

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
MARCH 8, 2007**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Lance Holter at approximately, 1:30 p.m., Thursday, March 8, 2007, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

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

**B. INTRODUCTION OF PLANNING DIRECTOR JEFFREY S. HUNT, AICP, AND  
PLANNING DEPUTY DIRECTOR COLLEEN SUYAMA**

Ms. Trisha Kapua`ala: Good afternoon, Chair Holter. Before we begin, may I introduce the Planning Director, Jeff Hunt, and Deputy Planning Director, Colleen Suyama? They're here to greet you all today.

Mr. Jeffrey Hunt: I'd just like to say that we look forward to continuing a real positive relationship with this Board. It sounds like we've had one in the past. In my experiences, the best relationship between a Board and a staff is one of mutual respect for each of the various roles that you play. And so, we'll commit to maintaining that relationship and hope that you guys have the same feelings towards us. And other than that, you won't see me a lot. I'll come down here now and then for an occasional visit, but as I've been telling other people, my clone hasn't been approved by Finance yet, so I can't really get to all these different meetings that I have to be at. So thank you.

Chair Holter: Thanks, Jeff. Hi, Colleen.

Ms. Colleen Suyama: Hi. I know some of you from my other work with other boards and commissions, but similar to Jeff, I'm here to help the Board in whatever capacity. And generally, Francis and Aaron will be here for most of the applications that come before you. Okay? Thank you.

Chair Holter: Thanks, you guys, for coming down. Are there any questions?

Mr. William Kamai: Just to let you two know that you have an excellent staff on our Commission.

Chair Holter: I'll second that.

Ms. Kapua`ala: Thank you, Mr. Kamai.

**C. PUBLIC HEARING**

- 1. CHRISTINA BAKEMAN requesting a variance from Maui County Code, §19.30A.050(B)(1) to allow a 1929 plantation style home to exceed the 1,000 square-foot limit by 68 square feet for a second farm dwelling, thereby allowing the construction of a main farm dwelling located at 471 Pulehuiki Road, Kamehaiki-Pulehuiki Homestead, Kula, Hawai'i; TMK: (2) 2-3-046:016. (BVAV 20070002)**

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

Chair Holter: Is there a video presentation?

Ms. Kapua`ala: No, sir. There is an additional packet of pictures that I placed before you. It's essentially, the same pictures that the applicant had submitted as a part of your staff report. There's just a little additional pictures at the end which show the farming activities.

Chair Holter: Thank you very much. Can the applicant please come to the microphone and state your name?

Ms. Christina Bakeman: I'm Christina Bakeman, or can call me Chris. And this is Taegen, my little foster baby. I don't have childcare. Sorry. So I've never done this before. I'm a little nervous. So what do you need from me?

Chair Holter: Would you like to waive the staff report and then begin your presentation?

Ms. Bakeman: Okay. What's the staff report?

Chair Holter: Just speak your heart and your position.

Ms. Bakeman: Okay. I think you all have the packet especially, with all the photographs. And also, I also have the newspaper. I never got an affidavit. This is the newspaper that I did the notices.

Ms. Kapua`ala: Thank you.

Ms. Bakeman: The reason I'm requesting this is because it's a 1929 plantation style home: 1068 square feet. It sits on a two-acre ag. lot. And I'd like to build the main house which would exceed the thousand square feet. And I'd like the accessory dwelling, this house, to get the variance to waive the 68 square feet.

And the reason I applied for it is because I appreciate the plantation style homes. This house is so old. It's single wall construction. I believe it's redwood, from all the contractors I've talked to. And what I'm doing is trying to keep it in its original form despite the little bit of termite damage that we have. And so I'd rather not destroy the 68 square feet in order to keep the house as it is. I think it's survived quite a bit of hurricanes, and earthquakes, and termite damage, and development. And I don't want to be one of the residents to be destroying it because of the 68 square feet.

I was encouraged to do this by a friend of mine, Jeff Johnson, who last year applied for a similar variance. He has a house. I think it was built in 1928. And his— At that time, Mike Foley was the Planning Director. And his zoning for accessory dwelling was also not to exceed a thousand square feet, and he was able to get a variance. His plantation home was 2,000 square feet. And so he got the variance for that, so I thought, well, mine's just 68 square feet more.

I noticed on one of the – I received a form in the mail. Sorry. Thank you, Trisha. This is nerve-wracking. Thanks for listening to me and considering this—I appreciate it—and being patient with the baby. He's a little drug baby. I just got him a month ago—foster care.

So Jeff had encouraged me to go ahead and apply for the variance because of the 68 square feet. On the notice that I received the other day, it was signed by Jeffrey Hunt, they said that they would deny it because I could either remove the 68 square feet, which that's what I don't want to do for the sake of the house, or that I could add onto it, extend it. However, from the contractors that I've talked to as far as extending it and making it larger, because of the style of the home and its single wall construction that my understanding is when I go to add onto that, it would all need to be brought up to the current code. And the electrical would not – I mean, the electrical is updated, but the single wall construction is all redwood, so there's no insulation. There's just all – well, I'm sure you've all seen the plantation style homes. So then I wouldn't be able to really add onto it without destroying the character of the house.

