not his attorney.

Chairman Abbott: No I understand.

Mr. Shnider: In terms of the Board's request for a letter from Mr. Rohrer, I'll be happy to explain Mr. Rohrer's position on the record. I can also provide a letter if that's necessary, but let me if possible provide that on Mr. Rohrer's position.

Chairman Abbott: If you have his confidence and his approval that is fine with me, you're his attorney.

Mr. Shnider: Ok. Mr. Rohrer has given approval for this and his reasoning is because he intends to give his testimony in the Special Use hearing before the Planning Department.

Chairman Abbott: Ok. Thank you very much that was my concern. Now we have a motion - - I think we have a motion. . .

Ms. Thomson: Ok so the current motion is to amend the main motion to have just a three month deferral . . . so you'd be voting first on the change from six to three months and then go back to the other one.

Chairman Abbott: Alright. Any discussion on the changing from the original motion from six months to three months? If not, I'll call for a vote. All in favor?

Members: "Aye."

Chairman Abbott: Chair votes Aye. Any opposed? None. Ok so we'll now consider the corrected motion which is three months.

It was moved by Mr. Sung seconded by Mr. DePonte,

VOTED: Motion to amend from a six month update to a three month update on the Special Use Permit Application status.

(Assenting: G. Abbott, C. Fukunaga, P. DePonte, H. Kihune, W. Greig, R. Sung. J. Reyher-Colon)

(Excused: T. Espeleta, M. Kincaid)

Mr. Sung: So long as the process still goes on.

Chairman Abbott: Correct. As long as the process is diligently followed and corrected.

Vice-Chairman Fukunaga: From a procedural standpoint is that something that the department can - - I mean who determines if it's diligently pursued or not impeded.

Ms. Thomson: I think that the department would probably be able to provide you the information about whether the submissions have been put in on time and all of that; and also at the three month mark they would probably tell you when it's scheduled for hearing at Planning Commission if it hasn't already been agenzied.

Chairman Abbott: Do you agree with that John?

Mr. John Rapacz: Thank you Mr. Chair yes, we can stay in touch with Mr. Fasi who will be processing

the application and if there are unreasonable delays in submitting materials that we've requested or anything like that, we'll know about it and we can report it to you.

Chairman Abbott: Does that meet with everyone's satisfaction? Then I'm going to call for a vote on the motion. All in favor say "Aye."

Members: "Aye."

Chairman Abbott: Any opposed? The deferral is granted by the requisites set forth by Mr. Sung and Mr. Kihune. Does that meet everyone's approval? Ok. Thank you very much.

It was moved by Mr. Sung seconded by Mr. DePonte,

VOTED: Motion for a three month update on the Special Use Permit Application status.

(Assenting: G. Abbott, C. Fukunaga, P. DePonte, H. Kihune, W. Greig, R. Sung. J. Reyher-Colon)

(Excused: T. Espeleta, M. Kincaid)

Chairman Abbott: Before we start, thank you very much to the people from the Sunseeker, I'm sorry this took a little longer than we thought. But it's been a very- -never mind phase.

C. PUBLIC HEARING

1. **NOHELANI UU of FRAMPTON & WARD representing CHARLES A. SPENCE of KAHONUA O KALE LLC owner of MAUI SUNSEEKER HOTEL** is applying for a variance from §19.14.030, Maui County Code (MCC), "Hotel District Accessory uses and buildings," to allow the use of a new café, which includes a 180 square foot kitchen, a 480 square foot café dining area with a small gift shop on one parcel, when MCC requires that all hotel and apartment-hotel buildings in which such accessory uses shall be permitted and allowed shall contain more than 20 rental units for property located at 551 South Kihei Road, Kihei, Hawaii TMK (2) 3-8-007:041 (BVAV 2015/0017) (M. Balberdi)

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

Ms. Malia Balberdi: Reads item into record.

Chairman Abbott: Thank you. Is there a presentation?

Ms. Balberdi: Yes.

Chairman Abbott: Will the applicant please come forward- -

Ms. Balberdi: Oh, I'll do the first half and then she'll continue. Ok, so you all have a copy of the presentation. This is the Maui Sunseeker Hotel, it encompasses four lots, each approximately 10,000 square feet and the area in red is the subject property relating to the variance application.

This is an aerial view of the hotel and this road over here is South Kihei Road right here. So if you're traveling down South Kihei Road, this is what you would see as a front part of the hotel and then this is a western view and the northern view of the hotel which is these four lots here and again the area in red is what we're talking about today.

This is the subject property- -sorry hold on....there are five parking spaces located over here and this is used as the hotel's main building and there's one rental unit on the second floor. Again this is the front property and this area which the photos are also provided in the staff report- - in the application, sorry. This is the proposed area of the kitchen that is to provide services for the café and this is the proposed area of the dining area.

So this concludes my presentation. I would like to introduce Nohelani U`u to represent the applicant.

Ms. Nohelani U`u: Good afternoon.

Chairman Abbott: Hi. Good afternoon. Will you please state your name please into the microphone for the record please?

Ms. U`u: Hi, my name is Nohelani U`u and I'm here from Frampton and Ward.

Chairman Abbott: Is there a problem with the sound?

Ms. U`u: Or am I just talking to soft? There we go. Ok.

Chairman Abbott: Thank you. Are you willing to waive the staff presentation the reading of it?

Ms. U`u: Sure.

Chairman Abbott: Thank you. Please proceed.

Ms. U`u: Good afternoon. My name is Nohelani U`u like I said, we are here from Frampton and Ward and thank you for seeing us today. We are here to discuss the Maui Sunseeker Hotel owned by Kahonua O Kale and Chuck Spence the owner is sitting right there, hi Chuck. We are from Frampton and Ward, Dave Ward will be speaking later as well.

The property is located at 20 Wailana Place in Kihei, the TMK is (2) 3-9-001:125. We are here for a variance request, Title 19.14.030 for the Hotel District Accessory Use requesting a small café, small dining area and gift shop.

During this process we had a meeting on October 14, 2015 and we did a mailout as well. I'm going to be giving you a brief introduction about the Sunseeker and its surrounding uses and then I'll introduce Chuck to discuss the café and then Dave will be doing a variance summary.

Here is an aerial view of Kihei, the Maui Sunseeker is there in blue right here, next to the Maui Lu along South Kihei Road and this up here is Starbucks next to that new Safeway. This is the Maui Sunseeker, you can see it's along four parcels. Here is the ocean and along South Kihei Road. This again is the same view with all of the Hotel zoned neighboring properties again next to Maui Lu and across the street of all these condominiums here.

If you're standing on Wailana looking out through South Kihei, this is your view looking left towards Wailea and looking right towards Maalaea. And again, if you're still standing on Wailana, this is your view facing Makai and your view facing Mauka.

This is their new signage right out front the South Kihei Road directing you to the reception which is here at the main hotel building with centralized check-in and two rooms- - two rental rooms.

