BOARD OF VARIANCES AND APPEALS
SPECIAL MEETING
SEPTEMBER 20, 2007

A. CALL TO ORDER

The meeting of the Board of Variances and Appeals (Board) was called to order by Vice-Chairman Warren at approximately, 1:30 p.m., Thursday, September 20, 2007, at the Planning Department's Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Hawaii.

A quorum of the Board was present. (See Record of Attendance.)

Vice-Chairman Warren Shibuya: Testimony will be taken at the start of the meeting on any agenda item in order to accommodate individuals who cannot be present when the agenda item is considered by the BVA. There is a signup sheet here. Are there others that need to sign up to testify, and/or would let me know if they have to leave, and they would like to speak first at this time, or would you like to speak at the time of the agenda item? Hearing that there are none, then we'll continue with the Board agenda.

The agenda items that we have today, I would like to – Members of the Board, I'd like to start off with first, the appeal in which the Ritz Carlton Kapalua is asking for an appeal for the Director of Parks and Recreation decision. And this is a contested case, and I feel that we could probably hear this first, and then go into the rules on the amendments to Chapter 801, and then go on into the Unfinished Business with Pedro and Luz Alonzo. Are there any objections to that order that I've just mentioned, Members? No? That's fine? Thank you.

C. APPEAL

1. **To determine a hearings' officer to preside over the following matter:**

   Martin Luna, Esq., of Carlsmith Ball, LLP representing W2005 Kapalua/Gengate Hotel Realty, LLC appealing the Director of Parks and Recreation's decision to apply the park dedication requirements of Maui County Code, §18.16.320 for the Ritz Carlton renovations located at 1 Ritz Carlton Drive, Kapalua, Maui, Hawai'i; TMK: (2) 4-2-004:014, 015 & 021. (BVAA 20070006)

Vice-Chairman Shibuya: So let's start off with the representatives for this Parks and Recreation decision application, the appeal. Could the appellant please describe their case?

Mr. Blaine Kobayashi: Good afternoon, Chair Shibuya, and Members of the Board. My name is Blaine Kobayashi. I represent the appellant petitioner in this case. We filed an appeal of the Parks Director's decision.

We're here today to determine who should be the hearings officer to preside over the contested case appeal hearing. We were provided a list of potential hearing officers by the Planning Department. I'm not sure if you have it in front of you, but we – I did discuss basically, our top three selection or preferred hearings officers in this case. And I've spoken with Ms. Lovell prior to today's hearing, and we did come to an agreement as far as the preferred hearings officers. And those individuals are first, Retired Judge John McConnell. Our second choice was Retired Judge Boyd Mossman. And our third choice was local attorney Mark Honda. And again, I have spoken to Ms. Lovell, and she is in agreement with that preferred order of hearings officers.

Vice-Chairman Shibuya: Mr. Kobayashi, I didn't get the last one. Is that--?

Mr. Kobayashi: Mark Honda.

Vice-Chairman Shibuya: Mark Honda. Okay. Thank you. Is that agreeable with Corporate Counsel?

Ms. Jane Lovell: Yes. Good afternoon, Chair, Members of the Commission, and staff. The Department of Corporation Counsel is here today representing the Parks Director. And we agree with both the selected hearings officers and the order of preference.

Vice-Chairman Shibuya: Okay. Thank you very much. Members, are there any comments or questions? If not, then I'd like to hear a motion to accept.

Mr. Stephen Castro, Sr.: So moved.

Ms. Kathleen Acks: I move to -- I'll second.

Vice-Chairman Shibuya: It's been moved by Stephen?

Mr. Castro: Yes.

Vice-Chairman Shibuya: And seconded by Kathleen. Members, this is to allow for the hearings officer: Retired Judge John McConnell as the first choice; also,

the Retired Judge Boyd Mossman; as well as Mr. Mark Honda would be the third choice. Members, all in favor, say aye. Any opposed? None?

It was moved by Mr. Castro, seconded by Ms. Acks, then unanimously

VOTED: To approve the selection of the following as Hearings Officers in the order of preference:

1. **Retired Judge John McConnell**
2. **Retired Judge Boyd Mossman**
3. **Mark Honda**

Vice-Chairman Shibuya: **Let the record be showing that there is a unanimous -- all five members agreeing to this.** And we will agree to this and thank you very much.

Mr. Kobayashi: Thank you.

Ms. Lovell: Thank you for taking us out of order.

Vice-Chairman Shibuya: Thank you.

B. PUBLIC HEARING

1. Review by the Board of Variances and Appeals of proposed amendments to Chapter 801, Rules of Practice and Procedure for the Board of Variances and Appeals. The proposed amendments are anticipated to streamline the processing of appeals from notices of violations of Titles 12, 14, 16, 18, 19, and 20 of the Maui County Code, including but not limited to zoning violations. The Board may take action to adopt the proposed amendments pursuant to Chapter 91, Hawaii Revised Statutes.

Vice-Chairman Shibuya: We'd like to begin the public hearing on this review of the Board of Variances and Appeals of proposed amendments to Chapter 801. First of all, would the Director like to discuss and present his reasons for providing these proposed amendments? But I'd like to let everyone know here that this is not a Board that we hear arguments here. I mean, we will hear the arguments, but we'll not have arguments between the Director and the audience, or the audience and the Board Members. Board Members, you may ask questions of the speaker, whoever the speakers are. And that's the way it'll go. We'll not have – I will not allow for any arguments. I'll just hear the presentations by either person. Clarification, questions, from you Members. Thank you. Mr. Hunt?

Mr. Jeffrey Hunt: Thank you. Good afternoon. The intent of the proposed rules before you to be succinct about it is to streamline the appeal process. And they were drafted by Corporation Counsel, so there are a number of legal issues involved with them. And I'll defer to Corporation Counsel on any legal issues. But again, there's several persistent complaints that we hear in the Planning Department, and one is to enforce the laws, and the other is to streamline processes. And this is what these rules are about.

There's been a lot of fear and misinformation regarding the rule changes. There's been talk about that it would lead to criminal processing or jail time. I just want to remind the Board that that doesn't apply to you at all. You don't have the power to convict someone of a crime. That's a whole court process. So hopefully, we can put that one to rest right away.

There's also been some concerns about the clause in there about advertising. And most people that I've talked to think it's reasonable to assume that if you advertise a business, you're operating a business. But at the same time, I've talked to a number of people who've expressed the concern that, well, there needs to be some way to deal with ads that have a time delay with them, or that have been published, and that are no longer under the control of the individual. So I think that's a legitimate concern. And hopefully, that'll be addressed today.

I think it's important that the rules -- that we all realize that the rules are not about County policy. We're not here today to debate the current TVR situation, or the grading of subdivisions, and building heights, shoreline construction, or any of the hot topic issues: the Super Ferry. The rules are about any violation of the Zoning or Building Code, and that's what the rules are intended to address.

Let me take you, and perhaps for the sake of the audience, through an abbreviated sequence of what happens through the violation process. If an inspector finds there's adequate evidence that someone is not complying with the laws, and this could be a building inspector or a zoning inspector, they can issue a notice of warning to that person. And then they work with that person to give them a reasonable amount of time on options to correct that situation. That's why they give them a warning. After a reasonable amount of time, if they haven't corrected the situation in the inspector's mind, then the inspector gives them a second warning. And then again, there's this reasonable amount of time to get them to correct that situation. They negotiate; they set the deadlines, that kind of thing. Then after a second reasonable amount of time, if they still haven't corrected the situation, then the inspector does have the ability to issue a fine. If that fine – if someone wants to appeal that fine, they appeal it to the Board of Variances and Appeals. That's where this whole rulemaking comes into play.

It's important to realize that again, the rules pertain to any violation including building, grading permit violations, and those are issued by the Department of

Public Works. So it's not just the Planning Department. I've talked to the Department of Public Works, and they fully support the streamlining part of this rulemaking. They're not concerned with the use, the advertising, because they don't deal with that, but they're fully in support of the streamlining part of these rules.

The rules in essence would allow the BVA to hear this appeal of a fine in a manner similar to small claims court. Each side would be allowed to state their case. There'd be a chance for rebuttal. And the legal people can speak to this better than me. But after each side presents their case, and there's a little rebuttal, then the BVA, the Board, would decide the matter right there. So it would be fair, and quick, and simple not just for the citizens, but also for the Planning Department, the Public Works Department, and also Corporation Counsel, and also for the Board of Variances and Appeals. So again, it's intended to be a streamlining process, and it would save the County and taxpayers a lot of money by having a more streamlined process.

So again in summary, the rules are responding to complaints about a lack of enforcement. They're intended to streamline the process for everyone involved. They're intended to save taxpayer dollars. And they're supported by the Public Works Department, the Planning Department, and your Corporation Counsel. So with that, I'll try and answer any questions you have.

Vice-Chairman Shibuya: Members, any questions? Hari?

Mr. Harjinder Ajmani: Yes, Mr. Hunt, was this rulemaking in the process for a while, or how did this come about? And who thought of doing this and when?

Mr. Hunt: It was drafted by the Corporation Counsel months ago. I think Corporation Counsel's going to make a short presentation also. So you might want to ask them.

Mr. Ajmani: Okay. Thank you.

Vice-Chairman Shibuya: Any other questions, Members, for Mr. Hunt? If not, thank you very much, Mr. Hunt.

Mr. Hunt: Thank you.

Vice-Chairman Shibuya: Corporation Counsel, would you like to present your--?

Mr. Michael Hopper: Just briefly, Mr. Chair. Thank you very much. These rules came about as part of a comprehensive overhaul of the County's enforcement procedures which involve not only the BVA, but will involve the Planning Commissions and their SMA enforcement.

The crisis basically came up, and this was recognized in the Zucker Report, which was issued – commissioned by, I believe, the County Council, which was an independent audit of the Planning Department. It showed that enforcing laws especially, zoning laws and SMA laws in many cases, led to these hearing procedures that were simply out of control.

In the case of the BVA, frequently what happens is that the cases are referred to a hearings officer. The case is heard by the hearings officer. Discovery is allowed to the same extent that the – if it's allowed in Hawaii State courts. And when all is said and done, we've been told by the Planning Department that the bill is about $15,000 to $25,000 per case. The cases take about a year in many – over a year in many cases. And that's before you have a resolution. And the Department simply can't continue to enforce in that manner because if every case is going to cost that amount in order to get a decision, it doesn't really matter what the decision is in that case, because even if the County proves the violation, that's a lot of time, effort, and money that could've been better spent elsewhere.