Also, because it was built in 1929 – the Zoning Ordinance of the County of Maui was enacted in 1958. So I believe that the intent of the zoning for a thousand square feet makes sense, but this house was built in 1929, so they weren't even aware of anything like that.

And I'm not much of a good salesperson to try to sell you any more than that. I'm just kind of telling you the facts. You've got the photos. My main thing when you say speak from my heart is I don't want to destroy the character of the house. I love these old plantation style homes, and I see so many destroyed through development or with termites. And this house has withstood all that, and I would hate to just change that in

order to build a larger house on the property. The larger house would be built on the other side of the property. And I'm installing a protea farm. I just purchased the house a year ago.

So I think that's all from me. Do you have any questions?

Chair Holter: Yeah. Mr. Shefte?

Mr. James Shefte: Yes. What would be the use of the house after you build your new home? What would you use the building for?

Ms. Bakeman: It probably would be for the protea farm because I've got two acres. And so what I want to do is be able to have people who work on the farm to stay in the house there, and then I would stay in the main house. The main house is on – it's kind of like a little gulch so the protea can grow in the gulch. There's also a protea farm right below me. So that was my intention of doing that.

Mr. Shefte: Thank you.

Chair Holter: Warren?

Mr. Warren Shibuya: I just have easy questions here. I looked at your floor plan and tried to figure out a thousand feet, and I couldn't come to that because I don't have enough information. Maybe you can give us some of the information that when you look at this floor plan–

Ms. Bakeman: Oh, I didn't put any measurements on it, did I? I'm sorry. You know what I do have, though, is the – I just have one copy. I have the tax map key from the County. Would you like–? Can I show you– ? I just have one copy, though.

Chair Holter: Give it to one of our staff, or how about giving it to Jim here?

Mr. Shefte: Thank you.

Mr. Shibuya: Okay. As long as I have something to calculate the thousand square feet. I just looked at the numbers here, and I was just saying, no, it doesn't come out to that. In fact, it exceeds it. So that's my question. Also, when I looked at it, it appears that it has indications of 17 feet to property line, and it faces Pulehuiki Road. If we look at the ordinances here, the code says 25 feet setback. And yet, it was not identified by the County. So I'm just wondering, is there a problem there? I seem to think that there is because the current setback is 25 feet.

Mr. Francis Cerizo: Yeah, since the building was built in the '20s, there were no setbacks at that time. And once the code was approved, or the Ag. Bill, in 1998, that's when the new setback came into play—that 25 feet. So it's considered as an existing, legal, nonconforming structure.

Mr. Shibuya: Okay. Thank you. That's what I suspected and that's what it is. Also, when I looked through some of the photos here, I noticed there were a lot of work done, interior-wise, and it appears that there's some extensions built on the structure. Can you tell me when it was constructed?

Ms. Bakeman: My understanding is that the house was built in 1929. And from – I bought it from Hiroshi and Lilly Kuwahara who had bought it from Elmer Carvalho, I believe, in '80 or '81. And from all the information that I gathered that there were no other extensions. It looks like on the front porch here that there might've been something, but when I talked to the previous owners, no one's able to tell me that there was an extension. I even talked to a gentleman who dated a girl in high school back in the '70s, and he would visit the house. And he said that it was still in its original condition. So, yeah, I know it looks like kind of chopped up, but if you look – when you're inside to look at the ceiling line, that is all the same, and then the roof line is all the same. So I don't know yet. No one's been able to tell me if there was anything added on.

Mr. Shibuya: Yeah, because I look at the top on the eaves, you see that portion there that's above there. It looks like a crawl space on the top.

Ms. Bakeman: Yeah, it does. And there is no crawl space. What they did actually – I've had someone – you have to bust into the ceiling to get in there. And so we did. And it's just another roof. And then it looks like they just put this metal roof on top of it like it used to be – well, it is, the old – sorry I don't know the terms, like a gravel tar paper roof. And then they just framed another roof on top.

Mr. Shibuya: Right. I want to direct your attention to this one photo here. It's sides of the house, and it shows that. And it has that little opening up there in the eave, it seems like, with a ladder going up.

Ms. Bakeman: Right. Right.

Mr. Shibuya: So that's why I'm asking the question.

Ms. Bakeman: Yeah, what we had to do was– These were all nailed in. So what we had to do was go up underneath the eaves, and bust that open. And then we went inside. And there is a gap. You can see how large the gap is there. It's about – I would

think four feet at the height. And when you go in there— I didn't go in. My contractor did. And it looks like what they did is just had like a tar gravel roof, and then they just framed another roof on top.

Mr. Shibuya: Right. Okay. So that's why I see it appears as though it was added on. And also when you look at the eaves, on the same photo, you notice the edge there, the fascia, the size is different.

