

**APPROVED: 8/10/2017**

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
April 13, 2017**

**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, April 13, 2017, 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 Howard Kihune: Good afternoon. Let the record show it is now 1:37 p.m. and the Board of Variances and Appeals will now come to order. We do have a quorum.

I'd like to ask quickly for an executive session so we as a Board can discuss with corp counsel the actual possible selection of a Hearings Officer for one of the items that are up for a hearing today. I think that it's important that as a group that an executive session will help with corporation counsel.

Vice-Chairman Raymond Sung: I make that motion Mr. Chair.

Chairman: All in favor say "Aye."

Members: "Aye."

Chairman: Any "Nays?" None. Ok, give us about five or six minutes please. Thank you.

It was moved by Vice-Chairman Sung, seconded by Mr. Willy Grieg, then

**VOTED: To move into executive session to discuss appointment of a Hearings Officer.**

**(Assenting: R. Sung, C. Fukunaga, W. Greig, J.Reyher-Colon, R. Masuda, J. Borge)**

**(Absent: M. Kincaid Jr., W. Kamai)**

Chairman Kihune: **The motion carries.** Thank you.

**...EXECUTIVE SESSION 1:40 P.M. TO 2:10 P.M...**

Chairman Kihune: Board of Variances and Appeals are back in session. Thank you for your patience. Just to kind of move things along we're going to actually move the two appeals in front of our actual introduction of our new members so we can get you moving and out of here, because that process could take us an hour.

So, what I'd like to do is bring up and have our staff read the appeals each number one, if staff could read that please.

#### H. APPEALS (NON-PUBLIC HEARING ITEMS)

In deciding the following Appeals, which are contested cases pursuant to Chapter 91 HRS, the Board is exercising an adjudicatory function. Therefore, Pursuant to Section 92-6 (a) (2) Hawaii Revised Statutes, the following portion of the meeting is NOT a public hearing; and the Board is not required to allow the public to be present or to testify.

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 zip line 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) (P. Critchlow)
  - a. Letter dated February 22, 2017 from Deputy Corporation Counsel Thomas Kolbe, requesting that the Board appoint a hearing officer.
  - b. The Board will consider the possible appointment of a Hearing Officer to preside over the above Appeal.
  - c. Pre-hearing conference.

Mr. Paul Critchlow: *Reads item into record*

Chairman Kihune: Thank you. In regards to the letter dated February 22, 2017 from Deputy Corporation Counsel Thomas Kolbe requesting that the Board appoint a Hearings Officer. Will any of the parties have any comments? Any attorneys?

Mr. Christopher Goodin: Yes, I'm Chris Goodin for D&S Ventures. This is a joint request that the parties are making pursuant to the Board's rules and we believe that it would best serve the case and the parties to appoint Retired Judge McConnell. I think it just makes sense in this case to have a fact finder appointed. I think that the most obvious benefit of having a Hearings Officer is that-that way the case can proceed in a sequence of days as opposed to having a hearing one day, every couple of weeks, if this body were to serve as the fact finder. I think that makes a lot of sense and I think there's a lot of facts and

conclusions of law to be found and drawn including the uses, the principle uses, what's a guided tour and all of those determinations are going to be informed by what's happening on the ground but also by the past history of interpretation and application and other instances by the Planning Department.

Another issue that's going to require a great deal of fact finding and legal conclusions is whether other similarly situated persons or entities that have a zip line are being treated differently. That's one of the principle issues that we've raised in our notice of appeal and that's one of the issues that I believe has really come to the fore as we've learned that other companies that have zip lines have not been required to seek a permit. So those factual issues and legal issues will need to be decided and I don't think it's something that can just be done, a hearing can be conducted in a space of a day. I think it will take some time and I think it just makes the most sense to be able to push through and to there's a sense of continuity in the proceeding.

And for all of those reasons we would respectfully request that a Hearings Officer be appointment in this matter.

Chairman Kihune: Thank you Mr. Goodin.

Mr. Caleb Rowe: Good afternoon. I'm Deputy Corporation Counsel Caleb Rowe, I'm here in place of Thomas Kolbe who's busy on another matter and I'm representing the Planning Department. Basically I agree with what he said, we did send in that letter saying that we were in agreement with it. We've also come into an agreement as to who we would prefer that Hearings Officer to be. Obviously that's up to you guys whether you agree to that or not. But we do think it's most expedient to be put before a Hearings Officer.

Chairman Kihune: Thank you Mr. Rowe. Members, any questions? Do I have a motion?

Mrs. Juanita Reyher-Colon: I make a motion to appoint a Hearings Officer and consider Retired Judge McConnell as the officer in this case.

Mr. Chad Fukunaga: I second that.

Chairman Kihune: Any discussion? All those in favor say "Aye."

Members: "Aye."

Chairman Kihune: Any "Nays?"

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

**VOTED: To appoint and consider retired Judge McConnell as Hearings Officer.**

**(Assenting: R. Sung, C. Fukunaga, W. Greig, J.Reyher-Colon, R. Masuda, J. Borge)**

**(Absent: M. Kincaid Jr., W. Kamai)**

Chairman Kihune: **Motion passed.**

Vice-Chairman Sung: So now does it have to be considered?