So what these rules would do is it would bring these cases before you, predominantly. Rather than going to a hearings officer, or having a long, prolonged discovery, which is not required by any laws that affect you, it's – discovery is really something that's not required by due process. It's required in State court, but administrative proceedings do not have to have any discovery at all. What it would have is that the hearing would be before you entirely. And the County believes that the Board itself is the one that makes these decisions, so it's the one that should hear these cases, and does believe that you would have the expertise to hear the cases.

So the rules would have a hearing procedure whereby the Planning Department would put on its evidence. The alleged violator would put on their evidence. Again, it would apply to all zoning violations, all building code violations, as well as I believe sign violations. The sections that it would apply to, the appeals from the sections that the violations are issued from are listed in the rules. I think the most important portions of the rules are the – that there would not be anymore discovery permitted because discovery time has just – it eats up resources and just takes forever. And another thing is that the hearings officers won't be around. The Chairperson, with the advice of the Board, will make rulings on evidence whether or not evidence is admissible or not. You're not constrained by the rules of evidence.

And there's also the rebuttable presumption regarding the operation of a business. That is a presumption that's permitted in civil cases. It basically states that if the Planning Department puts on – or Public Works Department puts on evidence of an advertisement for a business that once that evidence is shown, which you will presume that that business is in operation in the absence of

contrary evidence. It shifts the burden once that proof is shown, and would allow any alleged violator to put on whatever evidence they could to show that they were not conducting that business at the time. In addition, the Planning Department would need to show that in the case of a business that the business was somehow tied to the alleged violator that it was either their property, or it was their business they were conducting, as well as to show that that use is not permitted in that area, but again, those apply to only un-permitted businesses and not all types of notices of violation. However, the Department believed that it may bring other presumptions to your attention as rules of evidence in the future as presumptions are generally permitted in civil cases where there's a logical connection between the act, which is in this case an advertisement, and the facts presumed by the act, which is that you would not find advertisement for a business if that business was not in operation. And again, it would allow an alleged violator the full opportunity to introduce contrary evidence to that. And frankly, the Department believes that even in the absence of this presumption, if you were presented with evidence of an advertisement for a business that you would need an explanation for why that is not evidence that the business was operating even in the absence of such a presumption. So we do not believe it's actually a very big leap to have that presumption in the rules. We believe those presumptions are allowed. I believe much will be made of the presumption.

However, in our viewpoint, our main concerns are dealing with the hearings officer, and the discovery, and the streamlining of these cases. Those are our top priorities. And we would urge you to act on these rules today particularly, with those provisions in order to fix this process, which in working with the Planning Department it's really been a burden to them. They would like a decision on these cases more quickly even if that decision is adverse to them. Then they can go on to – the County can go onto enforcing the next alleged violator or the next violation rather than waiting over a year and $15,000 to $25,000 later for each notice of violation they issue. And I can speak more about this after the hearing if you like.

Vice-Chairman Shibuya: Okay. Thank you very much. Members, you have any questions? Kathleen?

Ms. Acks: I do have a question. From reading in the paper, I'm reading that a significant number of people have attempted to apply for permits. And either they've been told that we'll take your application, and it hasn't been processed, or whatever. So I'm really concerned about people who have made an attempt to get a permit, and get into this process, and can't seem to move forward. So is there going to be anything done to streamline that particular part of the process so that people who are making an attempt to run a legitimate business can get the appropriate permit so that they're not going to be in violation?

Mr. Hopper: I'd have to defer to the Department who processes those permits. I can tell you I don't believe that has any bearing on the current rule change today, at least in my opinion, and that the permits are processed by the Department. I'd have to let them respond to that. I don't have any knowledge of any particular delays in any particular permit, so I can't speak to that.

Ms. Acks: Do you read the *Maui News*?

Mr. Hopper: Yes, from time to time, I do read the *Maui News*.

Vice-Chairman Shibuya: Kathleen, you had more comments? No?

Mr. Ajmani: Okay, I have the same question I had for Mr. Hunt. When did this Zucker Report come out? And how long has this thing been in the works?

Mr. Hopper: I believe that we began the rule-processing about at the beginning of the year when I came on Board in January. It was one of the things when I first came on Board with Corporation Counsel that I was told that -- from our attorneys as well as the Department that it was just taking them a very long time to get decisions in this cases, and not just BVA, but particularly, with the SMA cases, special management area cases. It would take many months in order to come to a settlement of cases particularly, involving discovery problems.

Mr. Ajmani: Okay. Thank you.

Vice-Chairman Shibuya: Any other questions, Members?

Ms. Acks: Yeah, I have to follow up.

Vice-Chairman Shibuya: Go ahead.

Ms. Acks: I mean, I really have a hard time understanding how somebody who is legitimately trying to get a permit, and through no fault of their own, but the process isn't clear, or it isn't functioning well that those people are going to be jeopardized. And I think my bigger concern is the people who have made that attempt to do it the right way are the ones that are going to be jeopardized. And those people that are doing things under the table are still going to be Scot free. And that really bothers me that there's not going to be the incentive to apply for the application, to pay the appropriate taxes, to be in the system is going to be ultimately, not supported because the people – that's where you're going to get hung up. That's where you're name is going to be noticed, and you're going to be called to the table. And yet if you do things – you know, I mean, there was the letter, and I don't know whether it would happen, but in Canada, people are going to sit there and do vacation rentals through Canadian sources, which there certainly are a lot of Canadian visitors paid under the table, and those people are

not going to be in the same realm as those who are doing it legitimately. And that really bothers me that there's not going to be the incentive to say we've got a clean process that's smooth. You apply for a permit, and this is what the tax structure is going to be, and we're going to go forward and support you doing business. Instead, you've got a whole stack of people who have applied for permits. You've got names and addresses, and you can go after those people. And that really bothers me.

Mr. Hopper: Well, all I can say to that is that if – involved in changing your process here, whether or not you change the process, and you go with the more streamlined process, or the more drawn out process with the hearings officer and discovery, you know, it would ultimately, be your decision. If the Planning Department issued the notice of violation and you felt that that notice of violation was not meritorious, or that the use was not permitted, or for whatever other reason that you thought that in those particular cases that those – that the violation was issued in error, it would certainly be within your discretion to not uphold that violation when they come to you.

In addition, all I can say for permit applications, submitting a permit application does not generally mean that you're then permitted to operate that use or to do what you've submitted your permit for.

Now, I can't defend in the past if there's issues of permits taking longer than they should. I'm not involved in that process, but I can say that that's no excuse for operating the business, or the use, or building a structure--that's sometimes where problems come up without getting the permit--simply because the person's applied for permits. That's just not what the law allows.

Vice-Chairman Shibuya: Okay. Mr. -- Hari?

Mr. Ajmani: Yeah, I think …(inaudible)… really tried to look at the procedure that you're trying to implement, which in my three years of experience here I found that a hearing officer-type decision is really cumbersome, and I think that's why on our agenda there is a section that says, what is the status of the previous hearing report. And they go there, and some, I don't know when they come back. But I think the issue here is the procedure; not necessarily cases. So am I correct?

Mr. Hopper: These would apply again, not just to zoning violations but to building permit – or to building code violations, a lot of other types of violations. You would be hearing these yourself rather than going to a hearings officer. Most of the things in there, the rebuttable presumption does deal with particular types of cases, but the vast majority of the rule changes, I believe we got a lot of the rule changes from the Liquor Control Adjudication Board. The way that they conducted their hearings appear to be very efficient and very orderly. And we

believe that that procedure can be transferred here for you to hear cases. Again, this would not apply to all of your cases. The Parks' cases, for example, would not unless you chose to expand them to those types of cases. These would apply only to notices of violation which is – we believe a good place to start, but it's not the only place that can deal with these. But yes, we would anticipate that these hearings would take a day. It would be relatively quick. The parties would put on their evidence. It would be more in the realm of a traffic ticket, things of that nature that you would have a quick, orderly, hearing process. Both sides would be able to put on their case, and you'd be able to make a ruling quickly. And I believe from the Planning Department's perspective, even if it's against the Planning Department, it's better than waiting a year and $25,000 later. That's what I've been hearing, and that's the main reason why the rules are drafted the way they are.

Mr. Ajmani: Thank you.

Vice-Chairman Shibuya: Thank you. Members, any more questions of Corporate Counsel? No? I'd like to make an exception and allow Mr. Hunt if he wants to have a clarifying statement in terms of one of the Board Members mentioning in terms of the attempted permits, and is there a process in this in which you allow for the business operators to streamline their obtaining the permits.

Mr. Hunt: The concern about the permitting is a complex one, and it's being debated on a number of fronts, and being addressed on a number of fronts. And we've had discussions with Council. We've got further discussions intended with Council from a number of perspectives. The issue of giving what in the past was called amnesty is somebody submitted an application and they were allowed to continue the use, that's an issue that is most pertinent to the County Council. The issue before this Board today is, once a fine is issued for any violation of the Building Code or the Zoning Ordinance, then how do you folks deal with the appeal of that fine? That's what's before you today--not all the issues that have been in the paper regarding vacation rentals, or the Super Ferry, or anything else. The issue before you is how do you folks want to deal with appeals of any fine that comes before you?

Vice-Chairman Shibuya: Okay. Thank you very much, Mr. Hunt. Any other further questions from the Board Members? None? Okay. I will open it up the next portion here to the public to hear the public, but I'd like to first understand that there are some rules, and the rules are three minutes. We have a timekeeper: one of the staff members here. And once you start, please identify yourselves by your name. And if you represent an organization, please state that also. I'd like to first have the staff read this portion of the agenda so that all of the Members here understand what we're actually hearing.

Ms. Trisha Kapua`ala then read the public hearing item into the record.

Vice-Chairman Shibuya: Thank you. And again, Board Members, you may ask questions of the testifier. The testifier first listed here is Mr. David DeLeon.

Mr. David DeLeon: Good afternoon and aloha. Thank you for your service on this Board. I know this is a tough job. I'm David DeLeon. I'm representing the 1,700 members of the Realtors Association of Maui.

As described by the Corporation Counsel, we do not oppose the far majority of the streamlining proposals here. I think government is way too complicated and it needs to be slimmed down.