Ms. Bakeman: Yeah, right on the front, yeah. What they did, the previous owner— I'm sorry. When you said "added on," I was thinking of bedrooms and kitchens. What they did was they had a — there's a deck here. And the old eaves—you can't see it in this photo—the old eaves only came out — it didn't cover the whole deck. And what had happened from Hiroshi Kuwahara told me that the deck rotted out, so they replaced the deck flooring. And so it wouldn't do that again, he put a big roof ceiling on the deck. So actually, yeah, the deck ceiling is new.

Mr. Shibuya: Okay. Thank you for now. I'll just defer to other members. Thank you.

Chair Holter: Bill?

Mr. William Kamai: Ms. Bakeman, it's tough for the Commissioners on this Board to go by your drawing that you submitted.

Ms. Bakeman: Yeah, sorry about that. I didn't realize it was that bad.

Mr. Kamai: It's just that I'm trying to come out with some kind of dimension that would equal your main house: 1,068 square feet. Don't you have anything else besides this?

Ms. Bakeman: No, and you know what? I'm really sorry. For some reason, I thought I had put the dimensions on here. I just have the tax — yeah, just that. I thought I was so prepared. I'm so sorry.

Mr. Cerizo: Mr. Chair, on the map that was submitted by the applicant, the area is color-coded, and is broken up. There is a code legion on the bottom of that sheet that says certain areas: the main building is a certain area. There's an open deck, and there's the garage, perhaps, and it's all indicated on there. And the figure of 1,068 is also noted on that sheet.

Chair Holter: Okay. Go ahead, Bill. You saw it? Okay. So everybody's seen the floor plan from the tax map. We'll enter that into the application. Is there any other—? Oh, yeah, Hari?

Mr. Harjinder Ajmani: Hi. My question is that you said you couldn't find any – anybody could tell you if any additions were done, or when it was done, or anything like that?

Ms. Bakeman: Right. The only thing was what he pointed out was the deck. And again, I didn't even think about it as an addition. I think he did that within that last two or three years, but he didn't have a permit or anything, or I don't even know if he needed one, but–

Mr. Ajmani: Okay, so I have a question for the staff: were you able to find anything in the old permits, or anything that has been done on this?

Ms. Kapua`ala: No, there is no work on the County's records that any work has been done other than the construction in 1929.

Mr. Ajmani: I see. Okay, thank you. So the entire construction is of 1929 vintage or there about?

Ms. Bakeman: Yeah, as far as I know. When you look at the house, especially when you walk through it, it's the old redwood. There's no drywall anywhere. All the floors – I ripped up all the carpet that they had on there and it's all just the redwood planks. So I don't see anything new or updated. They did update the electrical and all the conduits on the outside because of the single wall construction.

Mr. Ajmani: Thank you.

Chair Holter: Uwe?

Mr. Uwe Schulz: Yeah, I was wondering, have you established another location for your proposed new house, by any chance?

Ms. Bakeman: Yes, and I thought I put that in here.

Chair Holter: I see a septic tank in the back here.

Ms. Bakeman: Yes. You know what I did is I gave you–

Chair Holter: In the new supplemental, the last page?

Ms. Bakeman: Well, it was this form with the lot. And then what I did is just put the house where the existing house is. And then the proposed house will be right up here. And then right in the middle here is like a gulch. And then on this side is Haleakala Ranch Gulch. So actually the previous owner had leveled off some land here for a

building site. Do you want to see this?

Mr. Schulz: Yes, please.

Ms. Bakeman: Yeah, the 1929 house had a cesspool. And because I wanted to install the protea farm, I went ahead and put in a septic tank. I removed the cesspool, and put in a new septic for the old house, and then also put one in for the new structure. So that was all done and taken cared of.

Chair Holter: Are there any other questions from the Board? Are there any letters for or against this proposal?

Ms. Kapua`ala: None.

Chair Holter: None. Okay.

Ms. Bakeman: I've been in open communication with my neighbors. There was one concern of a neighbor because I put that I'll have foster care kids. And so he was concerned I'd have a house full of ten kids. And I reassured him that that shouldn't be happening. And after this first baby, that probably won't be happening. It's more than enough right now.

Chair Holter: All right, so we're going to close the public hearing. And may we hear the staff's recommendation, please?

Ms. Bakeman: Thank you very much for listening.

Ms. Kapua`ala: Based on its analysis, the Department of Planning finds that strict compliance with the applicable provisions of this title would not prevent reasonable use of the subject property.

Based on the foregoing findings of fact and conclusions of law, the applicant has not met all of the requirements for the granting of the subject variance. Therefore, staff recommends DENIAL of the subject variance.

In consideration of the foregoing, the department recommends that the Board of Variances and Appeals adopt the department's staff and recommendation reports prepared for this March 8, 2007, meeting, and authorize the Planning Director to transmit said findings of fact, conclusions of law, and decision and order on behalf of the Board of Variances and Appeals.

Chair Holter: Thank you, staff. Would you like to comment on the recommendation?



Ms. Bakeman: Yes. When I went through it, it seems like it– I don't want to waste your time. I'm sorry.