Here is the map you saw earlier. This is the Sunseeker with the parcel here with six rooms, this parcel here with 12, this main building here with two and this with six more rentals. In here you can see the proposed serving area and small kitchen area. This is the photo we saw earlier which is the 100 square foot area as it exists today; they would need to do some commercial grade improvements with stainless steel countertops. And another photo of the kitchen, and this would be the 480 square foot dining area, that's outside of their main building and the aerial view we saw earlier.

I'm gonna have Chuck come up here and discuss his vision for the café. Chuck?

Chairman Abbott: Thank you very much.

Mr. Charles Spence: Thanks Nohe. My name is Charles Spence; I actually go by Chuck Spence as my nickname. I want to say thank you so much to the Board as well as to the Planning Department. I am the sole owner of two LLC's, one is the Maui Sunseeker LLC, which is the operating company for the hotel, the other is Kahonu O Kale which is the real estate holding company, my real estate holding company and I am the sole owner of both LLC's.

I bought the Maui Sunseeker back in 2008 from a partnership that included Michael Waldell (sp?) and Michael Waldell, he is now the current General Manager of the hotel, and he works for me. He was one of the previous owners and has been involved in the property since 2004. At that time when I bought the hotel it was only on two TMK's and it was 17 rooms. Currently we have the 26 rooms. Although we are zoned H-1, I'm not allowed to serve anything including coffee to my quest and this really puts us in a difficult spot because we're not a bed and breakfast therefore we can't include breakfast and other foods to the guest nor can we compete with the hotels that do have the restaurant space.

Many of our quests come from all over, Asia, Europe and many of them have issues with us not being able to serve food and they don't understand why they're in - - we're in a hotel zone and they can't have any food service at the location and they've mentioned this in reviews, which actually comes back to haunt us as time goes on. What we find that happens is that our guests awaken in the morning and they get up anywhere from 5:30a to 8:00a-9:00a in the morning and they will travel two to three miles to the nearest coffee shop. So they get up in the morning, go out to get a good coffee, then they come back, they get ready, then they go back out to get breakfast and as a result they're out there on the roads they're right in the mists of the rush hour traffic for people going to work. They also of course, pollute the air with the additional traffic as they travel back and forth.

In 2009, I came before the Maui County Planning and asked for a permit to open a café. At that time I only had 17 rooms and of course the zoning said that I could not have (...inaudible...static with microphone). As I was saying, back in 2009 I came before the Planning Department who advised me of the statutes saying that I'd have to 20 or more rooms or more then 20 to be exact. And in fact they were the ones that had suggested that I'd buy the adjacent properties behind for two reasons, first of all it would give me the space to be able to have a retail-café space and additionally it was problematic in that area.

We had an owner that was the owner of the building adjacent that was operating illegally. Illegal construction going on, we had lots of problems with them operating a rental unit that was attracting the wrong elements, we were having high crime with the police there almost every day because of it. So, I bought both properties that were adjacent which gave me the 40,000 square feet, about one acre.

And as the Planning Department had recommended, we worked very hard with the neighborhood. I'm a very strong believer in supporting the community and making sure it's all for the benefit of everybody that's in the area. We do have - - I did buy the two additional properties and that's why I'm here and continued to work with Planning over the years to bring that building into code and be fully compliant with all the build as that we did. Additionally we kept on striving for the approval for the café permit.

What we're looking to do is basically accommodate our guest primarily so what we're attempting to do is have breakfast in the morning with a good coffee service, so that people don't have to go so far. We found that there's actually quite a bit of support as you'll see; we have seven letters of approval that I know of - - of support from our neighbors that have been sent in. As well as we have some people here that are going to speak out in favor.

We would like to open it up for breakfast primarily, also provide a small lunch service. We're also looking to at some point do small pupus for the evening. One of the things that I use to do is actually I was in a similar position when I lived in Manhattan, I was on the Land Use Committee in Manhattan, so I know all the work you do to read all of your codes as well as all the readings on these cases and appreciate all that you do.

To circumvent a lot of the issues that might come up so that we don't have to postpone, what we did was we held a community meeting ourselves. We invited everybody in addition to doing the mailings for this and we had people come through for the tour. In the meeting, we had a couple of questions that came up. One was about the parking and our parking- -the codes for the hotel says that we only need 13 spaces for the 26 rooms. We have 35 and so that more than compensates for the hotel and the café. We have plenty of off-street parking available for the anticipated people that might come through.

Secondly we had questions about the noise and as you can from the drawing, the space that we're going to be serving is outside. So it's all the way at the back of the property which is going to be on the border of the new Hilton Grand Vacations property that's there; and that will be far away from all of the other condominiums in the area.

The other thing to note is that because we are a hotel, we have to be careful to take care of our own guests. So we can't have too much noise or waking people up early or keeping them up late.

With that, I just wanted to say thank you very much for hearing our appeal and thank you for the recommendation of approval from the Planning Department.

Chairman Abbott: Thank you Mr.Spence.

Mr. Dave Ward: My name is Dave Ward with Frampton and Ward. I'm just going to give a brief summary here. We have provided to you the justification for the variance in your packet as well as the Planning Department's revised report. We kind of look at this again as a summary; this is a 26 unit hotel it operates with a central check-in lobby just like another hotel. There are some on the maps-

- there are lines on a map, different properties...but out in the field when you're walking around, there's no difference, it's a 26 unit hotel.

This request is really for a small café and a dining area. The area that we're talking about is not as big as this room. It's a really small area I think you saw in the photos and this really doesn't enhance our guest- - our guest experience and with that as Chuck said we can reduce traffic on South Kihei Road. Chuck's been in this business quite a while, he knows what the patterns are of his guest and many of them get up in the morning, drive out to get coffee or a bagel or whatever they're going to get, come back to the hotel, dress, do that kind of stuff and leave again. And by cutting out those trips, that reduces traffic in Kihei. So I think from a large picture planning perspective, this makes a lot of sense.

With that, we're going to wrap up if there are any questions, we can take them now or later.

Chairman Abbott: Thank you very much Mr. Ward. Do we have any letters of opposition or approval other than what we have in the packet given to us?

Ms. Balberdi: No, there were actually four letters that didn't make it into my staff report but they were provided in your packet.

Chairman Abbott: Thank you very much.

B. PUBLIC TESTIMONY (Continued...)

Chairman Abbott: We'll take public testimony now if we can please. Please step up to the microphone, state your name please.

Mr. Chris Aker: Thank you, my name is Chris Acre. I stay at Aloha Pualani and it's right across from Maui Sunseeker, my family's got several high scale, high end vacation rentals right there and I tell you every morning, our guest get up, get in their cars that they rented and they drive right up to the Starbucks or to the nearest thing.