We do, however, very much strenuously oppose the proposed item on using advertising as an assumption of guilt. And that's what we're talking about here: assumption of guilt. How do you prove a negative? Because that's what the person who's brought before you will have to do. They'll have to prove a negative that they weren't running their business.

There's a well articulated statement from our attorney, and we hope that you'll have an opportunity to read it before you make your decision today. It's going to be much more clearer than anything I'm going to say.

I'd like to ask the Board Members who have opinions one way or another about TVRs to put them aside for the time being. What this is really about is a fundamental right—innocent before declared guilty. What's been happening here is the reversal of that for the convenience and the efficiency of the Department. Well, guess what? Fundamental rights are not convenient. They're fundamental and they must be maintained. And that's why the Realtors Association of Maui Today contacted the American Civil Liberties Union to ask for their involvement in this issue.

This rule would put innocent citizens at risk. This morning a gentleman called me, and he was talking about, oh, he was thinking about getting into a vacation rental, and he wanted to know more about the case. And he had actually wanted to know what was going on with the County. And we talked. He told me, well, you know, I thought about it, and it got so noisy that I decided to shut it down. I never did start the business, but I did shut down my website. I said "Well, how long have you had the website?" "Oh, about a year. I was just kind of fishing around to see what was going to happen." He never ran the business, but under this rule, he's guilty.

A couple of weeks ago, I got a call from the Mainland, and the young man was on the phone. And he said "I want to rent your studio you have listed in Craig's List." I said "I have what in Craig's List?" He says no, right here, and he read to me back my phone number. It says you have this listing. I said "Well, I really don't." And I asked him – I managed to do some research and found that the

person who listed the thing was one digit off of my phone number. Did that make me guilty? An advertisement is only that.

Will the County abridge our fundament First Amendments Rights of Free Speech in their enforcement action against TVRs? Advertising proves nothing more—

Ms. Kapua`ala: Three minutes.

Mr. DeLeon: Than just the suggestion of intent. Please take out the part about advertising from this proposal. The rest of the material stands as far as we're concerned. Thank you very much.

Vice-Chairman Shibuya: Thank you, Mr. DeLeon. Questions, Members? None. Thank you. Mr. David Dantes is the next speaker followed by Beverly Livingston.

Mr. David Dantes: Good afternoon, Members. David Dantes, president of the Maui Vacation Rental Association. Our association represents around 200 family businesses throughout Maui County who will be affected by the proposed rule change. The Administration has made a commitment to shutting down all of our operations except for the eight who have succeeded in obtaining permits through the arduous permit process over the past six years. Around 70 applicants have had their applications delayed since as early as 1998 for the convenience of the County and through no fault or request of their own. Perhaps as many as 200 other operators attempted to comply by requesting applications from the Planning Department and were told that they should withhold their application pending adoption of new legislation. Legislation was pending before the Council. It would've facilitated the permit process, but it was opposed by the Planning Department and defeated.

In the presentation earlier today by the Planning Department and Corporation Counsel, the Zucker Report was mentioned. And in that report, there were recommendations that the enforcement process be streamlined. What was omitted was the statement in the Zucker Report that this should not happen until there are clear permitting guidelines adopted for transient vacation rentals. I think the omission of that was a serious error this morning. The Zucker Report cautioned that aggressive enforcement for the adoption of reasonable clear regulations would be improper.

The Planning Director himself in January testified, "The problem with doing a sudden shift to a strong enforcement side is if there's pending legislation that would then change that enforcement, we have then wasted a lot of time and resources gone down a road that we didn't need to. It's also not fair to a property owner to take them through an enforcement process, and then turn around and take it back the other way." And then he added at a later date at a public hearing, "If we start going down the road where we levy a fine against a vacation

rental operator, is that really fair now to go backwards after we gave these people directions that it was okay?" And so the initial thought was it's not fair. It's government moving the goal post.

We submitted today a document called "Government Moving a Goal Post." Our request is that you actually defer a decision on this rule until you have had a time to digest this material. You could do that by a recess so that you could reconvene within a matter of days, I believe, and not have to go through public testimony again.

This document, "Government Moving a Goal Post," makes serious allegations against the Planning Department of a pattern of intentional misrepresentation of facts to decision-makers. The deliberate withholding of information—

Ms. Kapua`ala: Three minutes.

Mr. Dantes: Thank you. And the provision of inaccurate information that they refuse to correct after being confronted with the error. Please consider deferring your decision until you've read this. Thank you.

Vice-Chairman Shibuya: Thank you very much. Members, any questions for the speaker? If none, thank you very much.

Mr. Dantes: You're welcome.

Vice-Chairman Shibuya: Thank you. The next speaker is Beverly Livingston followed by Sharon Stone.

Ms. Beverly Livingston: Good afternoon. Thank you for being willing to hear us. Appreciate it. My name is Beverly Livingston. I'm a Board Member of the Maui Vacation Rental Association. And I'm here to enter into the record, a reading of a paper that you have been presented with. I and four other people are going to read it in so that it is on record. And it is a – titled, "The Board Should Not Eliminate Discovery Provisions for Contested Cases Involving Notices of Violation."

The Board's proposal, Section 12-801-100 indicates that the Board believes that the person cited with notices of violation don't deserve the opportunity to prepare their defense to the same degree as in other contested cases. Because civil fines that can amount to millions of dollars are at stake, and there may later be criminal charges brought, it is just as important, if not more important, to afford the cited person every opportunity to defend himself. Otherwise, for example, if Public Works calls a person's proposed fence, which doesn't need a permit, a wall, which does need a permit, and that person appeals the decision to the BVA, that person is entitled to a full discovery in the appeal. But if that same person

just put up the fence and the County issued a notice of violation, and now the person is subject to thousands of dollars in fines, then he is not entitled to full discovery. There is no reasonable basis for this difference. There is nothing inherently less important about one's rights or about the possible outcome in appealing a notice of violation. In fact, a failed appeal of a notice of violation may more often have much worse consequences.

The Board should not adopt the presumption that because an advertisement describes a business that would be an unlawful use that the unlawful use has occurred. Presumptions are reliable enough in some cases, but they are not supportable in this context and may not be upheld on appeal. It is irrational to presume a violation only because of an advertisement over which the landowner does not have exclusive control. And literally, millions of people other than the accused may have some control. The innocent will bear the burden of this presumption, and the Board will be overwhelmed with appeals and contested cases.

And that's the end of my statement. I will have other people read the next sections because I don't want to go over the three-minute time limit.

Vice-Chairman Shibuya: Okay. Thank you. Board Members, any questions? None? Thank you very much, Beverly. The next speaker is Sharon Stone followed by Cindy Biggers. Thank you.

Ms. Sharon Stone: Aloha and good afternoon. Sharon Stone. I have actually had my conditional use permit application filed in November 2001.

The presumption, no. 1, the presumption is not reliable. Because the accused does not have control of the media, the following instances could easily occur in which the presumption would be incorrect. Because the presumption is far too likely to be incorrect, it is not a reasonable presumption.

1.1, the County intends to shut down approximately, 1,000 vacation rentals. Tens of thousands of ads will survive indefinitely for units that have been closed. Each of those surviving ads can still lead to an allegation of a violation.

1.2, the owner may have relied specifically on the County's November the 1st, 2001, written, executed agreement, which allowed vacation rental owners to lawfully operate while waiting for a hearing on an application for the necessary permits. Nothing in the code or in that agreement prohibits advertisement.

1.3, the ad may simply be old. Print ads can last a long time, and internet ads may last forever. One can easily find two or five-year-old magazine or newspaper ads, or get on the internet and find thousands of outdated ads. Based only one such outdated ad, it will be presumed that the current owner of

the property has violated the County Code. And of course on the internet, there are usually multiple ads on multiple website lists, etc. The rule doesn't specify whether each such ad will create the presumption or serve as an independent basis for the notice of violation.

1.4, an ad may simply be a mistake: the wrong address or phone number is listed.

1.5, the inspector may have made a mistake--yes, they are human--and incorrectly assumed that the cited home was the one in the ad.

1.6, the ad may have been posted by the prior owner or lessee of a property.

1.7, the ad could be intentionally posted to harm another person. The potential for abuse and misuse of the presumption by individuals or government is unlimited.

1.8, the owner may merely be testing the market to decide whether to seek permits.

1.9, home-based businesses have been allowed since the 10/9/02 Planning Department policy statement allowing them with certain restrictions.

Ms. Kapua`ala: Three minutes.

Ms. Stone: Which contains no prohibition on advertising in the media. The owner may have posted an ad based on that statement. Mahalo.

Vice-Chairman Shibuya: Thank you very much. Questions, Members? None? Thank you. Next? Thank you, Sharon Stone. And this is Cindy Biggers followed by Jonelle Littleton.

Ms. Cindy Biggers: Aloha. I'm Cindy Biggers. And we also have had an application for a permit on – waiting since 2001.

.2, the – yes, .2, the presumption is so broad that it is not rational. The presumption says if there is an advertisement for business, then operation of that business is presumed. In other words, if a landowner is cited for unlawful operation of the business based only on an advertisement, then the landowner must prove that the business did not operate. This is true of any advertisement placed by anyone anytime anywhere no matter how old that ad is, or whether it's advertising for the future, or whether it's even for the right property.

.3, the context is inherently wrong for such a presumption. The County Code, 19.530.530.A.5 says the notice of violation must state the location and the time of

the violation. This prevents the County from making entirely open-ended allegations. However, ads for home businesses would rarely say that businesses will be conducted on a particular date. So if the inspector is relying only on an ad, he cannot truthfully allege the time of the violation. This is crucial since fines occur by the day up to a thousand dollars. If the advertisement does not specify a particular date, how can the notice of violation specify a date, or numerous dates, or – and corresponding fines? So the use of the presumption from a general advertisement for something is not reasonable proof that the particular thing occurred on a particular date, which is required for issuing the notice of violations. Also, many advertisements for home-based businesses don't state the location of the business. How can a notice of violation properly specify the location of a violation if the violation is merely presumed from an advertisement that states no location? Thank you.

Vice-Chairman Shibuya: Thank you, ma'am. Any questions from Members? None? Thank you. Next speaker is Cindy Biggers. That was her: Cindy. Jonelle Littleton.

Ms. Jonelle Littleton: Hi.

Vice-Chairman Shibuya: Hi, Jonelle. Followed by Thomas Croly. Thank you.