Chairman Kihune: No, it was actually all said in one motion.

Vice-Chairman Sung: ...inaudible... she said "to appoint and then consider..."

Chairman Kihune: Oh that's right, she used the word "consider" sorry, my fault. So the next motion that needs be made on is to appoint Judge McConnell as the Hearings Officer. We're going to need a motion on that.

Mrs. Reyher-Colon: I'll make that motion.

Chairman Kihune: Can you state it for us Juanita?

Mrs. Reyher-Colon: Motion is to appoint Retired Judge McConnell as the Hearings Officer.

Mr. Fukunaga: I second.

Chairman Kihune: Any discussion? None seen. Everyone in favor say "Aye."

Members: "Aye."

Chairman Kihune: Any "Nays?"

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

**VOTED: To appoint retired Judge McConnell as Hearings Officer.**

**(Assenting: R. Sung, C. Fukunaga, W. Greig, J.Reyher-Colon, R. Masuda, J. Borge)**

**(Absent: M. Kincaid Jr., W. Kamai)**

Chairman Kihune: **Motion passed.** John?

Mr. John Rapacz: Thank you Mr. Chair. So the Item H1c. is listed as pre-hearing conference and so given that the Board has appointed a Hearing Officer I think that it's

best for us to work through the contract process and get in touch with the Hearing Officer and the parties and set up a pre-hearing conference that way.

Chairman Kihune: Ok. So, I'm going to make a motion to that- -Oh, I'm not going to make that motion but I'm going to request that someone does- - Don't need to?

Mr. Rapacz: I don't think so.

Chairman Kihune: Ok. We're good. Thank you very much, I appreciate your time and I'm sorry for the delay.

Mr. Goodin: You're welcome.

H. APPEALS (NON-PUBLIC HEARING ITEMS) ... *(Continued)*...

2. **Kristin Holmes** appealing the Planning Director's non-renewal of a Short-Term Rental Home permit (STKM 2013/0015) for property located at 1627 South Alaniu Place, Kihei, Maui, Hawaii; TMK: (2) 3-9-011:046 (BVAA 2017/0001) (A. Cabais)
  - a. The Board will consider the possible appointment of a Hearing Officer to preside over the above Appeal.
  - b. Pre-hearing conference.

Chairman Kihune: Alright, the next item, item number two.

Mrs. Avelina Cabais: *Reads item into record.*

Chairman Kihune: Mrs. Holmes is your attorney or representative here?

Mrs. Kristin Holmes: Yes.

Chairman Kihune: Oh, perfect. Oh Jack. Hi Jack how are you?

Mr. Jack Naiditch: Good thanks how are you?

Chairman Kihune: Good Mr. Naiditch. Would you like to make a presentation for us at this point? Or any comments?

Mr. Naiditch: We have comments.

Chairman Kihune: Ok, great. When you're ready.

Mrs. Holmes: Good afternoon Members of the Board, Chairman, Members of the Department and Corporation Counsel. My name is Kristin Holmes and I'm the applicant in this appeal accompanied by my attorney Jack Naiditch.

Today we would like to resolve this issue here and now and we think that with the information that we present we should be able to do that. I'd like to give you a very brief background on the property to sort of orient you into our situation.

We are a multi-generation Maui family with roots going back to the 1880's. With my siblings we purchased this property centrally located for other family members living in Washington State and Australia and we soon determined that families wasn't going to be as high as anticipated. This is a really beautiful plantation home built in the 1920's and it was the home of the Railroad Manager for the Kahului Railroad and moved to the property in the 1960's. I have pictures of the home and I'd love to share them with you if I could just pass them around so you can get a sense of the property, there's two sets.

Ms. Richelle Thomson: Just for clarification, so we're not- -we didn't notice the hearing today, so right now we're not- -I don't believe we're ready to get into the full meet of the hearing. Is that correct? We're just introducing the topic?

Mr. Naiditch: ...*inaudible*... We don't plan to provide - -to bring testimony to you. We want to make some comments about the process that got us here today. I think after you hear our comments everybody will be satisfied and I think this particular matter will be resolved today.

So we want the opportunity to make these comments if that's possible.

Ms. Thomson: Just for clarification, the Board today is prepared to consider appointment of a Hearings Officer, either the Board will appoint itself in mass as the Hearings Officer, or a few of the members or if the matter is complex and we feel like it may be the type that requires an outside Hearings Officer then they may consider that. So if the parties have any opinions on the Hearings Officer that's really what we're here today. As far as scheduling the hearing, we would do that with 15 days' notice to the parties if the Board is going to be the Hearings Officer.

Mr. Naiditch: We don't have any opinion as to a Hearings Officer. So whether this Board should be the Hearings Officer or whether a Hearings Officer should be appointed to ...*inaudible*... in fact, that's really not our focus today. We really just want to make some comments that could possibly satisfy- -we just want to make some short comments if we could indulge you and then this matter would be resolved today.