I go to University of Hawaii for SSM-Sustainable Management, and I know that these cars are killing the ocean. Everybody here sees the coral that's happening right now, everybody does and we're doing it, we're all killing it; and this little shop here is not going to draw a bunch of traffic from car traffic anyway all it's going to do is provide my guest and the guest on this whole street a nice little place to walk where they can get a cup of coffee and walk across the street and go watch the sunrise or sunset or whatever.

I'll tell you what, we've been there for five years and Mike- - they've completely transformed this place and it improves the value of everybody's property right there. I really encourage you guys to pass that and let them have this little shop that's going to benefit everybody there and get the road cleaned up from all the traffic that's happening all the time and just killing everything. That's my part.

Chairman Abbott: Thank you very, very much Chris. Any additional?

Mrs. Laurie Trobough: Good afternoon, my name is Laurie Trobough. I live at 34 Wailana Place, earlier when you saw the map, I am right next door. I've lived there for 3 ½ years full time. I'm also the President of the AOA for my building. My husband and I are the only full time residence, we are full time residence there and we have been neighbors with Chuck and he is a wonderful neighbor. I didn't

come when they were having the terrible problems but we've had some issues that he has helped with.

My biggest thing is I want a mocha...(laughter)...and he keeps promising me a mocha. It would be great to get out and just walk over there and get a breakfast. I think the people that stay in our building, most of them are vacation rentals, they would love to be able to just get it like the other guy said everyone in the cul-de-sac mostly are vacation rentals. There's a few of us that live there full time, but the vacation rentals, that would be a great improvement, it would help his business and less cars. I don't see people driving to get there, I see people walking from our neighborhood and maybe the next neighborhood.

I am very much in favor of this. Thank you.

Chairman Abbott: Thank you Laurie.

Mr. John Trobough: Good afternoon, my name's John Trobough. I'm Laurie's husband and I live at 34 Wailana Place. We are neighbors of the Sunseeker. I guess I can only reiterate what she's just expressed that these guys are terrific neighbors; they run a first class resort, and our little cul-de-sac there are five other small condominium vacation rental type buildings, they're not large. But, we all have vacationing guests and just to get a cup of coffee or an egg mcmuffin or something you have to get in the car and drive for one or two miles- - would be the nearest place. It would be awfully nice for everyone on the cul-de-sac to have a little place where we can go next door and get a breakfast sandwich or if they do offer box lunches to pick up before you leave for the beach or something for the day, that would be wonderful also.

We very much support their application and ask you to approve it.

Chairman Abbott: Thank you John.

Ms. Ruth Langstroat: Good afternoon, my name is Ruth Langstroat. I live at 231 Keonekai, which is much further south. But I'm a volunteer and I'm speaking only for myself. I'm a volunteer at the Hawaiian Island's Humpback Whale National Marine Sanctuary and we're just across the road and down just a little bit from the Sunseeker; and when I volunteer there, my shift often starts about 10:00a in the morning and ends right about 1:00p. So getting a coffee before or lunch after would be very nice. I could park my car at the sanctuary and walk right over to Chuck's and get either a snack or lunch.

I also give the whale talk there on Tuesdays or Thursdays from 11:00a to 12:00p. Again, getting something to drink just before or getting a snack afterwards would be really helpful. The sanctuary is open Monday through Friday and we do have volunteers working at the sanctuary. Like I said, we've got the two shifts every day and then the folks giving the whale talk on Tuesdays and Thursdays.

So we have a lot of residence who are coming through the sanctuary and then we have lots of visitors as well. But especially those of us, who are from the area, love a place that's very local that we could just walk to; like I said, either for a cup of coffee or for a snack before or after our shift. And this would be a very handy thing in the neighborhood.

As a neighbor we would love to support this. Thank you.

Chairman Abbott: Thank you very much.

Ms. Roxanne Whitelight: Good afternoon, my name is Roxanne Whitelight. I also live at 231 Keonekai Road, Ruth is my spouse. I've actually been a guest at the Maui Sunseeker I had some problems with my lodging last year and so I moved down to the Sunseeker for a week and a half. I can first hand say how far it is to travel from the hotel either to go down and up to Safeway or around to Sugar Beach. Those are really your only options in terms of getting somewhere. So from a use perspective, to have something on site especially something that had that local feeling where people felt welcome and they could pick up something and continue with their day.

I also am a walker. I try to walk three to four miles every day and I attend Trinity Episcopal Church By-the-Sea. So after the church it would be nice to have something where I can walk down in that part of down and get some brunch after church.

I am definitely in support of this. Thank you so much for your time and efforts.

Chairman Abbott: Thank you Roxanne. Any other public testimony? Then I shall close public testimony and refer the matter to the Board. Questions?

Mr. Howard Kihune: I have a question Mr. Chair for Mr. Ward. Dave, can you tell me why we're not going for a consolidation rather than going for a variance so that this would be permitted on that property?

Mr. Ward: Dave Ward from Frampton and Ward. I appreciate your comment and I think this Board more than any other Board and probably more than most folks in county understand that the Maui County Code is kind of not crystal clear in every segment and there's different interpretations, there's different implementation issues. So in working through this process we've been working with the Planning Department and meeting with them and trying to come up with the best route and in conjunction with the Planning Department we've come to this being the best route for these folks to proceed. That's how we kind of gotten to where we are today.

Mr. Kihune: Ok. My second part of that question would be . . . by approving the variance for that small little parcel, that would run with that parcel, so I'm going to have a hard time going forward and approving that. I would rather see it come in as a consolidation- - again this is my comment- -but I would probably give it a turn if I were to vote to approve the variance; because I would like to see that property get consolidated in the next couple years so we can get rid of the variance.

Mr. Ward: Again, I'll try to dive a little bit deeper into this. Depending on how you interpret the code, it's possible that the consolidation actually wouldn't take care of the issue. There is an interpretation of the code that says that you must have 20 units- - 20+ units in a single building. And that interpretation of the code would not be resolved with consolidation. So again, I would rely on the Planning Department to better give their position. But it's kind of one of the things we've been running up against. The County Code is not crystal clear and because it's not clear, this was the best route that the Planning Department recommended that we take in order to resolve the issue.

But I do appreciate it and I understand the concern, but I also look at the other side and again it's an interpretation problem in many ways.

Mr. Kihune: Thank you. I would look at it as a consolidation. I would have an easier time giving a variance even though it wasn't in the same building. If it was consolidated with 26 units, that would be an easier approval process or for me to support.

It's a little different having a standalone café on a little piece of property by itself which will run with the property forever. Now what if your client decides to sale that one piece of property?

Mr. Ward: We would be happy having any kind of unilateral agreement or any type of agreement that would require that there be at least 21 units on the properties as a whole. We are a single hotel, we're not - - of course there are different lots, but it is a single use, with a single check in area. People come in, check in then go to their rooms. It's really no different than many other hotels.