Chair Holter: No, it's fine. Don't worry about it at all.

Ms. Bakeman: Okay. The recommendation I think was to add on or remove the 68 square feet. And I do understand that I can remove the 68 square feet with a little bit more effort, and work, and I can do that. The reason I'm choosing not to or asking for the variance is for the structure of the house. I just want to preserve the original character. And then again as I addressed in the beginning, it was also recommended that I could add onto it, but again, that would ruin the original craftsmanship of it because it would all need to be brought up to code. And then I don't– My understanding from the contractors I've talked to is that the walls would have to be removed, windows would need to be removed, and it would just destroy the character.

Chair Holter: Can I ask you a question? What's the hardship for you in that you would have to remove the 68 feet? And where would that hardship apply to? You said in your application, the kitchen area. And maybe you could describe how that will become a hardship for you, if you do have to do this.

Ms. Bakeman: Well, again, I think that I can do just about anything. So "hardship" was kind of a hard word for me. But the hardship I think more is on the house itself, the structure, because to remove the 68 square feet from the kitchen would remove most of the kitchen. So there would no longer be a kitchen in the house. I mean, it probably could be done, but there would be removal of the kitchen. So the hardship is on the house, the structure itself.

Chair Holter: So it would make it unlivable, for practical purposes.

Ms. Bakeman: Yes, yes.

Chair Holter: Thank you very much. Uwe?

Mr. Schulz: Yeah, I have a question for staff. If the variance is denied, and the 68 square feet would need to be removed, does that require a building permit or a demolition permit?

Mr. Cerizo: Yes.

Mr. Schulz: I was afraid of that. Thank you.

Mr. Cerizo: Well, for that portion. Since the building is over 50 years old, we'd have to

send it to the State Historic Preservation Division. And they may have adverse comments to that. But it's – we'll have to see what they have to say. If they would – what kind of treatment would have to be done after that.

Mr. Schulz: I just want to make a comment in that respect. When you deal with the State on historic buildings, and I went through that with my house on Lana`i, it took an entire year to get a determination that a burnt down house was not a historic structure anymore. And I'm not kidding. They declared the house – because the home was older than 50-some years, it was built in 1928, it took them an entire year to determine that a burnt house– It had totally burned. It was totally unusable. And they argued with me that it might've been a historic structure. And I said, well, what difference does it make because even if it was historic, it's not there anymore. But it took a whole year to convince them of that. So I just want you – when we make our decision here, I just want to make sure that everybody understands because of the age of the structure, it does need a building permit or a demolition permit. It also needs to get a determination from the State Historic branch. And it is extremely expensive, time-consuming, and totally useless.

Chair Holter: So that sounds like that would be a hardship?

Mr. Schulz: I would determine that as a hardship because it cost me a lot of money.

Chair Holter: Jim?

Mr. Shefte: Yes, I have a question for staff too. If they do go for a demolition permit, is there any chance that they would be required to upgrade the building to current standards as part of that permit process?

Mr. Cerizo: I'm not sure. It's a building code requirement, and that's a building question. If there is – sometimes when there is a renovation on a structure, and it exceeds a certain threshold of that structure, upgrading to the current standards would be required. But I'm not sure if this building under the Uniformed Building Code would require such a thing.

Mr. Schulz: I would like to elaborate on the same subject. If, for example, the kitchen would be removed or remodeled, that entails plumbing and electrical. And that would trigger that the entire structure would have to be brought up to code because it exceeds repairs.

Ms. Bakeman: And that was my understanding with contractors when I talked to them about it because I did look at that avenue.

Chair Holter: Any other discussion? Hari?

Mr. Ajmani: Yeah. Chris, so the reason to not change this house or not demolish it or whatever is because it's an old historic structure to be preserved and so on. So then if you were granted a variance on this one, would you keep it the way it is? Is there any plan of remodeling it, or getting it upgraded, or anything like that?

Ms. Bakeman: Well, the electrical, like I said, has been upgraded with the conduit on the outside. And then what I've done is I'm restoring it to the original – I went back and looked at the older colors of the houses when they were in the 1920s and '30s, and so I'm restoring all of that. And I'm putting in original window style, the single hung, wood, solid, wood windows. So I want to restore to the original look. Most of it is still the original look, but the shower stall and the bath sink is like from the '70s. So I'm collecting old things and trying to restore it. I like old things. In fact, when I bought the house, Mr. Kuwahara who is 81 years old, he said, are you going to drywall over all this? And I said no, because you can see all the wood. And then it's got the picture-hanging trim. So that's all intact. And all the termite damage, it's not too much, but there's enough, so I'm replacing the wood and restoring it. So it will stay original.

Chair Holter: Any other questions? Seeing none, then what is the pleasure of the Board? Do we have a motion?

Mr. Shibuya: Mr. Chair?

Chair Holter: Yeah, Warren?