Chairman Kihune: We cannot resolve that matter today Mr. Naiditch, we're here for a Hearings Officer to appoint one if we decide to move in that direction.

Mr. Naiditch: Ok well you had asked if we wanted to make some comments.

Chairman Kihune: Yeah, I'll give you a couple minutes, make a couple comments if you want, that would be great because we have some Board members that may not have been- -because we got a couple new Board members so that would be great.

Mrs. Holmes: Well what I want to address is my experience in this process and how that has affected what ultimately would be part of the decision that your group would make whether or not there should be a hearing or not- -

Ms. Thomson: The process is that this is really a pre-hearing conference and really all we're going to decide to do today is if the Board feels that this matter may be resolved fairly expeditiously that we don't need to send it out for an outside Hearings Officer or if it sounds like it's complex enough that we should appoint just a few of the members. So that's really what we need to hear from the parties is a brief explanation and any opinions on the topic.

Mr. Naiditch: Ok, so let me give you the comments in brief ok.

Chairman Kihune: Please.

Mr. Naiditch: My client was issued a Short-Term Rental Permit in 2013 and then received a two year extension. She came in for the further five year or one year extension, came in for the further five year extension in May of 2016. She had received a notice of one violation about the use of one of the parts of the property of the secondary dwelling, she corrected that immediately. Other than that she never got any complaints from the County about anything that was happening on the property. She filed her renewal application in May in November--in late October she received a letter from Mr. Spence deciding not to renew the application based on the violations that you see in our appeal.

She waited six months and during that time she has a short-term rental house, she's out there renting. She had \$50,000 of deposits at a booking, she was given a month to file an appeal and she immediately stopped her booking but she was hopeful that we could get here today much quicker than four in a half months. She filed her appeal, we had several meetings at the office in the Zoning Department about how do we expedite this. There was no real good answer forth coming.

Then what happened was in mid-June- -we got an extension from the Director that we could continue to use the property for short-term vacation rental up through the end of January. By mid-January we weren't getting any information about when we would be in front of you folks. So she decided to pull the plug, killed her business, canceled all the future reservations to the point where she's never going to do this again and in fact put the property up for sale.

Meanwhile, we finally got a response from the Planning Department that they had looked at our application and they found some defects. We quickly corrected those defects in early February and it still took two months to get in front of you folks for a hearing.

This process is heavily unfair to someone who has an existing permit that's not being renewed. It's one thing if you're going for a new permit and you're not engaged in a business; it's another thing to be -any of you to be engaged in your business and told you had to stop operating until there was a judiciary hearing. It's a form of an injunction against your business where you don't have any right to have a quick hearing.

Now, were not putting the blame on you folks, were putting the blame on the process. Why does it take- I have a copy of the Appeal Application here, there are seven boxes that you have to check, why does it- - and the Planning Department or the Zoning Enforcement, which ever division is looking at these things, is not supposed to be looking at the substance of what we're arguing, they're just supposed to see if the application is complete. Why does it take two months for someone to go through the application with seven boxes to see if it's complete? I mean I can go through this in an hour and say, "well, they didn't complete this, they didn't complete this...call them and let them know". None of that happened. We waited until it was far too late to stay in business, to get an indication whether even our application was complete. I can get in front of a federal judge in Oahu on a multi-million dollar civil lawsuit faster than four in a half months.

So, you have a situation here and I'm not talking about other permits that the Planning Department or the Public Works which come to your Board- -because you get to see all sorts of appeals on different denials or ramifications. But this is a special situation, you have an existing business and they were told essentially that you got to shut down; and I was told by the Planning Department that you don't have to shut down, you just pay a \$1,000.00 fine a day and if you win we won't collect on the fine. That's a *...inaudible...* choice, that's just no choice at all.

So, we're not here to continue this appeal.

Chairman Kihune: Ok.

Mr. Naiditch: We are dropping the appeal. No need to hire-spend the money to go further. She sold the property, she doesn't ever want to come back to the Planning Department and ask for another permit; because this whole experience has been so difficult and painful for her. And I'm pleading with John and Will, you guys have to have a different procedure to process this kind of situation. You can't let someone hang out there for four and a half months, expect them to pay \$30,000.00 a month in fines on the hopes that they win. You have to have a quicker procedure and in this case, your process failed. And I still don't understand why it took someone two month to see whether these seven items were checked off. It just boggles my mind. Now if the Planning Department is too busy or they're understaffed, we're tax payers, get some more staff. It's not our issue, it's your issue. And that's what was explained to me, "we don't have the staffing to do this", well,

then don't issue us a denial, extend our permit until we have a chance to be in front of this body to have our day in court. But we weren't given that and that's really what we came to tell you is that the process is stacked against us.

For someone in her position who has an existing permit which gets revoked or her renewal gets denied. Again, May to November for them to decide whether to deny her renewal and then November till today to get in front of this Board. That's almost a year. This is a ...*inaudible*...process.

Chairman Kihune: Well, your comments are very well taken I'm sure by everyone here. Mr. Naiditch I appreciate it, we appreciate you being here. It's unfortunate that Mrs. Holmes is going to withdraw her appeal, but since she's already sold the property is that correct? Is that what you said?