Mr. Kihune: That's why I look at it as consolidation that you're stating it as a single hotel, that it should be consolidated piece of property. Again, it's just my comments. It would be easier for me to support something from a standpoint that it is consolidated. Sorry we don't have 20 units in one building but I would be easy to approve or help push something through that supported the fact that we have it spread out and not in one building. It's an easy variance approval. Anyway my comments.

Mr. Ward: Again, we are open to the idea if staff- - if that's appropriate. We're very open to a unilateral agreement that would then bind us to be all of these units together in other words. If we ever were to drop below 21 units, which I guess is the magic number and of course this would go away . . . so we have no problem with that what so ever. Actually I worked with the department on a previous solution in that matter.

Mr. Kihune: Thank you.

Chairman Abbott: Raymond.

Mr. Raymond Sung: A follow up or maybe address to staff (...inaudible...) does the department have different interpretation of the (...inaudible...)

Mr. John Rapacz: Thank you Mr. Chair. Yes we do and that is why we recommended that a variance would be the appropriate remedy. The language reads that for accessory uses and buildings in the hotel zoning district, if you wish to have the accessory use of eating and drinking establishment then the limitation are that all hotel and apartment hotel buildings in which such accessory uses shall be permitted and allowed, shall contain more than 20 rental units. And that's in your amended Staff Report, page six, right in the middle of the page.

So we do interpret that to mean that the building, the hotel or apartment hotel building, which includes the eating or drinking establishment, must have 20 units in it. So the consolidation would not eliminate the need for a variance, even if they were to consolidate the lots they would still need a variance because the building in which they are proposing to have this use, does not have the 20 units.

Second comment if I could Mr. Chair, regarding the need for a unilateral agreement or something like that. That is something that we could do but in our amended recommendation on page nine, we have a standard condition- - it's always your condition number one in every variance you look at and that is that the variance shall be applicable only to the request as approved by and reflected in the record.

Now it would be our position that if something changed, if one of the lots was eliminated, if the number of hotel rooms total was below 20, we would not consider that to be the request as approved by the Board. And we would not consider the variance to allow those types of changes.

So we can do a unilateral agreement if that's what the Board would like to do. But our position is that if the circumstances which are before you today, which is four lots with 26 rooms, if that we're to change, then we would have to come back to the Board or they would have to come back to the Board and see if the Board would be willing to amend the variance to reflect those changes and conditions.

Chairman Abbott: Please.

Mr. Sung: Just for my own education. How time consuming, how expensive in terms of cost and how long would it take to consolidate (...inaudible...)

Mr. Rapacz: I'm sorry I can't really speak to that, that's a Title 18 Subdivision issue, the Department of Public Works, Environmental Management would have better answers to that. The Planning Department would review the application but our role in that is a small role so I can't really say how hard that would be.

Mr. Sung: Mr. Ward, any thoughts on that?

Mr. Ward: As a consultant we do assist people with subdivisions and so I do have some expertise in that area. One thing I know about subdivisions is that they always take longer than you think and they're always more expensive and harder than you think. They are reviewed by all the agencies and there's various items that can come up along the way and they really do take quite a bit of time and energy. If nothing else, just preparing the plat, paying engineers and that type of thing. It seems like something that's simple and it should go relatively quickly, there's always opening doors and quite frankly there's a bit of expense related to it. So I appreciate your question.

Mr. Sung: Are we talking about something in the five to ten year range? (...inaudible...)

Mr. Ward: I've never done a subdivision in less than a year.

Mr. Sung: But we're talking about consolidation.

Mr. Ward: I've never done a consolidation, re-subdivision within a year. Just hiring engineers etc., it's going to be in the - - I don't really want to estimate but in the 10's and 1,000's of dollars.

Mr. Sung: Thank you.

Chairman Abbott: Chad?

Mr. Chad Fukunaga: I have a question and I don't know if this is directed for staff or the applicant. But so why is this building being considered as an accessory and not as a permitted use? I see that coffee shops is a permitted use. I'm sorry am I reading this wrong? Wait I'm sorry I read it wrong.

Chairman Abbott: I have a question. This may be putting the cart before the horse. But as I am not familiar with all of the laws regarding restaurants and it sounds to me that we're creating the Sunseeker division of Starbucks on your property and I don't know and staff, I'm asking for your assistance for this. What are the legal ramifications? Is this a restaurant? Does he have to comply with restaurant standards? And we are obviously inviting or the intention is to invite or leave it open as it were for all of the apartment or condos in that particular area to come in and take place. I just want to know if it's legal. I mean every condominium I ever stayed in has a coffee pot. I'm not trying to be - - I just want

to be sure that everybody knows what is going on here. Because this is a difficult question because you're open for insurance claims and all kinds of food handling and whatever.

Mr. Ward: Absolutely. We will be a small café restaurant and dining area so we will be regulated by the Department of Health and we will be seeking all of those approvals. So we're not avoiding any approvals related to the Department of Health; or actually the further approvals that we're going to need to get in order to convert this kitchen into a commercial kitchen and to allow for the restaurant.

So there's no - - we're not asking for any type of variance there and they'll be full supervision by the Department of Health and all the other agencies as we go through the process. Is that satisfactory Mr. Abbott?

Chairman Abbott: Thank you. Any other questions from anyone on the Board? Any statements from Planning?

Mr. Rapacz: Thank you Mr. Chair. Let's see, I think we have to make two corrections to the report. One, Malia will handle which I think there's a discrepancy in the TMK listed on the agenda verses the one listed on the caption of the report.

Ms. Balberdi: Yes, for the record the address which is listed in your staff report is correct, it's at 20 Wailana Place the TMK is (2) 3-9-001:125. However, the agenda which had the public hearing notice stated 551 South Kihei Road which is the address at the hotel, not that particular parcel. And it had the incorrect TMK which was (2) 3-8-007:041. So for the record we wanted to state that the correct TMK is (2) 3-9-001:125.

Chairman Abbott: Thank you.

Mr. Rapacz: The second correction is on page 10 of the amended report and that's the back page, in the final paragraph it says considering the above information the Director recommends that the Board adopt the Planning Director's Report and Recommendation; and that should read "Adopt the Planning Director's Amended Report and Recommendation."

Chairman Abbott: Thank you John. Raymond, question?

Mr. Sung: Question for Corporation Counsel. Are there any issue with the- - specifically of the notice to the public? In spite of the agenda having the wrong TMK and the wrong address?

Ms. Thomson: Thank you and that was my concern too when I noticed the address and TMK issue. I believe that because it's the address for the hotel and we're considering the entire hotel property as the same geographic location that-that would be satisfactory correcting that. So I don't consider it a material change since its' not a completely different property and it's locating the hotel and a restaurant located within that larger facility.

Chairman Abbott: Anything further?

Vice-Chairman Fukunaga: I have a question for staff. I'm looking at my binder here and perhaps my ordinance is a little outdated. But when I look at 19.14.030, it's throwing out area regulations and I think that the paragraph that we're looking at with regard to requiring the 20 rooms; it's in 19.14.020-permitted uses. At least in my book . . . do I have an old?