Ms. Littleton: Thank you for meeting with me. Okay. How will this work? Even a brief hypothetical inquiry reveals fatal flaws, vagueness, and complications. For example, let's assume that you return from work and are served a notice of violation. The proposed rules don't say whether the notice must describe the basis for the violation, or merely allege the violation that is presumed from the ad. In fact, the proposed rule says that the presumption applies in appeals. Since there is no appeal yet, it is not clear that the inspector can rely only on an ad to issue a violation.

Suppose the notice says that the County found an ad on the internet for a vacation rental that appears to be your home. You have no idea what they are talking about, or why, when, or by whom the ad was posted. But the one thousand-dollar fine is levied along with any daily fines up to a hundred dollars per day doubled every month. By the time you get to your hearing, it is three months later. At the hearing, you are presumed to be in violation simply because of the ad.

Above, for simplicity sake, I've referred to the notice of violation. We could make this inquiry more complete and even more complicated by analyzing how the two required warnings preceding the notice of violation will be handled.

Does the presumption apply? If so, must the ad be identified? How does one establish that he has corrected the violation? If the owner informs the inspector

that the ad is a mistake, that he did not post it, and has been unable to find out how to remove it, does the presumption still apply? Or if the owner finds out how to remove the ad, does the fact that it existed at all still support the presumption?

What does it take to overcome this presumption? First, you had to pay the five hundred-dollar filing fee and then prepare a file – to file an appeal. Then you have to prepare witnesses, documents, arguments, etc. for a hearing on the appeal. The fine is now $22,000. Despite your best efforts, you cannot find out how that ad appeared. Then in the hearing, you have to prove that you never rented out a room to anyone for less than six months.

The proposed rule does not state what evidence may come into the presumption. How does a person prove that no visitor stayed in their home on a particular day? What can you show to the Board to convince them that you never have operated a home business? You can swear under oath, but if the Board doesn't believe you, the presumption availed. It's virtually impossible to prove something that didn't happen. And that's why the burden belongs on the County to prove that the alleged violations did happen. Thank you.

Vice-Chairman Shibuya: Thank you very much. Board Members, any questions? None? Thank you. Next is Thomas Croly followed by Bob Getzen. Yes, thank you.

Mr. Thomas Croly: In conclusion, the Board should allow full discovery for the appeals of a notice of violation. There's no basis in law or fact to treat them differently from the appeals of other matters. In fact, there may be far more at stake when contesting a notice of violation than another type of decision. The Board should not adopt the presumption – the proposed presumption.

While superficially, it may appear to simplify the process, it does at the potential expense of the rights of the public. If it streamlines the process, it streamlines only the part of the process that would aid the County in proving violations. In actuality, it makes it more complicated for the Board especially, when the proposed rule provides no particulars whatsoever on how the Board especially – I'm sorry. In actuality, it makes matters more complicated for the Board especially, when the proposed rule provides no particulars whatsoever on how the presumption will work at various stages of the enforcement process. Probably, the most tangible effect will be a drastic increase in the number of appeals the Board must hear because the County tried to make its case based only on an advertisement.

Before you approve the rule changes, please honestly consider a scenario of an individual in which through no actions of your own, you are accused, and as – a violation is presumed because someone saw an advertisement that you didn't even know about. Would you be satisfied to hear those – to hear that those like

you have done nothing wrong but must bear the cost of streamlining the process? As a Board Member, please consider how many appeals you'll be hearing because it would be so easy to issue notices of violation with so little evidence.

If I can add, as I thought about this issue personally, I thought about the comparison as Corporation Counsel made to a speeding ticket. Okay. If you were issued a speeding ticket and the presumption as you came into court was you're guilty of that speeding violation. Maybe the rule could be if you drive a Ferrari, we're just going to give you a speeding ticket because we all know Ferraris are fast. And as you come into court, you now have to prove that if you drive a Ferrari, you're able to keep it under the speed limit. This is – you know, I may be stretching it a bit there, but the point is that just an advertisement in and of itself is not enough to show that this violation exists, and I hope the Board will see that. Thank you.

Vice-Chairman Shibuya: Thank you very much.

Mr. Ajmani: Can I ask a question?

Vice-Chairman Shibuya: Yes.

Mr. Ajmani: Mr. Croly, do you represent any organization, or are you a member of--?

Mr. Croly: No, I'm just speaking here as a concerned citizen.

Mr. Ajmani: Are you a Member of MVRA?

Mr. Croly: I am a Member of MVRA, yes.

Mr. Ajmani: Okay. Thank you.

Vice-Chairman Shibuya: Any other questions, Members? None? Thank you. Next speaker is Mr. Bob Getzen followed by Pamela Tumpap. Any other members in the audience here planning to -- or wishes to speak, or express themselves, there's a signup sheet here. Thank you.

Mr. Bog Getzen: Aloha, Members of the Board. And thank you for serving on the Board. I know it requires a great deal of time and commitment. I appreciate the County trying to streamline processes.

I drove in from Hana today. Excuse me. I moved to Hana 40 years ago. When I first moved to Hana 40 years ago, I began construction trades. My second and third job, this is in the middle '60s, were remodeling existing vacation rentals.

Over the years, my neighbors have had vacation rentals for 20, 25 years without any restrictions. Forty years ago, I was able to walk into the County building with a building permit application, turn around and walk out the same – I could walk to every department, turn around and walk out the same day with a building permit. Today– I haven't applied for a building permit. I haven't had a need to recently. But my neighbors that have applied for building permits or even remodeling permits are telling them it's taking them over a year, a year and a half to get a building permit. So if we're going to streamline processes, I hope – I applaud the County's attempt to streamline, but it should be across the Board.

And the application for a vacation rental, the people in Hana that have tried to apply have either been rejected-- The ones that have told me they gave up after spending $4,000 or $5,000 in two years. The one person that did get a permit after spending how many thousands of dollars, but apparently, it was about $20,000; she was issued a permit for one year and told she needed to reapply for it the next year. At the current rate that the County has processed applications, if there's 800 to a thousand that need to be done, it will take 600 to 800 years to process the applications. So I think everybody agrees that this is an out of control situation.

In terms of what you're hearing today, in terms of applying for being able to issue a citation or whatever on a presumption that you have an advertisement, if you have a website, there are many people in Hana today who have already rejected reservations for next year. They've lost thousands of dollars. Their website is their only contact with customers that they've had for 20 or 25 years. Their – that website allows them to inform their customers of what's happening. I'm sorry. I can't take your reservation. I don't want to ruin your reservation – I don't want to ruin your vacation. These are people that have returned to Maui year after year.

Vice-Chairman Shibuya: Can you conclude, Mr. Getzen?

Mr. Getzen: Oh, okay. Anyway, thank you for your consideration. I hope you'll consider that – the seriousness of this, and the economic impact on Maui's economy overall. Thank you very much.

Vice-Chairman Shibuya: Thank you. Board Members, any questions? None? Thank you very much.

Mr. Getzen: Okay. Thank you.

Vice-Chairman Shibuya: Pamela Tumpap followed by Scott Innes.

Ms. Pamela Tumpap: Aloha, and thank you, Vice-Chairperson, Vice-Chairman Shibuya, for letting us speak this evening, or excuse me, this afternoon. We're not quite into the evening.

I'm Pamela Tumpap, president of the Maui Chamber of Commerce. And on behalf of the Maui Chamber of Commerce and our 940 members, we applaud the efforts by government to streamline processes that save taxpayers time and money, and that assists businesses. However, some of the proposed amendments here will negatively impact businesses, and we request that those amendments be denied and/or amended. Two areas of the proposed addition of the new subchapter, Subchapter 10, are of particular concern. And I think you've heard many great examples today, but I'll just kind of highlight it for you.

Certainly, the rebuttable presumption clause, this clause essentially states that operation of a transient vacation rental or other businesses presume from a published or electronic advertisement or listing for the transient vacation rental or other business. Under this presumption, businesses could be cited and fined for a business that has been closed and then have to appear before the Board of Variances and Appeals to prove they are not operating that business. We feel this can have a tremendous impact on the business community in both time and expense especially, for those who utilize and capitalize on extensive marketing efforts through the internet with multiple listings.

You know, through this new medium, anybody can link to your website, and continue to promote your website, and take pieces or parts off of your website. And when you're in business, of course, you hope they do that. The more others link to your site and carry your site within theirs, the better exposure you have. But after you close the business, you have no idea of knowing how far that advertisement has really gone. This is just one example. You've heard many others today. But we feel it's unfair to presume operation with this test, and feel this clause puts an unnecessary burden on businesses, and we ask that it not be adopted.

On the next section that I'm going to mention, and I think the issues of discovery are also very relevant, and I didn't put them in my letter to you today, but on the next thing that we are concerned about, and I can't say that I have all the information here today, but we're also concerned with Section 12-801-95, Failure of the appellant to appear. Since under Section 12-801-92 provides for a 15-day notice prior to the hearing, which would be, I assume, its regularly scheduled hearing that you would conduct, if a business cannot attend on that date, or because of other business they need to conduct would have to leave during the course of that hearing, the former, 12-801-85, really basically says that if the appellant fails to appear—

Ms. Kapua`ala: Three minutes.

Ms. Tumpap: Or the appellant or representative leaves the hearing while in process that constitutes a waiver of the appellant's rights to be heard and present

evidence and arguments. We feel that's unjustified and unfair. And so we appreciate your service, and ask that you consider our request.

Vice-Chairman Shibuya: Thank you very much, Ms. Tumpap. Any questions, Members? Thank you very much.

Ms. Tumpap: Thank you.

Vice-Chairman Shibuya: The next speaker is Mr. Scott Innes. If there's any others who want to speak, please sign up here. Thank you.

Mr. Scott Innes: Good afternoon, Members, Chairman. Thank you very much for allowing me the opportunity to speak to you today. My name's Scott Innes. And I've spent the last 26 years in sales and marketing for the travel industry working most recently as director of sales and marketing for Blue Hawaiian Helicopters for three years. I've spent the last 25 years involved in advertising and sales. And part of that I have extensive experience developing websites for Blue Hawaiian and some of my previous employers.