Mrs. Holmes: I was forced to. I would have not have sold it, was it not for this situation but because bookings are done frequently a year in advance, if I was not allowed to take any bookings after November or October 21st, then I'm dead for the next year; and it takes months to rebuild a business. So not only did we lose \$50,000.00 in solid bookings for the high season, we lost the future. So we didn't really have any choice or we couldn't even decide if we should do a long term rental because we didn't know how long this process could take. So, every way we turned we were stuck, so we were first to make a decision.

I passed the pictures because I'm emotional about this property, I take great pride in owning a historic home, I'm an interior designer, we've put a lot of money, we've put a lot of love and care into it. The guests that we had loved staying there, there's not very many people where you can accommodate 12 people so it was a perfect place for family reunions and everybody that stayed there was thanking us because they didn't have five people in one condo and five people in another hotel. So the island lost an asset that was something that we took a lot of pride in.

It hurts my heart, it's been a very emotional process and going back to people and having to say "the county shut us down, I don't have a right to a hearing, I'm sorry you have to go find a place and I know your booking is in two weeks and it's February, which is impossible and you've got 12 people in your group, I was sick about it.

Mr. Naiditch: When Mrs. Holmes says she doesn't have a right to a hearing, she does have a right, but it's an ...*inaudible*...right you can't have a hearing for four and a half months after you're given a notice to cease and dissed or pay a \$1,000.00 a day. Who in this room who has a business would continue? What would you folks do? I assuming everyone here has or was in business, how would you feel?

Chairman Kihune: Again, like I mentioned Mr. Naiditch and Mrs. Holmes, thank you very much and we appreciate your comments and again I'm pretty sure everyone in this room understands where you're coming from and hopefully- -

Mr. Naiditch: We just wanted our short moment in court and we appreciate your indulgences to hear this.

Chairman Kihune: Ok. So, at this point again, you are- -

Mr. Naiditch: Dropping the appeal.

Chairman Kihune: Yes, dropping the appeal. Correct. Ok. Thank you very much. Have a Happy Easter.

Mr. Naiditch: Thank you.

B. PUBLIC TESTIMONY - At the discretion of the Chair, public testimony may also be taken when each agenda item is discussed, except for contested cases under Chapter 91, HRS. Individuals who cannot be present when the agenda item is discussed may testify at the beginning of the meeting instead and will not be allowed to testify again when the agenda item is discussed unless new or additional information will be offered. Maximum time limits of at least three minutes may be established by the Board. More information on oral and written testimony can be found below.

Chairman Kihune: Alright we can get to introduction of our new members. Sorry any public testimony? Seeing none...we're good to go. Oh, wait Will wants to say something.

Mr. William Spence: Hi my name is William Spence, Department of Planning, Planning Director. I just wanted to come down to welcome to new members and say "Hi." I know I don't get down here very often but maybe you'll see more often. You're in very good hands so I'm not too worried about that. We've got a few different Boards and Commissions so we get busy and I don't get to see everyone as much as I'd like to and get to know everyone like I'd like to. But, welcome new members, and Bill Kamai I know you. Thank you.

Chairman Kihune: Thank you Mr. Spence. Have a great weekend. Happy Easter.

Mr. Spence: And everyone else here too. Thank you.

C. INTRODUCTION OF NEW MEMBERS

1. Jeffrey Borge
2. William Kamai

Chairman Kihune: Ok, now we can get to the introduction of our new members. I will say that I know Mr. Kamai and he's not here today unfortunately but I know we'll see him in the future. I'd like to welcome him on board.

Jeffrey Borge is also our newest member to our Board and I'd like to welcome him on Board. Maybe you could go ahead and say a few things about yourself that we could grasp on to.

Mr. Jeffrey Borge: I'm born and raised on Maui, living in Kahului and self-employed. Hopefully I can learn some new tricks from here and see what happens I guess.

Chairman Kihune: Thank you. Welcome on board.

Mr. Borge: Thank you.

#### **D. ELECTION OF OFFICERS FOR 2017-2018 COMMISSION YEAR**

- 1. Chairperson**
- 2. Vice-Chairperson**

Chairman Kihune: We're going to move on to the election of our officers for 2017 and 2018. Election of our Chairperson and our Vice-Chair. The floor is open for nominations on those two positions.

Vice-Chairman Sung: Mr. Chair, I nominate Mr. Howard Kihune Jr. to serve as Chairperson for the 2017-2018 Commission year.

Mrs. Reyher-Colon: I second that.

Chairman Kihune: I'm willing to. Second. Any discussion? All those in favor say "Aye."

Members: "Aye."

Chairman Kihune: Any "Nays?" Ok. I guess I'm the Chairman.

It was moved by Vice-Chairman Sung, seconded by Mrs. Reyher-Colon then

**VOTED: To nominate and elect Mr. Howard Kihune Jr. as Chairman  
for 2017-2018 Commission year.**

**(Assenting: R. Sung, C. Fukunaga, W. Greig, J.Reyher-Colon, R.  
Masuda, J. Borge)**

**(Absent: M. Kincaid Jr., W. Kamai)**

Chairman Kihune: **Nomination passed.**

Chairman Kihune: For Vice-Chair, any nominations?