Mr. Rapacz: Yes, that's been updated. You may have an amendment towards the back of your booklet. But the hotel zoning district was amended and reads differently now. The pertinent section is the section that's quoted on page six of the staff report and that's where among the listed accessory uses and buildings, the applicable one would be eating and drinking establishments.

Chairman Abbott: Any further questions or any further discussion for the Board or any of the gentlemen or ladies in the audience? At this time I'll ask if there is a motion. Go ahead bring it up... I'm going to refer to Corporate Counsel right here for a minute.

It is interesting and I want an answer myself. I want to know why there was a change in decision making or the decision versus the original report and then we get the amended. I want to know the change in reasoning or whatever to get the amended report.

Mr. Rapacz: Thank you Mr. Chair. Well, as the Board knows, these are not always black and white answers as to whether or not the criteria are met. The Board does struggle with them some times and so do we the staff. Unfortunately I did release the preliminary report and that's before it was finalized and that's what ended up with the Board. When we discussed the report and recommendation internally we did reach a different conclusion than we had initially. And that is the final report and the final conclusion of the Board- - I'm sorry of the Department.

Chairman Abbott: If I may ask John. What was the reason for the need for the discussion?

Mr. Rapacz: I think that- - well, some of the discussion is something is something that the Board has wrestled with a few times and that is when criteria three says that the hardship is not the result of the actions of the applicant. That can be interpreted very strictly. Some Board members do, some don't, some staff members do, and some don't.

In this case, we thought that there was more - - what was more significant in the decision was-was this unusual arrangement of this four lots for one hotel; and we saw that as being something that the applicant did not create.

The other issue was the number two and again we thought that because of the language in the code, which says all hotel and apartment hotel buildings, in order to have an accessory use must have more than 20 rooms. We did discuss whether that could be interpreted in different ways. I guess it's possible that it could be. We interpret it to include only the building itself but in this case since there were four lots for this hotel and the hotel itself had the 26 units; we thought that given those two discussions on item three and two that we would recommend approval.

Chairman Abbott: Raymond please.

Mr. Sung: Question for staff (...inaudible...) If this Board were to grant this variance as requested by Maui Sunseekers, presumably there might be other properties . . . hotel properties in Maui County where there are multiple buildings (...inaudible...) where no individual building has (...inaudible...) So, conceivably if that other property or properties were to come before this Board and keep a similar variance for a similar accessory use, we would basically be in this situation again. Would it not be a better approach for the department with or without Corporation Counsel or - - legislative services or whomever to issue an official interpretation of the divisions (...inaudible...) we just care about (...inaudible microphone static...) Because otherwise unless you- - not saying you personally John....but unless the department has a consistency, it doesn't do any good for this Board to grant or not grant a variance in this case but (...inaudible...) right?

Mr. Rapacz: Right.

Mr. Sung: Is it possible for you guys to adopt an interpretation as your official policy, so we don't have multiple requests for variances coming before this Board?

Mr. Rapacz: As far as I know, we've been consistent about it but I've only been with the department for a couple of years. I know that this is our position on what it means but I agree that the language can be clarified in the code to make it even clearer that we're talking about buildings, not parcels and not entire hotels. That's something that we can do, we keep a list of code provisions as we encounter them that could be improved and we will put this one on the list.

Now given that our position is clear or given a code amendment to clarify further, I don't know that that would reduce the number of people who want to do something different, and who would come to you to seek a variance. Some people would think that it's not a reasonable provision and they have fewer rooms in a particular building and would come to you none the less with or without the clarification.

Mr. Sung: One more question if I may.

Chairman Abbott: Please.

Mr. Sung: So for me it's more difficult (...inaudible...) so that is number two not number three (...inaudible...) walk this Board through how it is that in the original report you believe that the denial of the variance would not prevent use from the subject property as a hotel and now all of a sudden under the amended report looking at criteria number two, denial of the variance would prevent reasonable use of the entire property not just talking about that specific (...inaudible...)

Mr. Rapacz: Yes. I think that what has led us to this recommendation in this case is the configuration, that's played a large role in it. That the four lots together do operate as a hotel. We thought that it would not be unreasonable for 26 unit hotel to have this type of establishment, a small café type of restaurant.

The standard of whether or not strict compliance will prevent reasonable use again can be interpreted very strictly. It can be interpreted to mean that there would be no reasonable use of the property whatsoever if they had to comply. I think that if we were to interpret it that strictly that almost no variance could ever be granted.

Mr. Sung; I would understand that. I would actually look at it a little bit more (...inaudible...) and say would denial of the variance prevent good use of the property, reasonable use of the property as a hotel . . . would people stop staying there? Would they not be able to rent out the room and clearly for the last so many years, they've been operating as a hotel; a hotel without a convenient place to have coffee and snacks. Is an accessory use that would be (...inaudible...) applicant and members of the community desirable to the (...inaudible...) but the question is does it possess reasonable use of the property as a hotel otherwise without it. And they did go this long without it, I'm having difficulties seeing how actually satisfying criteria number two other than saying it would be nice to have and it's reasonable for them to have. But that's how I would look at the application - -

Mr. Rapacz: Ok. I understand.

Chairman Abbott: Any other discussions or questions? If there's not discussion do we have a motion before the Board or do we not?

Mr. Pat DePonte: I make a motion to accept.

Chairman Abbott: We have a motion to approve the variance. Do we have a second?

Ms. Thomson: Just to clarify, the motion is to accept the Planning Department's Amended Report and grant the variance.

Mr. DePonte: Yes.

Chairman Abbott: We have a motion to accept Planning Department's Report. Do we have a second?

Vice-Chairman Fukunaga: I second.

Chairman Abbott: We have a motion and a second. Any discussion?

Mr. Sung: Question for Member Kihune. Do you still have any concerns in regards to the time limit on this?

Mr. Kihune: My concern is if you take another property, hypothetical like a Ho`olei property in Wailea; they don't have 20 units in one building, but they've got 25 buildings that's run as a condo/hotel so they can come in and apply for a café now at their pool area, the same way for a variance. Do we want to see that happen? And every other property that's like that on the island? So we're opening up ourselves to a lot more issues I think in the future.

Granted I love the idea, I have no issue with the café. I just look at it from a standpoint that it'd be easier to consolidate. I may take a little longer, a little more time, a little more money but it works into the scheme of what the zoning toward the property is all about. We're circumventing it by going around it. Now if it was just the building when it was 15 feet when it should've been 20 feet, no problem; but that's not the issue as far as I'm concerned.

Mr. Sung: And there also needs to be either a change in the way that the provision is interpreted by the department before there needs to be an actual underlined change of staff with the ordinance, because until they say we care about 20 or more units (...inaudible...) property as opposed to a single building, we're still going to have this issue.