Part of the aspect of websites and being able to advertise because so many people are out there searching to do things, to come to Maui, to do – book activities, to find places to stay, lots of other reasons, a key thing for businesses who want to garner that business of getting those people is search engine optimization. Search terms are very, very important to the success of the business who wants to be ranked high on those search terms. And many, many websites are out there simply just for search engine optimization. So – these are activity companies, activity booking agencies, real estate sites, and vacation rental sites. And through links, you have an opportunity to increase your ranking of where – so you might be linked to an agency or to a website that is for vacation rentals, and simply just because that will get your name or that search term of the company that you represent up high on the list so that you can get that business. So you might have a website there just for that reason. It may not be the business that it really is. You're directing people to buy activities maybe, but we're affiliating or linking to a vacation rental company because of the traffic that those sites bring.

So the idea that people are guilty just by having this website of this use I think is very unfair. And advertising, per se, and having a website I don't think is reason to hold that person accountable as in violation of that rule. Thank you very much.

Vice-Chairman Shibuya: Members, any questions for the speaker? None? Thank you very much, Mr. Innes. I'll hold the public hearing if there's none. No one else would like to speak; we'll close the public hearing at this point. Yes, sir?

Mr. Hank Kline: (Inaudible)

Vice-Chairman Shibuya: Could you please state your name and then sign in afterwards?

Mr. Kline: Thank you. I'll be very brief. I know this is taking a while. I just want to say to put the last gentleman's—

Vice-Chairman Shibuya: Can you state your name, sir?

Mr. Kline: Hank Kline. I'm a member of MVRA. To put the last gentleman's remarks in context, we Googled our website yesterday. We have 14,000 links. There's 14,000 ads floating around out there that we have no control over. We get busted 14,000 times, but you know what I'm getting to. It's impossible to take care of that. So that part of the new ordinance seems a little hard to deal with. Thank you.

Vice-Chairman Shibuya: Thank you very much. Please sign in. Thank you. So if there's any other public hearing? None? Public hearing is now closed. Members, discussions open for this particular item.

Mr. Ajmani: Mr. Chairperson, I think most of the public hearing items have been regarding this one clause in the code that we are trying to adopt. Is it possible to ask the Corporate Counsel to explain how this would – what is the intent of this thing, and how they're going to enforce it? And what is the objective of having it in there? Thank you.

Vice-Chairman Shibuya: Absolutely. Go ahead, Corporate Counsel.

Mr. Hopper: Certainly. I'd be happy to. Rebuttable presumptions are – in the Hawaii Rules of Evidence, they explain how they can work. Again, the Board here is not constrained by the Hawaii Rules of Evidence but—

Mr. Ajmani: Could you explain the rebuttable – whatever that legal term is, what does it actually means?

Mr. Hopper: Rebuttable presumption actually means that if– I believe I have a citation here. Basically, it means that if the person with the initial burden of proof proves a certain fact that if there's a logical conclusion that from that fact something else can be concluded. For example that if there's an advertisement for a particular use or a business, it can presumed that the logical presumption from that is that use was being operated. However, the reason it's a rebuttable presumption and why rebuttable presumptions are allowed rather than irrebuttable presumptions is that that's not the end of the case there. The Planning Department, if theoretically, it looked to only come in with a website advertisement--that was it, that's all they had--would clearly be running the risk that there be an explanation for why that person is shut down, is no longer

operating that business, and can show that in front of you, which is why the Planning Department would plan to come up with additional evidence to verify things in addition to the website such as they would first need to establish that not only was there this advertisement, but that the property being advertised belonged to this person, or that this person was operating the business. And if they had nothing else, then they would run the risk and possibly a very high risk that you, as the Board, upon hearing the evidence introduced by the appellant would show that the advertisement actually isn't enough, after the presumption is rebutted. It just states that once that evidence is introduced, the burden would shift to the other party to show additional – to show why that that business actually was not operating despite the fact it was advertised. There's a big advertisement or something that said we are operating or this business is in existence. The presumption is based on the fact that typically people do not – they would not be advertising for a business that is not operating. That's not true in all cases. One hundred percent of the cases, that's not true. And that's why the presumption is rebuttable in these cases. But it would behoove the Planning Department to have additional evidence in the event that the presumption was rebutted – you know, whatever other evidence it believes would be persuasive because if it fails to meet that burden, it would run the risk that you would deny that – you would grant the appeal and deny the issuance of the notice of violation.

Vice-Chairman Shibuya: Thank you, Corporation Counsel. Hari, I'm going to give you a simple example. I'm not belittling this, but let's say it's a hot day, and a child steals an ice cream cone. And he runs out and he has a wrapper on the bottom. And somebody says – you know, that shop owner says that child stole my ice cream, and he didn't pay for it. And there's chocolate all over his mouth, and is dripping all over his front shirt, and wrapping on the side. That's presumptuous. That's the condition there. It's circumstantial evidence there. Yes, Corporate Counsel? I'm not a lawyer but, you know—

Mr. Hopper: I just – oh, I'm sorry.

Mr. Hari: Okay. So I think in a typical case, an evidence of advertisement would only be like supporting of some other evidence that the Planning Commission would produce. Am I correct?

Mr. Hopper: We believe you're the fact-finders. So you would weigh the evidence that you feel appropriate. But the Planning Department believes that if there was a case where an advertisement was introduced as the only evidence, or at least let's say for the sake of argument, considering that evidence alone, that there would need to be some explanation that that – what happens in a typical case is the Planning Department would introduce some type of evidence. And if they've introduced enough to prove the violation, the burden would in

substance in the absence of any presumption, would shift to the – in this case, the appellant could then show that – you know, to refute that evidence, basically.

In the case of an advertisement, even in the absence of this presumption, the Department believes that if there was that evidence introduced that the appellant would need to prove that – would need to show that in fact, the advertisement is wrong, that this business is not operating. And we would submit to you that that evidence is extremely persuasive and goes to the operation of that business. It would show that that business is more likely than not operating.

A couple of things that I would point out is, Hawaii Revised Statutes 91-10, Subsection 5 states that in contested case proceedings, except as otherwise provided by law, the party initiating the procedure shall have the burden of proof. In this case, the appellants are operating – are initiating the procedure. That's Hawaii State law. However, with the way that the hearing is set up, the Planning Department will be making the initial case and proving the violations. But as far as questioning the legality of a presumption, Hawaii State law actually does say that the party initiating the proceeding in contested case procedures has the burden of proof.

In addition, in Hawaii Rules of Evidence, Section 304, it does provide a general rule that a presumption established to implement a public policy imposes on the party against who is directed the burden of proof. In this case, the Department believes that this presumption is to implement a public policy which is to enforce the existing County Code. However, you're not constrained by the Hawaii Rules of Evidence, but that can be persuasive as to what would be considered by a court.

Also in addition, anyone who believes if you were to, as we hope, enact this presumption as part of your rules, a person who believes an administrative rule is illegal, does have the right to seek a declaratory judgment action under Hawaii State law. And basically, take that rule to court, and ask a judge to say – to determine the legality of that rule. That can only be done if you adopt the rule. So we would believe that if you would adopt the rule, the Department would frankly, look forward to proving that the rule is legal because we believe that it is, and wouldn't have – wouldn't have gone through this procedure and reviewing it.

Certainly, you do have the discretion to adopt the other rules and not the presumption or – you know, defer action on the presumption, and adopt the other rules. That's within your discretion, and as we said earlier, we believe the most significant portions of the rules are the other portions aside from the presumption. So you can do what you want with the presumption, but we believe that it is legally defensible and has a basis in law. We reviewed other presumptions that Hawaii Rules of Evidence have given, and it's actually very similar to many of them.

Vice-Chairman Shibuya: Okay. Thank you.

Mr. Ajmani: Thank you.

Vice-Chairman Shibuya: Mr. Hunt has a statement. Yes, sir?

Mr. Hunt: I can't imagine the Planning Department issuing a violation merely on the advertising. It just – I can't even imagine that happening. It would be in a bundle of evidence, and it would be considered along with the other evidence that is also presented to you.

And again, as Corporation Counsel said, if you guys have concerns with this presumption of evidence or whatever, perhaps we can deal with that, but these rules are intended – it shouldn't be an issue on vacation rentals or one particular violation. These rules are intended to expedite your appeal of any violation that comes before you whether it's a building permit violation, a grading permit, a sign, or Planning Department. So let's not get lost from the actual intent of the rule change.

Mr. Hopper: And I would just add, if I may Mr. Chair, that it's not a presumption of guilt that the violation has occurred. It simply presumes that the business was being operated.

Questions came up as to time. It is still the burden on the Planning Department to show what time was the business operating. It's still the burden to show that this person you have before you was the person operating this business and not just someone – I mean, you couldn't just have a random person there that had nothing connected with that business or that home.

And like I said, that type of evidence could be refuted if someone brought in evidence that – you know, that they had requested that this be taken down, and it wasn't taken down. And obviously, it would – you know, the Planning Department logically, would follow up on these cases. If they've been told, hey, we took our website down, we're no longer operating, come and see, there would be no reason for the Planning Department to continue to pursue that violation and take it – you know, they could decide to withdraw the notice of violation if it investigates subsequently and determines that the business is no longer being operated. So I think there would be rare cases where the business has actually stopped operating, the website's been taken down, and the Department would still press forward with the notice of violation.

Vice-Chairman Shibuya: Thank you. Hari, any more questions?

Mr. Ajmani: No.

Vice-Chairman Shibuya: Comments? No? Kathleen?

Mr. Ajmani: Yeah, can I make one comment?

Vice-Chairman Shibuya: Yes.

Mr. Ajmani: I think I just want to understand this a little bit for my own – you know, making sense to me. I think it's really no different than if you get a parking ticket. Your car is parked on the street, and you haven't paid the money for the parking meter. And you appeal and go to the judge. And basically, it's the policeman's word against your word. Nobody knows. Nobody can really prove that car was there or not. And I think it comes to a judge. And basically, the judge has to make a decision on who's telling the truth.

Vice-Chairman Shibuya: That is correct.

Mr. Ajmani: Am I wrong? It's something similar to it.

Vice-Chairman Shibuya: Yes.

Mr. Ajmani: So I think in getting a ticket, this is like a similar kind of situation where the violation can be given, and then based on the evidence, we can decide. It doesn't mean that this rule makes somebody guilty. I think there's a lot more to it. Thank you.

Vice-Chairman Shibuya: Thank you. Rachel? No? Stephen, no questions? Comments? Go ahead.

Ms. Rachel Ball Phillips: No questions, just a comment that I have to – feel a lot of questioning about that rebuttable presumption clause as well. Just based on the testimony and from my own personal experiences out there, I think that that's too much to presume somebody is guilty without – I mean, with just an advertisement. I would not be in favor of that.