Mr. Fukunaga: I'll make a nomination. I nominate Raymond Sung for Vice-Chair.

Mr. Willy Greig: Second.

Chairman Kihune: Any discussion? All those in favor?

Members: "Aye."

Chairman Kihune: Any "Nays?" Seeing none. Welcome Mr. Vice-Chair Raymond Sung.

Vice-Chairman Sung: I accept. Thank you

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

**VOTED: To nominate Mr. Raymond Sung as Vice-Chairman for 2017-2018 Commission year.**

**(Assenting: C. Fukunaga, W. Greig, J.Reyher-Colon, R. Masuda, J. Borge)**

**(Absent: M. Kincaid Jr., W. Kamai)**

Chairman Kihune: **Nomination passed.**

#### **E. ORIENTATION**

- 1. Policy Against Discrimination (J. Takakura)**
- 2. Role of the Board (D.Dias)**
- 3. Variances (D. Dias)**
- 4. Appeals (D. Dias)**
- 5. Rules of Practice and Procedure for the Board of Variances and Appeals (R. Thomson)**
- 6. Ethics (R. Thomson)**
- 7. Sunshine Law (R. Thomson)**
- 8. Maui County Charter (R. Thomson)**
- 9. Chapter 91, Hawaii Revised Statutes (HRS), Administrative Procedure, (R. Thomson)**
- 10. Chapter 92, HRS ,Public Agency Meetings and Records, (R. Thomson)**

Chairman Kihune: Alright we're going to have an orientation presentation, which will probably take us about 45 minutes to an hour.

Ms. Jacky Takakura: Good afternoon everyone. My name's Jacky Takakura and I'm the Administrative Officer for the Department of Planning. I've been with the County for about 19 years and I work in the Human Resources and all kinds of other stuff.

A lot of this orientation is about how to deal with permits and rules and interpretation. My presentation is how to work with the people who are bringing this to you and these policies that we have with the County of Maui they apply to allow of us here in the room, the employees, the Board and Commission Members, Corporation Counsel and also the public as they deal with us and that's why it's important for all of you to understand the policies. Particularly the policy against discrimination.

I also gave you the Violence in the Workplace Action Plan so that you are aware of the procedures that the County follows in case any of those types of incidents should occur.

First, I'm just going to try and go over this discrimination policy really quickly and if you have any questions please just go ahead and ask.

The policy itself is simple. Officers and employees of the County must not discriminate against or engage in the harassment or retaliation of another employee, the public, or individual under consideration for County employment. The policy applies to Board and Commission Members. Like I said, if you look at the policy itself, it clarifies, on the second page, the third paragraph.... As officers or agents of the County, Members of the County Board and Commissions are also covered by the policy and the policy prohibits discrimination in any form including verbal, written and physical harassment.

What we define as discrimination or decisions that are made because of an individual's race, sex, pregnancy or sexual orientation age etc. those are all those protected classes and a whole list of them are in the policy itself. There's quite a few, it's all in there.

These discriminations can be on equal terms, they could be harassment, they could be retaliation, they could be saying yes to one and no to another based on some protected class and even historically we've all seen this happen before where wages were based on your race or people were hired because of certain qualities. That's all illegal now. Just some examples that are certainly prohibited.

Harassment also is prohibited and the definition of harassment is in here in the policy. Verbal harassment could be the things that you say, derogatory comments, negative stereotyping, things that someone might think is a funny joke but it's actually kind of insulting are harassing. Physical harassment, inappropriate touching. Visual forms of harassment could be posters of cartoons or things that are inappropriate.

Discrimination - -gender based discrimination could be certain things that are allowed for men and not for women for example or sexual harassment. Pregnancy and breastfeeding are also considered sexual harassment or in this category because only women can get pregnant or breastfeeding.

Sexual harassment that's certainly advances that are unwelcomed. Request for favors and other things that are unwelcomed and such things that are used as the basis for employment or other kinds of decisions.

What we say here is that someone could ask someone out once and that person says "no", that's not harassment. But when it's severe or pervasive and they keep asking and asking that creates a hostile work environment that is certainly harassment. And when you look at that and ask is it harassment or not, it's what we consider the reasonable victim's standards, the victim's perspective. Even if the person didn't intend to be harassing, it's from the victim's point-of-view, was it or not.

Like I mentioned pregnancy, it could be considered discriminatory because only women can get pregnant. We've had situations of where we hire a new hire and they go on leave for having a baby, and that's fine, they can take leave without pay and it doesn't come back as discrimination.

Disability discrimination- it's illegal to discriminate against an employee or applicant who has a disability. The important thing is that they can perform the duties of the position. And sometimes a person may appear to have a disability but they may not or they may have a disability and you don't even know it. When we consider that-the person, can they do the essential functions of the job and also does the disability affect a major life activity, with or without an accommodation.

So it's important to not make assumptions because a lot of times, you can't see that disability. And a lot of times also, a reasonable accommodations can actually help that person and they can do the job without any problems.

The Religion discrimination- no unequal terms or conditions, no harassment, we must provide reasonable accommodations for religious practices.

When a situation comes up that could possibly be illegal discrimination. These are usually the questions that are asked. Is that person a member of a protected class? Is it the race, or the gender or the orientation or the age? Was there an adverse activity? Where they denied something that someone else got? Did that adverse action because of that protected class? Was it because of their gender or their race or their age or whatever it was? And was there some other reason? Was there a legally valid defense to what happened?

Usually upon investigation, if the answers are yes to the first three and no to the fourth, then it probably was something that wasn't legal. If someone makes a complaint about this then we would investigate. When I get a complaint, the first's thing I do is I pull out my policy and I do an investigation. Usually interviewing the complainant, witnesses and the accused.

Certain things we do consult with Corporation Counsel and Personnel Services if we need to and we try to see how can we can correct and also prevent this from happening.

If you feel you have been subjected to illegal discrimination, you want to report immediately within a 180 days. You can go to the Commission Chair, you can go to EEO Officer, his name is Ralph Thomas, you could go to Will Spence or Michele McLean, you could also go to Corporation Counsel who's been in the meetings with you and we can certainly meet and decide what action to take.

In certain situations some people go directly to the US EEO or the Civil Rights Commission and in those cases we certainly cooperate with them and provide them all the information they request so that we can get to a decision whether or not something actually occurred.

If someone makes a complaint, we keep that as confidential as possible. When I do investigations I do tell them that I can't keep things absolutely confidential because if an employment files a grievance or something, but we do keep in confidential to the fullest extent possible.

If someone makes a complaint I do tell everyone that retaliating is prohibited. And if someone feels that they are being retaliate on because of a complaint that they have made that needs to be reported as soon as possible because we will investigate that too.

Just as a note, all County facilities, well we can't discriminate against person to use any of the County facilities like the Sakamoto pool in that picture. That's why you always see on the agendas, if anybody needs accommodations they can let us know and we can certainly provide that.

Just so you know all of us as employees of the County, we get these reminders every single year, the Policy of Discrimination, The Violence in the Workplace Action Plan and also there's a Drug Free Workplace Policy that we send out every single year and every employee has to sign it that they've read it.

So if anything ever happens in one of these minutes where you're at with an applicant or something, something discriminatory or even something that might fall into the category of the Violence in a Workplace Action Plan, you're going to want to report that immediately so that we can take action. If anything happens that you feel that you would need to call 911, you're certainly welcome to do that too. There's nothing stopping you from calling 911, but we would also investigate administratively on our side too.

Any questions?

Vice-Chair Sung: Yes, I have two questions. The first one is the Policy of the County of Maui coextensive with the Federal and State Laws or does it even go beyond what the Federal and State Laws provide in some extent?

Ms. Takakura: I'm not sure if you know that one?

Ms. Thomson: I don't that answer off the top of my head.

Ms. Takakura: What we normally is that we would do an investigation internally following the County procedures. But, employees- -well in my experience- - employees have gone to the EEOC which automatically goes to the Civil Rights Commission I believe and then in those situations, we always have Corporation Counsel involved and we work with those two. Usually I'm ending up turning over my internal investigations to them and then they can make their decisions.

Vice-Chair Sung: And then the second question. Just to clarify, so the policy is meant to protect . . . even with respect to I guess members of the public that interact with County Employees or agents in the course of their official use--for example. . . members of the public who attend these hearings or BVA meetings.

Ms. Takakura: Yes, right. Because you could have it going both ways where say someone from the public says that could be discriminatory. I've had situations in another place, in another department where we've let them know that- that is not acceptable behavior towards employees and likewise we as employees certainly cannot treat our applicants in a discriminatory manner; ya know like deny something because of their race or etc.

Vice-Chair Sung: Ok. Thank you.

Ms. Takakura: You have these all on file, hopefully you don't need them but if you do, we do have the policy in place and these are certainly the things that we follow. Thank you.

Chairman Kihune: Thank you. It was shorter than I expected.

Mr. Danny Dias: Good afternoon. My name is Danny Dias, I am the new Planning Supervisor for the Zoning Division. Basically, Carolyn Cortez as you folks remember she went to the Planning Implementation Division in our Department so I'm taking her place. Just a quick one about me. I've been in the Department for 12 years now working in our Current Division. Most of my experience is with the various Boards and Commissions like Planning Commission, County Council, State Land Use Commission etc. so, with that I have a short presentation. Just a general overview of your roles and responsibilities, the process that you folks will go through. A little disclaimer, this isn't meant to be an all-inclusive detailed presentation, it's just enough so that our new member here can have a good idea of what to expect for the next few years.

The authority that this Board gets is from the Maui County Charter section 8.7. I'm going to read this verbatim. . . Tasks includes: 1) Hear and determine applications for variances from the strict application of any zoning, subdivision or building ordinances. 2) Hear and determine appeals alleging error from any person aggrieved by a decision or order of any

department charged with the enforcement of zoning, subdivision, and building ordinances. 3) Hear and determine all other matters which the board may be required to pass on pursuant to ordinances. . . .This is not really something I think you folks deal with a lot and. . . . 4) Adopt rules of procedure for the conduct of the board's business. . . this board already has rules of practice and procedures so you may amend those rules perhaps but that's pretty rare also. So, mostly your tasks include 1 and 2, Hear and Determine variances and appeals.