Mr. Kihune: It's not that I - - I like the whole idea, I think it's great, it's a nice little property; I drive by it every time. I just look at it as we're just opening up another issue further down the road in regards to that zoning issue. I'd like to see it be consolidated and then go through that path. Now there's no issues, if there's a variance because the building is 10 feet instead of 15, they can deal with that. But now we're giving a small little piece of a TMK right to put a café on it and what does it not stop the next property and the next property. All the condo/hotels in Ka`anapali and Lahaina and all that stuff that goes on.

I want it to be consistent is what I really look at. Consistency is more important to me than anything else. Especially when it comes to a zoning issue- - this is more of a zoning issue, that's why I'm concerned.

Mr. Sung: I would tend to agree and I would also - -but I'm one vote from a total of nine members of the Board, so everyone votes maybe in their own independence for this case.

Mr. Kihune: I want to reiterate, I'm not against the café at all.

Mr. Sung: I'm not either. I think that it's a good idea, the testimonies that the applicant and the members of the community make sense. But I still have just the underline difficulties of actually seeing how denial of the variance itself asking to grant reasonable use of the property as a hotel. (...inaudible...) So, if I have to just follow the rules then I think for me the answer is no, but I don't see how just because we want to get to an outcome we can finesse it in a way by ignoring the application of criteria number two. I just don't see how that works. If someone can explain it to me and convince me, I'd welcome that cause I think I might be open to a vote, but I just don't see how I can get there applying the criteria and the way that it supposed to be considered a variance.

Mr. Kihune: Here's another comment. Mr. Spence had mention that he purchased the two additional TMKs so he in some way, he created his own issue by now having four TMKs with 26 units; when he had only two TMKs and X amount of units he didn't have that issue, correct? And then he purchased two more after 2008 so now he's got four TMKs.

Again, I love the whole concept I think every little property like that should have a little café, a little someplace they can go. I just think we're opening ourselves up to much more in the future. That's all. And some legal issues too.

Chairman Abbott: Question, Chad?

Vice-Chairman Fukunaga: I have a question for Mr. Spence.

Chairman Abbott: Will you step up to the podium please Mr. Spence?

Vice-Chairman Fukunaga: I think you're making a point when you were testifying and I don't believe I caught it all and you had mentioned I think it was in 2009 that you approached the department wishing to pursue I think it was (...inaudible..) at the time, and at that time you only had 17 units and you were advised that possibly if you had purchased the other two lots then - - I didn't hear what the continuation of that sentence was. Can you please repeat- -

Mr. Spence: At that time I approached Planning and they had stated that if I purchase the property, they could (...inaudible...) because then it would give me more than 20 rooms. So it was a directive that I was acting on.

Also in terms of the question with regards to operating as a normal hotel, it does hinder us- - I am one that's a stickler about making sure that we're fully compliant and abide by all laws. If indeed somebody walks up and they want to buy something that's a retail item, be it a t-shirt or whatever that might be and that's even a guest of ours, that's constitutes a retail sale and that's where we start to run into gray areas and we're conflicting in terms of our normal operations. For somebody who wants to be fully complaint. This is nothing more than trying to be fully compliant with all laws.

Mr. Sung: I understand that but you're still operating as a hotel within bounds up until this point.

Mr. Spence: I am. I am operating as a hotel, am I operating as a normal one? No, it doesn't hinder me in terms of competition that I face. In terms of consolidation, yes it's the engineering, it's also there's

much more that comes into play because then it becomes disruptive because you have all kinds of issues when you have to deal with the consolidation of plumbing, because if it's only one property then you have consolidate all the sewer line, all of the water lines and it could really become terribly expensive and you have to sell a lot of cups of coffee or sell a lot of eggs to basically justify it. So it's difficult and yes, I understand that it was me that bucked forward under the guidance of the department's suggestion but never less - -and hence the request for the variance.

Chairman Abbott: Thank you.

Vice-Chairman Fukunaga: I see the applicant's point where this ordinance is not black and white, it can be interpreted in more than one way and I actually interpret it the same way as I believe the applicant interprets it. It's not just one building; it does say all hotel and apartment buildings . . . plural . . . in which such accessory uses. Clearly there's more than one way to interpret and he may have been misinformed or misunderstood with prior comments from the Planning Department but - -

To answer the question or the concern about consolidating . . . there seems like there's more than one way to attack this. One is you can do a consolidation or you can do a variance, I've been involved with subdivision consolidation and I agree with Mr. Ward that they do take a considerable amount of time, more time than you usually think they would take and it does cost more than you think it would take. And it's usually more problematic than you think it will be.

I've also been involved with subdivisions when a certain code - -there was room for interpretation with certain codes. So in processing the subdivision we had to jump through more hoops and they're still dealing with problems as a result of that. As of today the department now interprets that code differently. Where we would not have had to jump through the hoops at the time we processed the subdivision.

The point I'm trying to make is interpretation or the possibility of having more than one interpretation is a problem. I don't know if consolidation in this case, I don't think consolidation is the right way to go.

Chairman Abbott: Any further discussion? Any other further remarks? John please.

Mr. Rapacz: Thank you Mr. Chair. Just one additional comment because the issue keeps coming up about the subdivision; we would be very happy to do a Unilateral Agreement that would tie the four lots together for purposes of the variance; so that it would be considered as one unit, one project, whatever you'd like to call it. Tying the lots together as though they had been consolidated for purposes of the variance; so that any change on any of the lots would reflect on the others, no one lot could be sold of separately without it affecting the variance. We could do any agreement that would accomplish that.

Mr. Sung: Would that not be Bilateral Agreement and not a Unilateral Agreement?

Mr. Rapacz: I have often question why the county calls them Unilateral but we can do an agreement.

Mr. Sung: Bilateral agreement.

Mr. Rapacz: Yes.

Ms. Thomson: Just for clarification, would the department recommend that we put that as a specific condition in the variance- - is that the variance would terminate if the four properties collectively cease to operate with a minimum of 20 rental units, something to that affect?

Mr. Rapacz: Yes something to that affect. We'd probably have to think through the language somewhat to do that and as the applicant mentioned, we had gone through some of that discussion previously when we were looking at a different solution. So we could draft it in a way that would ensure that the number of hotel rooms would always remain above 20 as a minimum requirement and we may be able to impose additional requirements as well.

Chairman Abbott: Ok. Anything further? We have a motion and we have a second.

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

Ms. Thomson: That's what I was going to suggest, if you want to include staff's recommendation that we'd probably do it by way of amendment.

Mr. Sung: I hereby make a motion to amend the motion on the floor to include staff's recommendation in regards to a Bilateral Agreement as a previously stated by John.

Ms. Thomson: You need to vote on that amendment.

Chairman Abbott: Any discussion on the amendment, if not we'll have a vote. All those in favor of the amendment?

Members "Aye."

Chairman Abbott: No opposed. **The amendment is carried on to the motion.**

It was moved by Mr. Sung seconded by Mr. DePonte,

VOTED: Motion for amend the current motion on the floor to include staff's recommendation in regards to a Bilateral Agreement.