Mr. Shibuya: I'll go ahead and make a motion that we approve this variance. That if the occupant – I don't see it as having any exceptional, and unique, unusual, physical, geographical condition that causes this. And that the strict compliance of this, our current rules do not – will adversely affect the current structure. And I feel that if we keep the structure intact, it would probably be the most expeditious way of handling this unusual situation. And I think creating this hardship, we actually are minimizing this hardship. And we also want to be sure that if the occupants' safety is compromised or endangered by structural weaknesses due to aging, conditions of weather, moisture, insect damage, ground-shifting, or any combination of these elements, this structure shall be replaced with a new ohana structure, that is, if the owners desire to do that. And to rebuild rather than simply clear the defective unsafe structure. So you're replacing it and complying. And if the owner desires to rebuild the ohana, the owner shall fully comply with existing County building codes and setback requirements.

Due to the age of the structure, I'm proposing at least a 250,000-dollar hold harmless insurance be taken by the owner to ensure the County is immune to any claim or

damage or injuries resulting from this granted variance.

Mr. Schulz: I second that.

Chair Holter: Uwe seconded it. We have a first and a second. Is there any discussion?

Mr. Cerizo: Can I get that--? There are several conditions on this variance approval. And besides including the standard conditions for a hold harmless and \$250,000, I have here Condition No. 1 is that if the building becomes-- I guess maybe we have to be a little more clear. If the building becomes unlivable -- but usually when buildings become unlivable, they get condemned. And usually the County actually would go there and say the building is in such a state that we would condemn your building and you have to make due. So if you want to use that terminology that the building has been determined to be--

Ms. Bakeman: Uninhabitable?

Mr. Cerizo: Uninhabitable that the structure shall be replaced in its entirety.

Mr. Shibuya: Or as the owner desires, it could be removed. That's the option I'm giving the owner.

Mr. Cerizo: Replace--

Mr. Shibuya: Either replace or remove.

Mr. Cerizo: How about repaired?

Mr. Shibuya: Repaired is fine, but when we start talking about repairing, I think we are encroaching on the setback and some of our current rules. Is that a problem?

Mr. Cerizo: No, as long -- on existing nonconforming structures, as long as there's no expansion in that area. You can't make it further nonconforming. In other words, the building cannot -- the old portion in that setback area can't be added into. You can add on the area that is conforming. There's no problem with that. But the portion where there's an encroachment in the current setback, you cannot expand that area, and that's a standard provision.

Mr. Shibuya: Okay. Do I need to modify the motion?

Mr. Cerizo: Well, I'm just trying to get it clear as to -- just to make it easier for us to know how to implement the condition. If the building is determined to be uninhabitable by the

Department of Public Works, the applicant shall either replace, remove, or repair.

Mr. Shibuya: Okay. That would be fine unless – if there's a second on that.

Chair Holter: Hari?

Mr. Ajmani: I would like to make a small comment on this that if for any reason this building becomes uninhabitable, or needs to go through some kind of measure of remodeling that requires a permit, or they elect to replace it, then all the codes have to be followed. And it should revert to a maximum of a thousand square feet, and all the setback requirements, and the construction standards.

Mr. Shibuya: I agree.

Chair Holter: So is that understood to just be a comment or is that an amendment? It's a discussion comment?

Mr. Ajmani: I think that was – I was trying to be more clear about what Warren was proposing.

Chair Holter: So that's just clarifying the language, Francis?

Mr. Shibuya: Well, that one is a little more different because what you're saying is that it shall be made compliant. So in the reconstruction, let's say they're going to repair it. If they repair it, if there's any repair that is required that the building shall be made compliant as far as the area. That's another–

Mr. Shibuya: We can add that portion in.

Chair Holter: So it was seconded by Uwe. Is that okay with you?

Mr. Schulz: Yes.

Chair Holter: All right. Go ahead.

Mr. Randall Endo: I just have a question for staff. Francis, wouldn't the already existing law say that if you have to repair more than I think was half the value of the property, then at that point, you will be required to be compliant with all setbacks? In other words, all your nonconforming status would evaporate at that point. So I'm just wondering if that should be considered when you factor it into the condition. Because it sounds like now it's kind of unclear because you just said any repairs would then kick you into your – you lose your nonconforming status. But it should be a certain amount of repairs,

right? It has to be substantial repairs that kick you into that place where you have to be compliant.

Mr. Cerizo: Well, that should be written into your recommendation that on the removal of the 68 square feet, it shall be implemented if more than – that the value exceeds 50% of the value of the structure. Sometimes they use the replacement value as a threshold. So if the improvements exceed 50% of the replacement cost of the structure, the 68 square feet shall be removed.

Mr. James Giroux: Francis, can I just comment? Just to clarify the condition, Warren, are you trying to get to where basically the variance will lapse if the building becomes inhabitable? Is that your intention?

Mr. Shibuya: That's correct.