Vice-Chairman Shibuya: Sure. Understand. And like – you know, the Department Director Hunt mentioned that it's just not one piece of evidence, and not the sole evidence that they will be citing the individual on. So it's probably a group of items that would cause this action. And, James, would you mind? I know I'm catching you cold on this, but the evidences of – the treatment of evidences, and how justice determines them, at what levels are they–? This Board is made up of lay persons. And it's a citizens' group. And they listen to their peers. And the type of evidence that is provided to them is treated at a different level as the courts do. And so the presentation is much easier for the people to present to us. And we will be able to hear it at a more human level, per

se, a less legal level. And I find that this kind of explanation might be helpful for everyone here. Thank you.

Mr. James Giroux: I think, Warren, what you're touching on is that in an administrative hearing, you're basically looking at, I believe, it’s a preponderance of the evidence whereas in a criminal case, you would be looking at proof beyond a reasonable doubt. There’s a proof higher than that, and it’s called, proof beyond all doubt, and only God knows. And I’ve won many a criminal cases based on that argument.

So I know that juries and lay people– You know, we use these different standards, but when it comes to you, even though it’s preponderance of the doubt, test your gut. Test your eyes. Test your ears. Test yourself. And are you receiving enough evidence for you to believe that a violation may be occurring with all of the evidence and all of the circumstances that you are presented by the Department? And is that sufficient for the Department for you to feel that the Department has done their job and their due diligence to go out and seek out violators who are not following the County Code? Has the Department acted beyond their scope, beyond the law? Have their abused their discretion? Are they just flat out wrong? That’s – when you're looking at an appeal, those are the questions that you're asking yourself and when you ask questions of the testifiers.

The other level of inquiry is you, as a Body, can test the credibility of the witnesses yourself by asking them questions based upon their testimony. So the human to human reality, the touch of energy between a witness and a fact-finder is present in this Board. And that’s why you're called a quasi adjudicatory. And that’s why I always stress on you about the propriety of your conduct, the fairness of your questioning, the ability to remain impartial until all evidence is presented to you. And I’ve always stressed that to this Board, and I will always stress that to this Board because I take your duties as seriously as I take mine in that we are here for the purpose of adjudicatory reasons in order to be part of the government’s process of dispensing justice.

That being said, you are an administrative body. You're not a judicial body. When you're participating in a – this type of body, the rules of evidence—cleaned off the table. All the … (inaudible) … of lawyers are put into the back pocket. All of the semantics—taken off the table. Your concern is with relevance, redundancy, and privilege: very basic concepts of fact-finding.

That being said, oftentimes you do look at the rules of evidence to try to determine issues of fairness. Somebody can raise hearsay. Oh, the fact of the matter asserted said out of the courtroom. Is that the truth? You know, well, let’s hear what the allegation is. Let’s hear what was supposedly said. This Body can actually hear hearsay and rely on hearsay to make its judgment whereas a judge

in a court of law would not be able to rely on hearsay. They would need the actual person who said what they said to say it in front of them again.

As far as presumptions go, it always comes down to weight. What's the weight of evidence? You know, how much weight are you going to give something? Somebody says something. You just don't think they're credible, but they said what they said. It just doesn't make sense to you, what they said. So you give that testimony no weight even though it was uttered. Well, it doesn't mean anything to the fact-finder once the fact-finder sees, or hears, or decides that that testimony does not seem credible.

And as judges for every piece of evidence, you're struggling with that. You're constantly struggling with every piece of evidence that comes before you. Every word from the testifier's mouth, you're struggling. Am I going to believe it? Am I not going to believe it? How much weight am I going--? If something else comes up, is that piece of information going to be higher in my judgment? And that's why you have nine people. When you get to the discussion, you start asking each other. You know, well, they said that. Well, I don't believe that. That doesn't make sense to me. And you guys can go on forever if you want discussing a matter until you are guys are comfortable with the decision that you make, and five people have to agree, a minimum of five people.

So that being said, I'm going to get off my soap box, and try to look at some of these presumptions that the actual law allows. In the courtroom, in a civil and in a criminal case – and some of them are quite funny when you look at them because you heard arguments about for and against presumptions, or mostly against them. And as an exercise, I like to try to read these rules sometimes because, you know, even lawyers don't read these very often. And when you stumble upon some, you gotta laugh, because there are presumptions out there that are legal, and judges will follow these. And remember, presumptions are always rebuttable. That means you can always find evidence to negate that whether how small, but about how much credibility you're going to give it and how much weight, it can negate a presumption.

So that being said, I'm looking at Rule 303 of the Hawaii Rules of Evidence under Presumptions. And one of the presumptions that they have is that the exercise of act of ownership. To the person who exercises acts of ownership over a property is presumed to be the owner of it. That's the scariest presumption I've ever seen. Get off of my property. Get off right now. Get off of my property. When you try to tell somebody to get off of a piece of land, what this presumption is saying is that's a type of act of ownership, the right to exclude. Get off of my property. Well, does that mean that's the owner? But the person who's trying to fight against that needs to bring evidence that that's not the owner. He's just saying that. That's words. He's just using words. Here's my deed. I have a warranty deed. And guess what? The other person pulls out – well, I have a

quitclaim deed. And the other person whips out-- So it starts the ball rolling. It brings us all to where we can start the conversation. It doesn't end the conversation. It starts the conversations.

No. 9, a writing. A writing is presumed to have been truly dated. That's because the date's important, right? But Warren could put the wrong date on the top of his notes. And me and him could get into a big argument about what date the meeting was. And he could say, well, on my notes, I have that we had that meeting on such and such day, you good for nothing, lawyer. You don't know what you're talking about. And I could say, Warren, I'm going to presume that you are right because you wrote it down on your notes. And obviously, that's the notes of the day of the meeting, but I, being a lawyer, have outsmarted you again, and I have the agenda. So, Warren, again you picked a fight with the wrong lawyer. So there we go. We're on a roll. We're going down the street, and we gotta decide, and we gotta make decisions. So that's the idea of having presumptions in your rules.

But also, the idea of a presumption still needs to be proven. I still gotta find – Warren's still gotta his writing. He's gotta find his notes. Once he's does that, I gotta go find my damn agenda, right? You know, that guy who said get off my property, you know, now I gotta go get my warranty deed, darn it, you know, but it starts the ball rolling. And I think this Body has dealt with a lot of adjudicatory proceedings in the last two years. And you've seen how people present evidence, and evidence that's presented to you. And we've accepted evidence and we've denied evidence. And we've heard evidence that probably shouldn't have come in, but we heard it anyway. But all in all, in an administrative hearing, you want to get as much evidence as you can. Everything, get everything you can, right? And then make a decision, but a decision has to be made eventually.

So there's a lot more presumptions, and those are just a couple of that I wanted to talk to you because they struck me as pretty funny as a lawyer when I see that, but they're there. They're presumptions.

And if there's any other questions about handling evidence or procedure, I'd be happy to answer.

Vice-Chairman Shibuya: Okay. Any questions, Board Members? Just alluding to the administrative law and how we handle it, this Body would be working with that. And it's not very strict in a sense, but it allows for human feelings, and human understanding between the accused and appellant. And it allows this Board to make that decision after hearing all the information and asking them for information. The types of information would not necessarily be the same things that we would be – required in a court, but this Body can make that request as long as it's reasonable and pertains to the issue. Members, I'm open to hearing your thoughts.

Mr. Ajmani: Mr. Chair, as I said initially, I am in favor of simplifying and streamlining this application or appellant process before the Board of Variances because I always felt that we are wasting so much of County money on the hearing officers, and the delay that happens, and the monument of these – monumental thing about them, the evidence, and that position, and all that. So I think a lot of simple cases are going there, which I think is a total waste of money, our time, and everybody's time. So I am definitely, in support of simplifying this procedure and discussing the adoption of this.

Vice-Chairman Shibuya: Is that a motion or just a discussion?

Mr. Ajmani: Okay, I think I will call for a motion that we adopt the procedures as they've been outlined by the Corporate Counsel, and adopt them as a motion to adopt them.

Vice-Chairman Shibuya: Thank you. There's a motion, Members. Is there any second? There's no second, so the motion dies.

Ms. Acks: I'd like to make a motion that we adopt removing 12-801-95, the Failure of appellant to appear; and removing 12-801-98, the Rebuttal presumption.

Vice-Chairman Shibuya: So you're saying that you're going to approve it with these exceptions?

Ms. Acks: Correct.

Vice-Chairman Shibuya: So that's a motion to accept except for those two provisions?

Ms. Acks: Correct.

Vice-Chairman Shibuya: Any comments?

Ms. Ball Phillips: I'll second.

Vice-Chairman Shibuya: You'll second. There's a second. Okay. It has been moved and second that we adopt this measure except for those two provisions. Can you read the provisions again?

Ms. Acks: They're 12—

Vice-Chairman Shibuya: I mean the statement, just a short description of it.

Ms. Acks: The failure of appellant to appear.

Vice-Chairman Shibuya: Okay, appellant to appear.

Ms. Acks: And rebuttal presumption.

Vice-Chairman Shibuya: And rebuttal presumption. Okay. Yes, it's open for discussion.

Mr. Giroux: Kathleen, I just want to touch on the failure to appear. As far as the Board, if that were to pass, what would be the process by which to insure that this case was disposed of? Is it the failure to appear that concerns you, or is it the having to leave in the middle?

Ms. Acks: There was a mention of having to appear within a specific timeframe—15 days. I was off island for six weeks this summer. If I was presented something like that, I would not have been able to appear and take care of it. So I think there are times when people cannot appear for very good reasons, and if they're not notified then that would bother me.

Mr. Giroux: So it's the shortness of time? Is that the concern?

Ms .Acks: Well, I think without having any means of – yeah, the shortness of time and – I mean, if I'm off island, I might not even get the notification that I'm not meeting.

Mr. Giroux: Mike, can you find the time period? I do not see a time period in the Section 95. Is there a time period after service for the hearing date?

Vice-Chairman Shibuya: There's two sides of this. If you are issued an appointment to appear, then if you provide the excuse or reason for not being able to appear, then that could be acceptable. And if you are not present, then you cannot be issued that complaint or citation.

Mr. Hopper: James, I would just add – say that you have to be served with the violation before – you know, you have to be served with your hearing date before you can proceed with – the Board can proceed with that. You have to get noticed of that date. So—

Mr. Giroux: Yeah, I'm looking at 12-801-92, Notice of hearing. Kathleen, I'm just going to read that. It says, "The Board shall give written notice of hearing to all parties at their last recorded address by registered or certified mail, return receipt requested at least 15 days before the hearing. The notice shall include information required by Chapter 91-9(b)." So if you're out of the Country, and somebody mails something to you, if the Department does not get the returned receipt, they will assume you did not get served. And so you would not be

required to be present at the hearing. You would basically, have not been served.

Ms. Acks: So even if somebody else signs for you? I mean, I would be concerned about somebody who in good faith thought they were doing me a favor by accepting something. I mean—

Vice-Chairman Shibuya: I don’t think so.

Ms. Acks: I just – I would like further clarification. That bothers me from the standpoint of I could see it happening to me, so—

Mr. Giroux: No, I mean, it would be – I mean, there would be a serious due process violation for you not to have been given due notice.

Vice-Chairman Shibuya: Okay. Hari?

Mr. Ajmani: Okay. Isn’t this something similar to what we have now? We publish the thing in the newspaper and there’s a whole due process before we hear something. This is not negating any of that, is it?

Mr. Giroux: In fact, I think that this actually mirrors the rules as they are now. I believe so.

Vice-Chairman Shibuya: Yeah, it’s not something very different. It’s exactly the same.

Mr. Giroux: It should be the same.

Mr. Hopper: I would believe that even if it isn’t that you would have the right if a party does not attend to proceed without that party if they’ve been duly served with the notice even in the absence of that rule. But Mr. Giroux may correct me if I’m wrong, but I believe they’re – if someone doesn’t show up here or in front of Planning Commissions for SMA cases, I believe they have the right to deny the request or take action if it’s been shown that person’s duly served. You would have the option, I would say. You wouldn't necessarily have to, but you’d have the option.

Ms. Kapua`ala: Kathleen, as far as the 15 days is concerned, you would first receive a notice of violation. You would have 30 days to appeal. And we would – the Planning Department would then schedule a hearing with the Board of Variances and Appeals. By law we’re required to give you notice pursuant to Chapter 91 of Hawaii Revised Statutes at least 15 days prior. So if you receive the notice of violation, and you proceeded to appeal to the Board of Variances and Appeals, you would be expecting to hear from the Planning Department

when your hearing date is. Now, if you leave between the time that you file your notice of appeal and the time you receive your notice of hearing, I don't – we're still doing what was required of law by us as far as notice. It's not necessarily—

Ms. Acks: I guess I'm concerned about a situation where you had, for example, if I had made plans to be off island for six weeks. And I was told that the hearing was going to be two weeks after I left.

Ms. Kapua`ala: We'd be happy to change that date for you.

Ms. Acks: Is that--? I mean, that's what I'm concerned about. Is there a process in which you can have that date changed because I'd be very concerned if there is not—?

Ms. Kapua`ala: Yes, there's no time limit requirement as in variances where a hearing date must be scheduled and a decision must be made. In appeals, if you choose to delay your hearing date, your first hearing date with the Board for six months because you're on vacation, that is your right. We will work with you to schedule a hearing when it's convenient for you.

Vice-Chairman Shibuya: And also the fining of the individual based on the citation would not start. They would not be fined.

Ms. Kapua`ala: By departmental procedure, we do stop the accruing of fines once you appeal. Once you lose that appeal, then the fines would begin accruing again until you correct that violation. If you win, the case is moot.

Mr. Hopper: Mr. Chair?

Vice-Chairman Shibuya: Yes, go ahead, Mike?

Mr. Hopper: I don't believe this is actually in your rules, but I believe that I got the language – if it was not from here, it was from the Liquor Control Adjudication Board rules. So it wasn't a language that we made up, I don't believe. The language about failing to appear and what happens in that instance if you're duly served, I believe was taken from Liquor Control Adjudication Board's rules. We wanted to just make sure there wasn't an instance where there were constant deferrals and – that can trigger – inaction can trigger time periods. And we wanted to get that down in the rules as notice to people that if they failed to appear when they've been served that action can be taken without you. I think that was the idea behind that.

Vice-Chairman Shibuya: Yes.

Mr. Giroux: Chair, also included is that actually this language appears to be coming straight from Hawaii Revised Statute. It says "Unless otherwise provided by law, all parties shall be given written notice of hearing by registered or certified with return receipt requested at least 15 days before the hearing." So it's a standard any administrative body in Hawaii would follow this method of notice.

Vice-Chairman Shibuya: Questions? Comments? Hari?

Mr. Ajmani: Yeah, I think maybe some form of this failure to appear has to be there otherwise people can just not appear, and nothing can be done, and can be postponed indefinitely. So I think this rule is an important rule to be kept.

Vice-Chairman Shibuya: How do you feel, Kathleen?

Ms. Acks: I'll change it and just remove 12-801-98.

Vice-Chairman Shibuya: Okay. And the other--?

Ms. Acks: The rebuttable presumption.

Vice-Chairman Shibuya: Now, the rebuttable presumption is the other exception. Any comments to that or discussions on that item? Hari?

Mr. Ajmani: Is there something more softer to be done for the presumptions because I think the biggest objection that everybody had was this use of advertisement being caused as a presumption? So, Corporate Counsel, is there--? I think some presence of a rebuttable presumption has to be there whether it's the advertisement or something else. We can discuss it, but I think without that then there is no case.

Vice-Chairman Shibuya: That's correct. Go ahead, James.

Mr. Giroux: As far as that goes, that's your call. Like I said, the Rules of Evidence actually don't apply to administrative hearings. So if that is extremely bothersome to you, you know, you can take that out, but be mindful that if the Department gives you evidence of an advertisement, you still can weigh that as part of the evidence. And you can ask the same question: well, why is this – you know, what website link, or is this a direct link, how old was this, how come this doesn't correlate to the time of operation? You know, you still have the ability to test the advertisement as being part of looking at an assumption that -- what is going on? What is going on? Also, you can look at the source of the advertisement. Is it the *Maui News*? Is it *The Bulletin*? Or is it some whacky website that we can't seem to find out who the owner of the website is, or something like that? So you can still look at the evidence of advertising in

weighing your cumulative assessment of whether or not an operation is occurring of any type of business.

Vice-Chairman Shibuya: I think much of this rebuttable presumption item here is related with the application of the treatment of evidence for a court case. And in our hearing, it's much looser. It's much more flexible. And I would call it more humane. And it allows for us to receive the feelings of the person speaking. I would not be – I personally would not be the one who would be able to convict the person based on my example: the candy – ice cream wrapper right next to the person. That alone is not enough to convict and say that, yes, that person is a bad boy. He stole the ice cream. No, he just stood there. Maybe the ice cream wrapper blew over to him. So that alone would not be enough for me. So a similar thing with advertising: if that advertising just so happened to be there, that's not enough for me.

Mr. Ajmani: I think I also feel the same way, but on the other hand, I've also seen the cases that have come before the Board, and the kind of evidence that the Planning Commission has brought to us. So I feel secure, at least in my thoughts, they would not just bring a case based on a website downloaded that they may have done or something. So there would be a lot more than that to find somebody running a vacation rental.

But I think since that provision is the one that is causing most of the argument and so on, I think we can – I'm sure we can reach some other procedure or additional thing that has to become part of a rebuttable presumption. Maybe we can just add to this, but I think a provision for the presumption has to be there somehow. Maybe we can reword it or whatever.

Vice-Chairman Shibuya: Maybe legal counsel can tell us – apparently, this Board wants more flexibility, and I believe to treat the various types of evidence that it hears.

Mr. Giroux: What I can suggest is that if you're 99% good with these, and you passed your motion, what we can do in the future is sit down after we've seen how these work without the presumption to continue the conversation and continue the discussion to further look at to see what is working and what is not working as far as what the Department presents to you as evidence of operation, use, connectability. So you are empowered to create your own rules. So what I'm saying is that if you're comfortable with everything else and you feel that this just isn't ready, or you're not ready to grasp that presumption, then you can go on, adopt the rules without that presumption. And when you feel in the future that you want to start talking about presumptions, then we can enter into the conversation and present our research or things like that.

Vice-Chairman Shibuya: Any other discussions, Members? No? Kathleen, you were the maker of the original motion. And you allowed to change your mind on the first item, but you would like to retain rebuttable presumption, is it not?

Ms. Acks: To exclude it, yes.

Vice-Chairman Shibuya: Yes. And the second was by Rachel. You feel the same?

Ms. Ball Phillips: I'm in agreement.

Vice-Chairman Shibuya: She is in agreement. Okay. Members, the motion on the board – on the floor is to approve this request with the exclusion of the rebuttable presumption. How many of you are in favor? All in favor say aye. Chair agrees.

It was moved by Ms. Acks, seconded by Ms. Ball Phillips, then unanimously

VOTED: **to adopt the proposed rule amendments to Chapter 801, Rules of Practice and Procedure for the Board of Variances and Appeals excluding, Subsection 12-801-98, Rebuttal presumption, as discussed.**

(Assenting: K. Acks, R. Ball Phillips, S. Castro, Sr., H. Ajmani, and W. Shibuya.)
(Excused: U. Schulz, W. Kamai, J. Shefte, and R. Endo)

Vice-Chairman Shibuya: **And we will accept it.** There's no objection. We'll accept this motion without the rebuttable presumption clause, and with the understanding also that I believe we want the County to, as we go through the process, we'll be able to refine it and make changes to it as we see fit.

Mr. Giroux: And, Chair, would that motion be staff would have authority to move this on to signing by the Mayor and filing with the Clerk's Office? It would then become effective ten days after filing with the Clerk.

Vice-Chairman Shibuya: That is correct. Thank you very much, Members. We'll take a ten-minute recess here. Thank you.

(A recess was then taken at 3:20 p.m. and the meeting reconvened at 3:30 p.m.)

D. UNFINISHED BUSINESS

1. **PEDRO and LUZ ALONZO requesting variances from Maui County Code, §16.08.060(A) and §19.08.060 to allow a two-story dwelling**

to be located between 9 feet-6 inches to 9 feet-1 inch from the side boundary line, whereas ten (10) feet are required for the second story, for property located at 508 South Kamehameha Avenue, Kahului, Maui, Hawaii; TMK: (2) 3-8-056:009. (BVAV 20070005)

Vice-Chairman Shibuya: The next item on the agenda is Unfinished Business—Pedro and Luz Alonzo. Will staff read the public hearing item?

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

Vice-Chairman Shibuya: Thank you. Members, we are at a bare minimum for a quorum. And I don't believe – Kathleen, were you here or were you present when we discussed initially this case? Or did you--? We're wondering whether you were here or had you reviewed the minutes.

Ms. Acks: I was here on August 25th.

Mr. Ajmani: No, this happened on August 9.

Ms. Acks: I was not here on August 9.

Vice-Chairman Shibuya: Yes, so she was not here.

Mr. Ajmani: Yes.

Vice-Chairman Shibuya: Okay, then we don't have a quorum enough to vote on this item. Kathleen, have you read the minutes maybe on this particular item? If you have not, then it's favorable that we ask the membership to make a motion to defer to the next meeting. James, would you give us a legal opinion on this?

Ms. Acks: I can read it fairly quickly.

Mr. Giroux: Well, let me try to figure this out. I'm looking at 91-11 of the HRS which talks about examination of evidence by the agency. It says "Whenever in a contested case, the officials of the agency who are to render the final decision," which is us, "have not heard and examined all of the evidence, the decision if adverse to a party to the proceeding," the person asking for the variance, "other than the agency itself shall not be made until a proposal for a decision containing a statement of reasons and including determination of each issue of fact of law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions, and present arguments to the officials who are to render the decision who shall personally consider the whole record or such portions thereof as may be cited by the parties."

So it gets complicated, but I think to boil that down, Kathleen, if you have an opportunity to read the transcript and the relevant portions thereof, and if the applicant for this variance is willing to waive a pre-finding or a written order prior to your finding, I believe we could proceed.

Mr. Francis Cerizo: Mr. Chair?

Vice-Chairman Shibuya: Go ahead, staff.

Mr. Cerizo: At the time of the presentation of the project, we did have photos, and we did have two sets of drawings that the first set actually provided what the variance was for. And then the second set was the actual permit. If she needs to review the entire file including the drawings and including the photos, is that necessary as being – took it up to date on this matter? Do we need to make the presentation over again so that she has--?

Vice-Chairman Shibuya: I think she needs more time I think at this point to be clearer. And I feel that she does need that time. And so the members from the Alonzo Family, who is your representative there? If you wouldn't mind coming to the podium and speaking? Please identify yourself, please?

Ms. Luz Alonzo: Good afternoon, everyone. I'm Luz Alonzo and I live at 508 South Kamehameha, Kahului, Maui.

Vice-Chairman Shibuya: Okay. And the other person with you?

Mr. Joel Corpuz: My name is Joel Corpuz. I'm the engineer of record on the project.

Vice-Chairman Shibuya: Okay. Thank you very much, Mr. Corpuz. Mrs. Alonzo, right now I'm in a questioning mode at this point in a sense that I'm looking for some assurances from the Board Members that they are able to hear this. Normally, we would have five votes to make a decision one way or the other on your particular matter. One Member was not present when we first started this, and it's not really fair to that person to make any vote unless that person has gone through and examined many of the documents. That person does not have the documents. That person has a transcript. And to be very fair with you, I hope you understand what I'm saying. Yes, sir, Mr. Corpuz?

Mr. Corpuz: I think it would be safer for her towards the conservative and defer the matter because new evidence was submitted after our initial meeting.

Vice-Chairman Shibuya: That is correct.

Mr. Corpuz: New documents.
Vice-Chairman Shibuya: That's correct. It was two sets of drawings, if I recall, right, and also the presentations?

Mr. Corpuz: Two sets of drawings and a letter. I think the final tally came out to three sets of drawings and a letter.

Vice-Chairman Shibuya: Okay. Thank you. On the record now, are you willing to defer and waive the time limit?

Mr. Corpuz: I think that should be a question for the homeowner.

Vice-Chairman Shibuya: Okay. If she wouldn't mind? That means the clock does not start. Because if you say that the clock starts, then we will go ahead, and press on, and make a decision based on what we have. If you defer that and allow us to not start the clock because we have to complete it within a time limit, if she lets us do it, then this time limit continues, or it starts at the next session.

Mr. Corpuz: I believe she understands and she would rather have a fair hearing than a rushed one.

Vice-Chairman Shibuya: Okay. So she does consent to the extension, and so the deferral is agreeable with the applicant. Members, any motion on this for deferral?

Mr. Ajmani: I have one question before a motion. You said there were three sets of drawings? I only have two sets of drawings.

Vice-Chairman Shibuya: The drawings that I have are actually two. So maybe you might want to come and take a look, Mr. Corpuz, and then tell me if there's actually three.

On the side conversation here, I was talking with the professional engineer, Mr. Corpuz. And I just wanted to put this on the record that he mentions that there is a third document, third plan, I believe, and that he will provide it to us by the next meeting, or at the next meeting? How do you want to do this?

Mr. Corpuz: Before the next meeting?

Vice-Chairman Shibuya: Before the next meeting? Okay. Thank you very much.

Ms. Kapua`ala: Mr. Corpuz, because we mail out the Tuesday prior to the Thursday meeting, could we receive the plan two weeks before the meeting, by the latest, Friday?

Mr. Corpuz: Tomorrow?

Ms. Kapua`ala: Is that tomorrow?

Mr. Corpuz: Friday?

Vice-Chairman Shibuya: Next week Friday?

Ms. Kapua`ala: I don't have a calendar with me.

Ms. Tremaine Balberdi: Next week Friday.

Ms. Kapua`ala: Oh, next week Friday. Thank you, Tremaine.

Mr. Corpuz: Yeah, it should be no problem.

Ms. Kapua`ala: Okay. Twenty-five sets, if possible? Twenty, is 20 okay, Tremaine?

Ms. Balberdi: Yes.

Ms. Kapua`ala: Twenty.

Mr. Corpuz: Twenty?

Ms. Kapua`ala: Twenty sets, please.

Mr. Corpuz: Okay.

Ms. Kapua`ala: Thank you.

Ms. Shibuya: Members, we are missing one document. And so, I'm open to hearing your motion on this matter.

Mr. Ajmani: I make a motion that we defer the decision on this issue until we have all the evidence before us.

Vice-Chairman Shibuya: Thank you. The motion has been made. Anybody second?

Mr. Castro: Second.

Vice-Chairman Shibuya: Second by Stephen. We'll take a vote here. Any discussion on this matter, first. None? We'll take a vote on this. The motion is

to defer this issue. And it would not impact – adversely impact the clock starting. We will be expecting a third set of documents from Mr. Corpuz. All in favor say aye. Opposed? Hearing none, it was unanimous.

It was moved by Mr. Ajmani, seconded by Mr. Castro, then unanimously

VOTED: to defer action as discussed.

(Assenting: H. Ajmani, S. Castro, Sr., K. Acks, R. Ball Phillips, and W. Shibuya.)
(Excused: U. Schulz, W. Kamai, J. Shefte, and R. Endo)

Vice-Chairman Shibuya: **This motion passed. It'll be deferred, and we'll hear it at the next available scheduled time.** I'm sorry that you had to wait through this long period. It's just – I did not realize that one Member was not here, initially, and that's not fair. It's just unfortunate. I'm sorry that you had to wait.

Mr. Corpuz: No problem.

Vice-Chairman Shibuya: Thank you. Thank you for coming.

Mr. Corpuz: Thank you for your time.

Vice-Chairman Shibuya: Thank you.

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Vice-Chairman Shibuya: The next agenda item here will be the Director's Report: Status Update on BVA's Contested Cases. Staff?

Ms. Kapua`ala: I am sad to say there is no progress on any of the cases.

Vice-Chairman Shibuya: No progress.

Mr. Giroux: So basically, we're drowning in paperwork right now?

Ms. Kapua`ala: Yes, sir. We're waiting for proposed findings from attorneys on one case. We're waiting for an order from Judge McConnell on another case. We are waiting-- Oh, I know. I know what I can ask. Remember I brought up the matter where Glenn Kosaka was chosen as the hearings officer? And at the first pre-hearing conference, the attorneys discovered that part of their evidence was a Corp. Counsel decision where Glenn Kosaka was Corp. Counsel at that time,

so he signed that letter. So if it's okay with the – I mean, if you think that's a conflict, I'd be happy to proceed to hire the second hearings officer that was chosen on that hearing day.

Vice-Chairman Shibuya: What's the pleasure of the group?

Ms. Acks: I think that's a good idea.

Vice-Chairman Shibuya: Good idea. Can you make that in a motion, please?

Ms. Acks: I move that we take the second choice.

Mr. Ajmani: Second.

Vice-Chairman Shibuya: Seconded by Hari. All in favor say aye. Any opposed? None?

It was moved by Ms. Acks, seconded by Mr. Ajmani, then unanimously

VOTED: to approve hiring the second hearings officer that was chosen regarding a contested case described by Planning Department Staff.

(Assenting: K. Acks, H. Ajmani, S. Castro, Sr., R. Ball Phillips, and W. Shibuya.)
(Excused: U. Schulz, W. Kamai, J. Shefte, and R. Endo)

Vice-Chairman Shibuya: It's passed. Trisha, you – thank you very much for your information. And we expect you to be a hard-nosed, hard-driving manager making sure that these judges provide us the hearing material ASAP.

Ms. Kapua`ala: Okay, sir.

Ms. Acks: So we're not having a meeting next week because of the County Fair? Is that correct?

Vice-Chairman Shibuya: Yes, I think so.

Mr. Ajmani: No, it's not because of the County Fair. It's because there is some kind of HCPO meeting.

Vice-Chairman Shibuya: Okay, now the next item is – let's see. I see adjournment here.

F. NEXT MEETING DATE: October 11, 2007

Vice-Chairman Shibuya: The next meeting would be October 11th. Everybody, next meeting is October 11th. Any motion to adjourn or any discussions you'd like.

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:45 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Warren Shibuya, Vice-Chairman
Rachel Ball Phillips
Harjinder Ajmani
Stephen Castro, Sr.
Kathleen Acks

Members Excused:

Randall Endo, Chairman
William Kamai
Uwe Schulz
James Shefte

Others:

Jeffrey Hunt, Planning Director
Francis Cerizo, Staff Planner
Trisha Kapua`ala, Staff Planner
James Giroux, Deputy Corporation Counsel
Michael Hopper, Deputy Corporation Counsel