(Assenting: G. Abbott, C. Fukunaga, P. DePonte, H. Kihune, W. Greig, R. Sung. J. Reyher-Colon)

(Excused: T. Espeleta, M. Kincaid)

Chairman Abbott: Now we'll vote on the motion, we have a second with the amendments; everything seems to be out on the table, any further discussion? If not I'll call for a vote, all those in favor of approval of the variance, please say "Aye."

Members: "Aye."

Chairman Abbott: All those in opposed to the variance say "No." We have five "Ayes" and one "No."

Mr. Kihune: You didn't vote. So that's five to one.

Chairman Abbott: Yes. Well I'm going to vote "No" also. I just think we need to- - I'm sticking with Howard's thing on this. It is approved though because there is a five vote majority is that correct counsel? The **variance is approved**. Thank you very much. I'm sorry it took so long.

Mr. Spence: Thank you.

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

VOTED: Motion for a three month update on the Special Use Permit Application status.

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

(Dissenting: G. Abbott, R. Sung)

(Excused: T. Espeleta, M. Kincaid)

(...inaudible discussion between Board members...)

Chairman Abbott: John please.

Mr. Rapacz: Thank you Mr. Chair while we're still on the record and regarding the previous item, it wasn't clear to me whether the Board was indicating that it thinks or it would like to see the zoning code changed so that you could have a restaurant or similar accessory use on a property with more than 20 or more rooms or at a hotel regardless of the number of parcels.

I heard a couple of folks make suggestions about what would make more sense in the code but I'm not sure I understand what the Board would like to see.

Mr. Kihune: I think the code is good the way it stands. I just think that it would've been easier to come in as a consolidation, take the 26 units, you may not have it in one building but it would be easier for us to give a variance for a café based on the fact that they've got 26 units on one TMK. That's where I stand.

Mr. Rapacz: Ok. You're not looking for a change then?

Mr. Kihune: I'm not looking for a change because I don't want the Ho`olei project to come in and go, we want to put a restaurant now where the pool is at. I don't think that's the intention of the law. That's totally different; it's more of a condo/hotel right?

Vice-Chairman Fukunaga: I disagree. I feel that the code is not clear. They're allowed to operate as a hotel spread over multiple TMKs but at the same time those different structures or hotels are not considered when you're considering these accessory uses. So it seems to further conflict with the department's interpretation of the code, because I interpret it the other way.

Mr. Rapacz: What is your interpretation so that we know and we can consider amendments? Are you saying that it should be based on the number of units in the hotel? Right now I think it's the number of units in the building? I think that's what the code says.

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Vice-Chairman Fukunaga: Right now it says all hotels and apartment hotel buildings, so when it says all hotel- - to me a hotel can have multiple buildings, not just one building and then it says and apartment hotel buildings . . . again plural. That's suggesting that you can- - that this principal is applied to multiple buildings and not just one building, one structure.

Mr. Sung: So applying a sort of a grammatical strict constructionism I think that Chad is saying, it doesn't say each building - - it's saying all (...inaudible...) it's all together.

Vice-Chairman Fukunaga: And further considering that again they're allowed to operate as one consolidated hotel over multiple TMKs with multiple buildings that support the plural.

Mr. Rapacz: Ok. So you would like to see a change that would make it clear that so long as the hotel project had 20 or more than 20 rental units then it could have these accessory uses even if no single building had 20 units and even if the 21 units or more were spread over multiple parcels.

Vice-Chairman Fukunaga: It would seem like a more logical approach to it.

Mr. Rapacz: Ok.

Vice-Chairman Fukunaga: I don't know why you need to have 21 buildings to have 20 units. Like you could have one hundred by unit building and not have a- - or one 20 unit.

Mr. Rapacz: I understand.

Mr. Sung: Although (...inaudible...) extreme, Howard's concerns would be what if you had 25 single unit bungalows- -

Mr. Kihune: (...inaudible...) Village has that? That's how their hotel is set up. So it all depends on which county you're in. It's a different ordinance and John would know, so it's a different thing.

Mr. Sung: But would there be problem to have a catch phase say 25 single unit bungalows?

Mr. Kihune: I wouldn't have a problem giving a variance for that. That's all I'm trying to say. I think I'd like to have it where you have the ability to grant the variance, instead of just having - -now if that ordinance changes that means anybody that has that particular general plan can come in and open up a restaurant. That's the only thing I look at.

Mr. Sung: I think that really the simplest and most effective solution for immediate help would be for the department to seriously consider the interpretation as firmly (...inaudible...) and seen that there is a difference between all buildings verses each building as pointed out by Member Fukunaga and (...inaudible...) better understanding more (...inaudible...)

Mr. Kihune: You take the Golf Villas or the Bay Villas, now they've got- - that's all separate, but they're all hotels but they could have a restaurant (...inaudible...) so I look at it that way. We would change something that I think right now is fine. It just gives us the opportunity to grant a variance based on a situation and is it good for that community or for that homeowners or whatever it may be.

Vice-Chairman Fukunaga: To me it just didn't seem like the right path to force them to do a subdivision which is not an easy process because of an interpretation or policy that could change tomorrow. The department could change the way they view it - - and then they did the subdivision for nothing.

Chairman Abbott: But there are mitigating circumstances, he bought variances parts of the parcel at different times.

Vice-Chairman Fukunaga: (...inaudible...)

Chairman Abbott: I understand that but does that mean if he has one more building he gets to operate as something else? I mean we're leaving it, it's so ambiguous right now that it's just not feasible.

Mr. Kihune: Again, I hear everybody's concerns or everybody's reason why but I look at it from a standpoint that - -

Chairman Abbott: Well obviously the Planning Department has to come up with a plan or variance or a rule or something that covers all of these things because it is a nightmare.

Mr. Kihune: Remember now, I still voted Yes. Because I like the concept, I think it's fair for the property. But I look at it from a standpoint- -

Mr. Sung: But we're not supposed to vote yes just because we like it- -

Mr. Kihune: No, no I didn't do that.

Mr. Sung: We have to apply the - -

Mr. Kihune: I look at it from a standpoint that I'd like to see the consolidation done, that were my comments.

Vice-Chairman Fukunaga: I think that's your number too. When I look at the code, I would assume that I reason and can use these accessory uses because I believe that reasonably interpreted the code the way I think I should. So now that you have purchased it and it's taken away (...inaudible...) I think reasonable use are these accessory uses.

Chairman Abbott: A hotel with - -

Mr. Sung: Some or most or all of those?

Vice-Chairman Fukunaga: Well if you're going to allow all the other accessory uses and not this.

Chairman Abbott: I think we've hashed out about all that we could hash out.

Mr. Kihune: What's next?