Duties of the Board. The Board's primary duty is similar to that of a Judge. Duties include: Review variance and appeal applications; Review of the Planning Director's report on the application. . whenever an item comes before you , the Director will provide a report that sort of summarizes all the information that you need, the various codes and involves the variance or appeal and we'll provide that to you before the meeting as sort of a cheat sheet if you will; Hear and review the evidence presented (application, items that are submitted, testimony, etc...); Determine whether the proposed variance or appeal meets the criteria required for that particular case; Identify facts and state why the criteria was met or not and also you'll be making a decision.

Variances and Appeals, very basic: What are they? Variance definition according to Webster's Dictionary-A license to do some act contrary to the usual rule. So, if you take something like the zoning code, you have setback requirements in the residential district- it says six feet side yard setback for a single-story house and for some reason you want to do something different, you would then have to ask for variance. Appeal: A proceeding by which a case is brought before the Board to review a decision made by a director or department.

Let's talk about variances in a little more detail. Applicant's may seek variances from the Maui County Code for: 1) Zoning (Title 19): Interim Zoning Provisions, Comprehensive Zoning Ordinance, and Flood Hazard Areas; and that's what the Planning Department administers is the Zoning Code. 2) Subdivisions (Title 18). 3) Building (Title 16). 4) Streets, Sidewalks, and Public Places (Title 12). Each of these titles state the specific criteria that the Board must find in order to grant a variance.

Just to kind of elaborate on that, I'm going to focus on Title 19. Title 19 has three criteria and I'll bring them all up. Three criteria that an applicant must meet to get a variance from Title 19. These are our setback example, the criteria is that 1) There is (a) an exceptional unique, or unusual physical or geographical condition existing on the subject property (b) which is not generally prevalent in the neighborhood or surrounding area and (c) the use sought to be authorized by the variance will not alter the essential character of the neighborhood. 2) Strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property; 3) and that the conditions creating a hardship were not the result of previous actions by the applicant. All criteria must be met in order to grant a variance.

If you look at this in more detail with my setback example, let's say for example you have a residential area, everybody builds their house so that their side yard is at least six feet and then you have somebody that has a three foot setback come in because their neighbor reports it and makes a complaint and then now they're seeking a variance. When it comes before you, you have to make sure that there's an exceptional, unique or unusual physical or geographic condition, so if it's a bunch of lots that are all similar then they probably don't meet that criteria, something that's not generally prevalent in the neighborhood or surrounding area. So there has to be something really unique about that property. Number two, strict compliance will be applicable provision would prevent reasonable use of the subject property. So if they were to follow the code, will they now not be able to reasonably use their property. And number three, did they cause the hardship themselves? Did they perhaps not get a building permit and maybe that's why it was not properly measured or etc. They have to meet all of these criteria to get a variance from Title 19.

So that's pretty strict criteria and it's a pretty high standard to meet. It's very rare that somebody can justify. Going back to number three just to elaborate. That the conditions creating a hardship were not the result of previous actions by the applicant. That also includes if you buy a property that already has its issues, so a lot of times people will say, "Well I bought the property like this"; we hear that all the time. Well, if you buy the property like that you sort of take on all the issues.

Vice-Chair Sung: Danny?

Mr. Dias: Yes?

Vice-Chair Sung: So to clarify, you're saying that if a homeowner is a relatively recent homeowner because he or she bought the property from the seller and even if during this time when the homeowner is trying to seek a variance it was due to actions by the seller and not him or her - -the seller's actions count against this current homeowner for purposes like criteria number three? Is that what you're saying? Well, it could count against him?

Mr. Dias: It could and part of you buying a house, part of the process is you doing your due diligence, there's a number of inspections that occur etc. and so -

Vice-Chair Sung: But no exceptions made for example if the homeowner purchased the property as is? Or gets a quick claimed deed?

Ms. Thomson: I could probably take a stab at that one. Danny's correct. For the purposes of the variances, they step in to the shoes of the owner- -

Vice-Chair Sung: Right.

Ms. Thomson: Regardless of how they required title. They might have a private right of action against that previous owner if some defect wasn't disclosed in their sales process. But it would be outside of what we can do here.

Vice-Chair Sung: Ok. Thank you.

Mr. Dias: Ok. So procedures for a variance. Variance Procedures: The Planning Director will provide the Board with a report that provides background information, presents the Applicant's position on how they meet the requirements for a variance and the Director's analysis on whether the variance meets each of the criteria. In most cases, the Director will also make a recommendation to the Board.

At the meeting itself the Board may ask questions of the Applicant and Department to assist with its decision making. The Board will then discuss the matter. Identify and state the facts it is relying on to determine whether the variance meets each of the criteria, then vote on a decision. All these meetings are recorded. The Board has 60 days from the closing of the Public Hearing to make a decision.

The Department will prepare a Findings of Fact, Conclusion of Law, Decision and Order that reflects the Board's decision. The Board will review it, and either approve or revise it. If the Applicant disagrees with the Board's decision, the Applicant can appeal it to the Hawaii Second Circuit Court (Maui). So it's important that the Board identifies the facts that you're relying on so if it does get appealed and it does go to court, it's clear why you made the decision that you made.

That's variances in a nutshell. We'll look at appeals real quick.

Appeals: Persons who have sought and received a decision by a Department Director for the following code titles, and who disagree with the Director's decision, may generally appeal the decision to the BVA. You folks dealt with that right at the beginning of the meeting. Same with variances, you can submit an Appeal for the following: 1) Zoning (Title 19): Interim Zoning Provisions, Comprehensive Zoning Ordinance, and Flood Hazard Areas. 2) Subdivision (Title 18). 3) Building (Title 16). 4) Street, Sidewalks, and Public Places (Title 12). Each of these titles state specific deadlines by which an appeal must be filed. Generally it's either 15 or 30 days after the decision is made or you get that letter from the Director-you have to file your appeal.

Criteria for Appeals: The Board shall hear and grant an appeal if the Board finds one of the following- - so unlike the variance in Title 19 where all three of the criteria have been met, in this case just one of these have to be met. And the three criteria is: 1) that the subject decision or order was based on clearly erroneous finding of material fact or erroneous application of the law or; 2) That the subject decision or order was arbitrary or capricious in its application or; 3) That the subject decision or order was clearly unwarranted abuse of discretion.

So although it only needs to meet one of these criteria, it's still pretty stringent. Basically the Director in layman's terms have to really screw up or make a really bad decision and the applicant has to prove that. Often times, people want to appeal because they disagree with the Director or they don't like the decisions but, that doesn't mean that it was clearly erroneous or arbitrary or abusive.

This is the last slide here. Procedures for an appeal and this is much abbreviated because appeals and the process can be a little more complex. But just in general: For appeals not involving a violation, there is a more formal trial-like hearing, called a Contested Case Hearing in our rules and the Board may appoint a 'Hearing Officer" who will conduct the hearing and provide the Board with a report and recommendation. Ultimately the Board will make the final decision after reviewing submittals, identifying pertinent facts, applying the law, discussing the matter, and voting on a decision.

The Department will prepare Findings of Facts, Conclusions of Law and Decision and Order for the Board's approval and signature. If the applicant disagrees with the decision, he/she may appeal it to the Hawaii Second Circuit Court (Maui). For appeal of violations of the applicable Titles, there is an abbreviated hearing procedure governed by Subchapter 10 of the Rules or Practice and Procedure for the BVA.

It's important to know that you don't need to necessarily memorize all of this. When we do have items before you, we'll have a report, all the details will be there. So this is just a broad idea of what you can expect in the upcoming months and years. That's it. Thank you.

Chairman Kihune: Thank you.

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

- 1. Having voted on October 8, 2015, to approve the variance for United Auto Parts (BU 877279) (BVAV 2015/0015), the Board will consider and may adopt the draft Findings of Fact, Conclusions of Law and Decision and Order.**

Chairman Kihune: Ok do we have a motion to adopt the D&O?

Mrs. Reyher-Colon: I make a motion to adopt the D&O.

Mr. Fukunaga: Second.

Chairman Kihune: Any discussion? All in favor say "Aye".

Members: "Aye."

Chairman Kihune: Any “nays”? Seeing none.

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

**VOTED: Motion to accept the Findings of Fact, Conclusion of Law,  
Decision and Order (BVAV 2015/0015)**

**(Assenting: C. Fukunaga, W. Greig, J.Reyher-Colon, R. Masuda,  
J. Borge)**

**(Absent: M. Kincaid Jr., W. Kamai)**

Chairman Kihune: **Motion passed.**

**I. NEXT MEETING DATE: APRIL 27, 2017**

Chairman Kihune: Next meeting on April 27, 2017. Ok. Thank you very much for your help.

**J. ADJOURNMENT**

Chairman Kihune: Meeting’s adjourned.

There being no further to come before the Board, the meeting adjourned at 3:48 p.m.

Respectfully submitted by,

*Chalsey Kwon*

CHALSEY R. K. KWON

Secretary to Boards & Commission II

**RECORD OF ATTENDANCE**

**Members Present:**

Howard S. K. Kihune, Chairman  
Raymond Sung, Vice Chairman  
Chad Fukunaga  
William Greig  
Juanita Reyher-Colon  
Ralph Masuda  
Jeffrey Borge

**Excused:**

Max Kincaid Jr.

William Kamai

**Others:**

John Rapacz; Planning Program Administrator, Department of Planning

Danny Dias; Supervising Planner

Paul Critchlow, Staff Planner

Avelina Cabais, Staff Planner

Jared Burkett, Staff Planner

Chalsey Kwon, Secretary to Boards & Commission II, Department of Planning

Summer Enfield-Carlos, Secretary to Zoning Division

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