Mr. Giroux: So we should probably just state that because what you're getting into is what Randy is saying is just existing law regarding variances. And I think what you want to do is pretty much make this variance conditional on that this structure remains habitable. Once it is deemed uninhabitable that the variance will lapse. I think that would be the clearest way for the County to be able to enforce it, and for the owner to know what is expected of them, and what representations they can make to the new owner or anybody because variances, by law, run with the land. And so when you make these conditions, you want to make them clear because we all may be dead by then. This house has outlasted a lot of people and it might outlast us. So when people look at the paperwork, and somebody pulls the variance and looks at it, and goes, well, I want to build a nice 2,080 brand-new home here, they're going to see that, well, the biggest they can build it is 1,000 feet, not 1,068. So I think if you want to amend your motion to reflect the intent to just say that this variance will be good until the house is deemed uninhabitable, I think that's the clearest motion we can get.

Mr. Shibuya: I think that's the original intent. I think I'll go ahead and amend the motion to say that the approval of this variance is to ensure that this structure is habitable. And that once it becomes or deemed uninhabitable, then—not usable—then this variance would allow you to go ahead and destroy it, or fix it up. Well, you're going to fix it up prior to that anyway.

Ms. Bakeman: Yeah, I hope it's inhabitable for a while, so yeah.

Mr. Shibuya: That's the intent. Because I think you did want to retain the 1929 Kula farmhouse character, and you did state that, and so I think this is in line with that intent. Does that cover it?

Chair Holter: Francis? Just a moment here.

Ms. Kapua`ala: Okay, Mr. Shibuya, just to rephrase for the record that this condition shall be should this dwelling be deemed uninhabitable that the variance would then be subsequently be withdrawn.

Mr. Shibuya: That is correct.

Ms. Kapua`ala: Void, made void.

Mr. Shibuya: Void.

Chair Holter: Hari?

Mr. Ajmani: I think that covers the conditions when the house becomes so bad that nobody can live in it. But I want to make sure that somebody does not want to upgrade it even before it becomes uninhabitable to 1,068 square feet more than the house. I think it should just go – the square footages go with the current structure. And if they replace any structure, then it should be a thousand square feet and meet all the codes.

Chair Holter: Uwe, is this discussion amendment satisfactory to your second?

Mr. Schulz: Yes, it is.

Chair Holter: So you second this?

Mr. Schulz: Yes.

Chair Holter: With the amendments?

Mr. Schulz: Yes.

Chair Holter: All right. It's been first and seconded. Is there more discussion? No? All right. All those in favor–

Ms. Kapua`ala: Excuse me, Board members. Would you be interested in applying a condition regarding a hold harmless agreement and the related insurance policy making the County additionally insured?

Mr. Shibuya: Yes, I did mention that. And that was – due to the age of the structure, I proposed a 250,000-dollar hold harmless insurance be taken by the owner to ensure the County is immune to any claim or damage or injuries resulting from this granted

variance.

Ms. Kapua`ala: Thank you for clarifying.

Chair Holter: Is that all right, Uwe?

Mr. Schulz: Yes.

Chair Holter: Okay. All those in favor, raise your right hand and say aye.

It was moved by Mr. Shibuya, seconded by Mr. Schulz, then unanimously

**VOTED: To approve the variance as discussed.**

**(Assenting: W. Shibuya, U. Schulz, W. Kamai, R. Endo,  
K. Acks, H. Ajmani, and J. Shefte.)**

Chair Holter: Let it be seen it's unanimous. Seven in favor. Your variance has been approved.

Ms. Bakeman: Oh, thank you so much.

**D. APPROVAL OF THE FEBRUARY 8, 2007, MEETING MINUTES**

Chair Holter: So we're moving on to – is there a motion to approve the minutes?

Mr. Schulz: I so move.

Mr. Kamai: Second.

Chair Holter: It's first by Uwe and seconded by William. All those in favor?

It was moved by Mr. Schulz, seconded by Mr. Kamai, then unanimously

**VOTED: To approve the February 8, 2007, meeting minutes as presented.**

**(Assenting: U. Schulz, W. Kamai, W. Shibuya, R. Endo,  
K. Acks, H. Ajmani, and J. Shefte.)**

Chair Holter: All right, now we're moving on to our Communications regarding a letter of



the parking situation in Lahaina.

## **E. COMMUNICATIONS**

### **1. Discussion on sending a letter to the County Council regarding parking in Lahaina.**

**An executive session may be called in order for the BVA to consult with their attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities.**

Chair Holter: Trisha—maybe she can explain that this is the final copy that we should discuss whether or not we want to approve this or not. And this is subject to our previous meeting where we discuss this letter regarding phantom parking and creating an ordinance – a letter to the County Council and the Mayor in efforts to create a bill and ordinance for a parking mechanism for business country towns. We have a – do you want to go into executive session?

Mr. Giroux: Chair, I just wanted to make a couple comments about some wording just to make sure that you're aware of certain phraseologies. I don't know if you want me to make that in open session, or if you want me to make that in executive session as far as looking at your powers, duties, and liabilities.

Chair Holter: What do you suggest?

Mr. Giroux: If we get the vote to go into executive, it'll be really short. I just have a couple of lines that I want to make comments on.

Chair Holter: All right. Is there a motion to go into executive session?

Mr. Shefte: So moved.

Mr. Schulz: I second.

Chair Holter: We got a first with Jim Shefte and second with Uwe. All those in favor?

It was moved by Mr. Shefte, seconded by Mr. Schulz, then unanimously

**VOTED: To go into an executive session.**

**(Assenting: J. Shefte U. Schulz, W. Kamai, W. Shibuya,  
R. Endo, K. Acks, and H. Ajmani.)**

Chair Holter: It's unanimous.

(The Board then went into an executive session at approximately, 2:12 p.m. and reconvened to the regular meeting at 2:22 p.m.)

Chair Holter: Regarding Communication E, let's strike the first paragraph and place this instead. You want to—?

Mr. Shibuya: You want to read that again?

Chair Holter: Yeah.

Mr. Shibuya: Okay. "Due to limited available parking, strict application of Maui County Code 19.35.070, in county business town commercial and historically-zoned areas cannot be accommodated without a variance."

Mr. Giroux: Maybe it should be "often times?"

Mr. Shibuya: "Often times cannot be—."

Chair Holter: Is that it?

Mr. Shibuya: Yes.

Chair Holter: And then add "Merchants are struggling to meet offsite parking requirements." Is that it—often times? Is that where the "often times" came in?

Mr. Shibuya: Yes.

Chair Holter: All right. Then we should change the subject heading also and say, "Parking Assessment Fees for Developments within Business Country Town Districts," so we can lead it to – the ultimate goal is to create a bill and ordinance to create a mechanism to collect fees for parking. Is that all right?

Mr. Shibuya: Right.

Chair Holter: Okay, so "Parking Assessment Fees for Developments Located Within Business Country Town Districts." Is that all right?

Mr. Shibuya: "And Historical Sites."

Chair Holter: "And Historical Sites." Okay. Is that okay?

Ms. Kapua`ala: So I will bring this back to the Board at the next meeting?

Chair Holter: Which is March 22<sup>nd</sup>? Yeah, March 22<sup>nd</sup>.

Ms. Kapua`ala: For review and possible signature.

Chair Holter: Okay.

Ms. Kapua`ala: Thank you.

Chair Holter: Thanks, staff. Now— Oh, sorry.

Mr. Endo: I have a quick question, Mr. Chair. I was just wondering if maybe we should have James or somebody confirm that writing a letter of this nature is within the scope and authority of the BVA. It seems like it's little bit on the tangential side to our general scope of authority which is to hear the standard matters that we normally do and grant variances. I mean, I think it's a helpful letter, and I have nothing against the letter. I just want to make sure that we don't—

Chair Holter: It's coming through us. All these issues keep coming through us. And there's been no mechanism—I've been watching it for four years—there's been no mechanism to communicate it further to the Council that we have this issue here. And it's like this is where it's stopping. And so our staff is making — for the last four years has been working on this issue over and over and over. And it always comes up to these parking stalls in Lahaina, or even Makawao, or somewhere else that other people are using. So it would be really simple to create an ordinance to buy a piece of property so that all the developers would be able to start buying into this parking lot. And then we would stop — it would be a mechanism that would relieve a tremendous amount of work, I think. That's what I noticed over this time.

Mr. Endo: I have nothing against the content of the letter. I just want to make sure that we don't do something we're not supposed to. If it turns out, for example, that James researches it and says, oh, yeah, maybe it's not really within our scope of authority, then you can do the same exact letter. It just wouldn't have the BVA letterhead. And then you'd just sign it as Lance Holter. And then in the letter you say, over the five years I've been on the BVA, we've had this experience. So it can have the same message. It just wouldn't have the official letterhead.

Chair Holter: Okay. It just that it looks like – as an Agency, it might make more impact.

Mr. Endo: A little bit more weight, more power, yeah.

Mr. Ajmani: Actually, I think our letter is an advisory letter anyway. And as a Board, I think we can definitely issue advisory type of things. So I don't see why that should be against any rules and regulations. We are not mandating them to do something. We're just advising that we have observed these things, and somebody needs to do something about it.

Mr. Giroux: I can look into the issue and advise the staff accordingly.

Chair Holter: Now, I notice that there is this new one coming up. It's for this restaurant in this building that we just gave – we just dealt with. Now they're coming in. The restaurant in there is coming for a parking variance from 20 to ten stalls. And I think that's coming up at the next hearing. I saw it in the paper today. So, I mean, here it comes again.

Ms. Acks: Instead of saying, "It would make a great improvement," what if we said, "The Board of Variances and Appeals is proposing the County Council consider applicants be able to pay into a permanent parking fund and the County began the purchase?"

Chair Holter: I like that.

Ms. Acks: I mean, we're just proposing it.

Chair Holter: Can you give it back to them? To—?

Ms. Acks: "The Board of Variances and Appeals is proposing the County Council consider supporting applicants able to pay into a permanent fund, and the County begin the purchase and development of a parking facility, which essentially, is a more permanent parking solution." "Would result in a more parking—?" "Would result in a more permanent parking solution."

Chair Holter: That's perfect. Thank you. All right. And if we can't do this, then I'll just sign it next month. All right. So, oh, okay, Director's Report, F.

## **F. DIRECTOR'S REPORT**

### **1. Status Update on BVA's Contested Cases**

Chair Holter: Uwe, Contested Cases?

Mr. Schulz: Yeah, I just want to ask the staff on the intersection of Lahainaluna and Honoapiilani Highway, we had a contested case that somebody opened a flea market without a permit. And just very recently, the property has changed and the flea market has stopped being there. But now there's a brand-new one on the same intersection on the Pioneer Mill property on the north side of the intersection: Lahainaluna and Honoapiilani Highway. And I was just wondering if Planning had issued a permit for this particular enterprise. It just sort of moved across the street. It moved from the south side of Lahainaluna to the north side of Lahainaluna. And I think that's the property that you want buy for parking, Lance.

Chair Holter: I think that's actually the mill site up above—the old mill site further up.

Ms. Kapua`ala: It's actually the same site. The applicant or the appellant did come to us and asked if it was a permitted use. Because the mill site is, I believe, M-1 or M-2, it's outrightly permitted. So the new site is a permitted flea market. The old site, she's still responsible for those occurring fines.

Mr. Schulz: Thank you.

Mr. Giroux: Trish, did we get any feedback from Corporation Counsel regarding the Parks' appeal?

Ms. Kapua`ala: None at all. And I should follow up after this meeting.

Mr. Giroux: Can we write a letter or something asking for response or what they're going to do as far as assigning us an attorney? I'm getting a little nervous here because I'm suspecting that there's deadlines that need to be met. If the record of appeal is already up there, I'm suspecting that there's got to be some kind of answer, or notice of appearance, or something that needs to be filed.

Ms. Kapua`ala: Okay. Do you recommend I send it directly to Mr. Moto?

Mr. Giroux: Yeah.

Ms. Kapua`ala: I'll surely do so, James.

Chair Holter: Are there any other questions on any other contested cases here?

Ms. Acks: Yeah, I have a question: if something is contested, does that stop the clock?

Ms. Kapua`ala: No.

Ms. Acks: No?

Ms. Kapua`ala: An appeal to the Board of Variances and Appeals in no way stays the order. That means that the fine does not toll.

Chair Holter: No, I think she means it the other way. So if it's a contested case, the contested case stops the Board of Appeals' timeline. If it goes into a contested case, it stops it. Is that what you meant? Yeah.

Ms. Kapua`ala: I don't think a timeline will begin until the parties have presented all of the evidence before the Board.

Mr. Giroux: Yeah, there's a different timeline once it's in contested case hearings. In accordance to our procedures that the hearings – until there's the final order, then there's a different – under the contested case procedures, there's a different deadline.

Mr. Shibuya: The way I look at it, in lieu of the Village park thing, that is actually in the Second Circuit Court, is it not?

Mr. Giroux: Yeah, the Parks' case went to the Circuit Court.

Mr. Shibuya: There is a time limit on the court. Can we find that out because I don't want to default judgement again?

Mr. Giroux: Yeah, that would be in accordance to the rules of civil procedure, and the rules of Circuit Court, and any local rules that – and any orders and judgements coming from the court.

Mr. Shefte: That's totally out of our hands, right? No?

Mr. Shibuya: Well, we haven't identified a representative, a legal counsel, and so this Board is without counsel.

Mr. Giroux: Yeah, the original suit went up without our name on the caption. And the court ordered that the caption be redone to include us as a party. And then we took a vote as far as how much participation we wanted. And so we voted – or this Board voted to have counsel represent our position in front of the Circuit Court as far as filing separate pleadings, I guess, as far as–

Mr. Shefte: Has it happened yet?

Mr. Giroux: And that's what Trisha is going to follow up on.

Mr. Shibuya: So we file an amicus?

Mr. Giroux: No, we will be a party, and that's the difference. In Agency appeals, the Agency can decide when they're in an adjudicatory position to actually just let the parties duke it out. But as far as the standard of appeal, one of the parties will always take the position that the Board was either – did an illegal act, did not follow its procedures, was not – was beyond its scope of jurisdiction. And so that's basically what the party who's moving wants to prove when they're appealing from a Board's decision.

Mr. Shibuya: Right. And that's why the Board said no, we're going to have our own legal counsel addressing this and representing us.

Chair Holter: All right. Any other discussion? All right. The Board of Variances and Appeals is adjourned. And the next meeting date is March 22<sup>nd</sup>.

**G. NEXT MEETING DATE: March 22, 2007**

**H. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at 2:40 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Lance Holter, Chairman  
Warren Shibuya, Vice-Chairman  
Uwe Schulz  
Kathleen Acks  
William Kamai  
Harjinder Ajmani  
James Shefte  
Randall Endo (1:35 p.m. to 2:40 p.m.)

**Others:**

Francis Cerizo, Planning Staff  
Trisha Kapua`ala, Planning Staff  
James Giroux, Deputy Corporation Counsel