Mr. Sung: Can we . . . while we're still on the record in open sessions just say it's not meant as a patronizing or if people take it that way but I would say for the appearance of the integrity of the process, it's not very good when two session in a roll we've had to approach an amended report (...inaudible...) for me I would rather just have one even if it comes in late so it doesn't come in our packet, even if that report doesn't get done until we get here on the day of- - but you don't have frankly the embarrassing situation where you have to an announcement for the public about not only your analysis but also your conclusion - - regardless whether we agreed with the original one or the reversed one but honestly as a member of the public I would wonder "Gee this happened twice in a row", what

exactly happened - - you could go through logical extreme in coming up with scenarios that how the department all of sudden makes a change and it doesn't suit well with the county and the department and agency.

I would just encourage you guys to figure out what you want to do, don't release any preliminary reports because I don't need it that much far in advance. I would rather you guys figure out what you want to say and what you want to recommend and once you're done then you can issue the report (...inaudible...)

Honestly I found more convincing the original report rather than the amended one. I had trouble reconciling what was new with what was old. It just didn't make sense.

Chairman Abbott: Well, I don't know about the rest of you, but I don't rely on these staff reports decision on making my decision on what we're supposed to do. I rely on what's before the Board because we have the option of approving or disapproving or not paying any attention to whatsoever the staff's recommendation.

Mr. Sung: Absolutely.

Chairman Abbott: We have to make up our own- - it's a mere tool to help us make a decision but if you can't make the decision based on the facts and the information that you already have in the packet it's not going to help that much.

Mr. Sung: Absolutely. I agree I would point out that the original report in this case makes very good points I thought and by the time the amended report was issued I did not find it convincing the additional information or analysis that was put in there and taking everything into account, I found it actually more difficult to reconcile and so- -

Chairman Abbott: I've already made my decision before all this information was forth coming anyway. I had already worked out in my mind how I was going to get to where I was going.

Ms. Thomson: We have to look at all the information before you make a decision.

Chairman Abbott: I said my interpretation.

Mr. Kihune: Mr. Sung, your amendment to add the Bilateral Agreement is what swayed me to vote yes.

Chairman Abbott: Ok. Moving on.

Mr. Kihune: I can live with the consolidation.

Mr. Rapacz: Mr. Chair could I just say - it was simply an oversight on our part it was an accidental release of a preliminary report and I think you know we will be far more careful in the future and my apologies.

Chairman Abbott: Thank you John we appreciate it. We know you go through hazards with us.

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

1. Having voted on February 26, 2015 to approve the variance for Molokai High School Science Facility (BVAV 2015/0004), the Board will consider and may adopt the draft Findings of Fact, Conclusions of Law and Decision and Order.

Chairman Abbott: Let's go on to article E. Adoption of Findings of Fact, Conclusion of Law, Decision and Order pertaining to Molokai School Science Facility.

Ms. Thomson: Basically for a procedural standpoint, what you need to do in voting on this is to have reviewed the record and if you were not present for the hearing or any of the information you would have reviewed all the record before voting on this and if you haven't had the chance to do that then please say so on the record and refrain from voting.

Chairman Abbott: Has everyone had a chance to review? Then I'll call for a motion to accept.

Mrs. Juanita Reyher-Colon: I motion to accept the Findings of Fact and Conclusion of Law.

Chairman Abbott: Thank you Juanita. Do we have a second?

Mr. Sung: I'll second.

Chairman Abbott: We have a second, any discussion? If not, I'll call for a vote, all those in favor of accepting?

Members: "Aye."

Chairman Abbott: Any opposed? The Chair votes "Aye" also.

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

VOTED: Motion accept the Findings of Fact, Conclusions of Law, Decision and Order.

(Assenting: G. Abbott, C. Fukunaga, P. DePonte, H. Kihune, W. Greig, R. Sung, J. Reyher-Colon)

(Excused: T. Espeleta, M. Kincaid)

Chairman Abbott: I don't know if the rest of the panel has been aware of Mr. Kolbe and Mr. Rohrer and Mr. Rohrer's attorney of the thing that's been going on in the back room. Mr. Kolbe do you have additional information for us?

Mr. Kolbe: Hi Tom Kolbe on behalf of the County. I don't believe that we need to do anything further on this matter. I can check in the hall if Mr. Rohrer and his Counsel is outside but it's my understanding that they've left and I believe that our earlier communications with you in terms of what's going to happen next are still on line.

Chairman Abbott: That was one very angry man.

Mr. Kolbe: Yeah. In this case obviously he's not here anymore I don't want to talk too much about anything except that he was counseled and so we proceeded in a manner that the parties had agreed to at this hearing and I actually lost my tie on my way down here, I didn't realize we we're going to come back on the record. I don't think we need to do anything further and I can certainly communicate with the various parties as to what happened today.

Mr. Kihune: Can I only ask was it were a matter of miscommunication on their side or something?

Mr. Kolbe: I can't really guess on why there would be a change in their position.

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

Chairman Abbott: That's something that we can't guess at.

Mr. Kolbe: I can't guess at it and I think I'm going to leave that relationship to the attorney and his client, to them if he has some concerns about the representations his attorney made they need to work those out.

Mr. Sung: But he wasn't here at the time.

Mr. Kolbe: Yeah, I don't have an answer for you as to how that went down the way it did. I was surprised.

Chairman Abbott: Thank you very much.

Mr. Kolbe: Sorry about that.

Mr. Sung: Do we still want that letter from Mr. Rohrer- -

Chairman Abbott: Well we've agreed to accept the attorney's reference that he was in deed representing Mr. Rohrer so we gave him the option.

Mr. Sung: Well we gave the attorney the option.

Chairman Abbott: Well the attorney is who he has to go through anyway.

Mr. Sung: I don't think so.

Chairman Abbott: I'll ask Richelle.

Ms. Thomson: Because Mr. Rohrer didn't stick around and isn't providing you any other information, all you have to go on is what was presented to you today and so I think that you've made a decision that you have and I wouldn't make a different position at this point because it's not supported.

Mr. Sung: Ok.

F. APPROVAL OF THE AUGUST 27, 2015 MEETING MINUTES.

Chairman Abbott: I don't think the minutes are ready for our approval. So let's bypass.

G. NEXT MEETING DATE: NOVEMBER 12, 2015

Chairman Abbott: Ok, next meeting is the 22nd of October. Any other questions?

F. ADJOURNMENT

Chairman Abbott: If nothing further the meeting's adjourned.

There being no further to come before the Board, the meeting adjourned at 3:26 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
Patrick De Ponte
Howard S. K. Kihune
William Greig
Raymond Sung
Juanita Reyher-Colon

Excused:

Teddy Espeleta
Max Kincaid Jr.

Others:

John Rapacz, Planning Program Administrator, Department of Planning
Carolyn Cortez, Staff Planner, Department of Planning
Malia Balberdi, Staff Planner, Department of Planning
Chalsey Kwon, Secretary to Boards & Commission II, Department of Planning
Richelle Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel