

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
APRIL 26, 2007**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Randall Endo at approximately, 1:30 p.m., Thursday, April 26, 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. PUBLIC HEARING**

- 1. CRAIG G. NAKAMURA of CARLSMITH BALL, LLP, representing WDI INTERNATIONAL, INC. requesting a variance from Maui County Code, §19.36.010 to reduce the number of designated parking stalls from twenty (20) stalls to ten (10) stalls for Tony Roma's Ribs • Seafood • Steaks located at the Old Kishi Building located 736 Front Street, Lahaina, Maui, Hawai'i; TMK: (2) 4-6-009:057. (BVAV 20070003)**

Chair Endo: We'd like to ask staff, Trish, to introduce the first matter.

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

Ms. Kapua`ala: And I have a video for the Board. So our video editing software didn't quite work out, so I'm going to be doing this file by file. It takes a little moment.

Now, this is standing on Front Street. The subject building: the Old Kishi Building. As you can see, the building has zero setbacks on the front and the sides. The only parking here are the County parallel parking stalls.

The next shot is on the sidewalk looking into the Old Kishi Building. This was once the old Diamond Head Art Gallery, and now it's occupied by Pictures Plus. Dairy Queen occupies the same structure. I'll have a shot in a minute. That door is going to be the entrance to Tony Roma's.

Now, this is inside the art gallery. The next shot is right outside the art gallery in the hallway, which used to be designated for storage. Now, this is the back entrance to the Tony Roma's Restaurant, and that's where the lift will also be located.

The next shot is outside to the rear of the building. It's a one-way street. Private property. This is where the contractor utilizes to rest and park. The adjacent parcels do have some parking stalls located onsite.

Again, the subject property. Next door is a paid parking lot, and right across the street is a County parking lot.

Now, we're on the second floor currently under construction. This gentleman's doing the trimmings. So they painted that day. That's the balcony that you were viewing earlier. The staircase from the first floor. This is more towards the bar area and kitchen, mostly where the staff will be located. Kitchen area.

I'm just going to jump ahead to the Lahaina Restoration Foundation parcel. This is located on the next block. That's the Baldwin Home and the subject parking lot where they've already gotten 20 offsite parking stalls approved by the Maui Planning Commission.

Thank you, Board, that concludes this presentation. And we have here today, Mr. Nakamura, representing the applicant.

Chair Endo: Good morning, Mr. Nakamura. Would you—?

Mr. Craig Nakamura: Well, did you want to ask – did the Board want to ask questions of the staff, or shall I go ahead and just make a short presentation?

Chair Endo: Does anyone have questions for staff before we hear the applicant's presentation? Warren?

Mr. Warren Shibuya: Trish, on your review, and I'm looking at the map, too, it does not appear that there's any space in the front as well as in the back. Did you notice any parking stalls because the property line just goes right to the very edge of the building?

Ms. Kapua`ala: Yes, sir, that is correct. There is – I believe the staff report says there's a three-foot setback in the rear of the property – well, the property that's farthest away from Front Street: Luakini Street, I believe.

Mr. Shibuya: Okay. And on Front Street, there's no front parking?

Ms. Kapua`ala: No, sir.

Mr. Shibuya: There's none, right?

Ms. Kapua`ala: The entire Front Street, there is no parking on any of the properties' fronts.

Mr. Shibuya: Okay. Thank you.

Chair Endo: Mr. Nakamura, would you be willing to waive reading of the staff report?

Mr. Nakamura: Oh, certainly.

Chair Endo: Okay. In that case, why don't you proceed with your presentation?

Mr. Nakamura: Thank you. Just – I'll try to be brief. I noticed that are a couple of new members on the Board at this month's meeting. And there is some background dealing with this particular application involving prior applications to the Board. So, I, no. 1, want to welcome you. And also, no. 2, I kind of want to go over these things a little bit.

The point that Mr. Shibuya makes I think is a very good one. This is – that's one of the reasons that we're here is because this is a very old property. And back in the 1900s when – or early 1900s when this was built, the building was built, there were no setbacks in this area of Lahaina. Everything was built all the way to the property line. So on Front Street, you basically go all the way to the sidewalk. And on the sides of the lot, you go right to the next building. And in the back there as you saw, there's very limited space between the building and the property line. And that's the way things were built back then. And I think that was basically the way the commercial area worked. Most of the people were visiting on horseback or walking, and there wasn't a lot of cars or congestion at the time. So that fit the situation at the time, and the improvements were made that way. There weren't any provisions for parking on the property. Very limited provisions.

And this particular building, historically, was for commercial as well as residential use. I think there was some apartments and residences on the second floor. It's a two-story building. Over time, this – of course, Lahaina has changed, as everybody knows. It's a very busy commercial area. There's very limited on-street parking as you can see. And everyone knows – is familiar with Lahaina. It's a pedestrian-oriented town meaning that most of the visitors and patrons basically, park in one of the parking lots on the outskirts and they walk into town. They walk down Front Street. They visit the various shops. You might see a restaurant that you like. You stop in and eat. You know, that type of thing. I think very few people go to a particular restaurant, or would drive to a particular restaurant to eat and park there.

This section of Lahaina is also a historic district meaning that it's been designated by the County as a very special and unique area. It's restricted as far as the types of uses that can be made of the property, any kinds of improvements that can be made, albeit, there are various restrictions that the County has on the businesses. So to meet those types of historic conditions, and also meet today's requirements, today's parking requirements, it's very difficult for new businesses.

What we have here is a situation where Tony Roma's is going to come in and open a

new restaurant. And because it's a new use, it's required to comply with today's parking requirements. So you have a use going into a building that was built for conditions back many, many years ago, but being required to meet with today's parking requirements. And that's basically why we're here because there's not enough parking on the property to accommodate the requirements for parking for this particular restaurant.

The change in the use, the addition of the Tony Roma's Restaurant, is requiring 20 parking stalls onsite. And because we cannot do it onsite, the County does allow an application for offsite parking meaning, I think, the requirement is you can provide the parking offsite if it's within 400 feet. I think it's 400 feet of the property.

You have to make an application to the Planning Commission for a separate approval. And in this case, that's what has been done. Tony Roma's has a lease with the Lahaina Restoration Foundation. As you saw, the parking is behind the Baldwin House which is about a block, a half a block away on the backside of – on Luakini Street. And we've leased 20 stalls there, and are paying – will pay two thousand dollars a month for those stalls. So a hundred dollars a stall.

Tony Roma's had applied for that offsite parking approval together with its building permit back in August of last year. And it's quite some time ago. Basically, at that point, they were advised by the Planning Department that the offsite parking approval couldn't be processed because of the then existing variance that the building had. And it's – I guess there's certain technical requirements pertaining to the variance: the way it was issued, the number of stalls that were issued at the time. So basically, the restaurant basically, he just wanted to get his building permit so that he could proceed with construction and open his restaurant as quickly as he can. We're already in the situation where they're paying lease rent to the landlord. And, of course, like any business, you want to get opened. I mean that's what you need to do. They ran into this difficulty because of the previous variance. They couldn't get their parking approved, and this is where the landlord came in several months ago.

I think the hearing was back in December for an offsite – well, excuse me, to amend the previous variance that they had for the property. There were again some technical difficulties with that request. And the application was deferred, I think, for a month or two. Subsequently, the landlord amended that application and it was approved.

One of the reasons, or probably the main reason that we're here today is because at the time of that hearing, which was in December of last year, there seemed to be a very strong sentiment amongst the Board members at least recognizing the fact that this parking situation – that we weren't dealing with this parking situation in Lahaina the correct way.

There was a reference to phantom parking. That's the first time I heard that used but –

that term used, but it is a very apt term because really what's happening in Lahaina is that this type of offsite parking approval does not really provide more parking, which is what we need in Lahaina. We need more parking, physically, more parking.

What is happening in Lahaina is that because of the requirements for new businesses to provide parking, they're getting these offsite parking approvals because the properties again, most of – a lot of the properties don't have parking. So you have to get parking at another site. And they're getting these offsite parking approvals for properties where – and I'm not referring to Lahaina Restoration Foundation, of course, but other owners are leasing stalls over and over again, the same stalls over and over again. Businesses will get their offsite parking approval, and then they'll cancel their leases so they're not – I mean, they get it for basically, a temporary basis just so they can get their permit. They cancel the leases and nobody knows about it. There was no way of tracking these things. Until very recently, I think what the Planning Department has done which I think was a good idea was to require a unilateral agreement, which is an agreement that the landowner and the parking lot owner would sign. And it would be recorded saying that the parking stalls were committed for a particular use on that property. So that now there is, if someone was to go to the effort, there is a means of tracking these stalls. But still, that's not a means of providing more parking.

We have a situation where there are a lot of businesses that are operating under the old – they received approvals a long time ago, and they don't have any parking, basically, is what it comes down to. And as you saw, some of those photographs or the video – certain of the parking stalls – I mean, the uses – it's already being used for a parking stall, in fact, paid parking. So that the uses again, are a little bit conflicting. The basic problem is we're not providing more parking. We're not providing more parking stalls which is what we need.

So we think it's – this situation also is if you think about it, most customers at a restaurant like Tony Roma's, no. 1, they're not going to know that there's a parking lot back there. It's a block and a half in the back street away, or half a block away. And even if they know about it, they're probably not going to use it. I mean, it's just something that most people are just going to ignore. Again, there is a County parking lot almost immediately or immediately in back of this restaurant facility on Luakini Street that people can use. And basically, that's the reason why we're here.

We're applying for a variance. We have – we're asking for some leniency in the situation where we're required to have 20 parking stalls. We're going to pay two thousand dollars a month for these stalls. And really, the stalls are really not even going to be used. And we're asking that the number of stalls be reduced, the requirement be reduced from 20 to 10. And I'd be happy to answer any questions regarding that particular – that part of my presentation.

Chair Endo: Ms. Acks?

Ms. Kathleen Acks: How many tables are you going to have in your restaurant?

Mr. Jun Hirano: (Inaudible)

Ms. Acks: A hundred thirty seats?

Mr. Nakamura: Why don't I—? Let me, so we can go – I know we want to have it on the record. Let me introduce Mr. Jun Hirano who is going to be the general manager of the restaurant.

Mr. Hirano: Hi. Good afternoon, gentlemen, ladies and gentlemen. My name is Jun Hirano. I'll be the general manager of Tony Roma's Lahaina.

Ms. Acks: Okay. So 40 tables?

Mr. Hirano: Yes.

Ms. Acks: Each of those tables is probably going to require a car. For the County-owned parking lot, the County parking lot, do they charge for parking there?

Mr. Nakamura: I don't believe so.

Mr. Hirano: No.

Ms. Acks: This is going to be kind of out of the box, and I'm not sure who the question should go to, but instead of the money going to a private company, is there any way of taking that same money to go towards the County so that the County, in fact, will expand, use that kind of seed money to expand the parking to, in fact, get more parking?

Mr. Nakamura: If I might just add a comment while you're asking that question? That's one of the issues that came up at the last hearing – not the last, but the last one that I was at. And you might recall, I believe you were here, and you might recall that Mr. Untermann who was here on behalf of the owner of the property and Diamond Head Gallery, that's one of the suggestions that he made. I mean, he volunteered to contribute to such a fund if one was ever created. And I understood that there has been a resolution, or a memo, or a request to the County Council that this Board made that that be studied: some solutions to the parking problem in Lahaina actually be done, or a study be done.

Ms. Acks: Do we have that option?

Mr. Francis Cerizo: No.

Ms. Acks: No.

Mr. Nakamura: Well, I guess being that there is nothing at this point, there's no fund that's created at this point, I mean, you know—

Mr. James Giroux: Kathleen, just to kind of on a background, basically, an ordinance would have to be passed that would allow – basically, two things would have to happen. There would have to be an ordinance that would allow the receipt of those monies. And then also, something would have to be created in the budget that would actually – where those monies would be received and withdrawn. So basically, it would be a Council – it would have to be driven by the Council, but out of the Planning Department, they can suggest legislation. I think one of the things is that, I guess, because it is in the parking that that's something that the Planning Department does have purview over that they would probably be the department who would push forward certain types of legislation to create certain kinds of funds. But then, Finance would also have to—I guess once that ordinance was passed—create an actual fund.

Ms. Acks: And that's what this proposal was all about?

Mr. Giroux: Yeah. I believe we wrote a letter, and I think it went to Riki Hokama as the Chair of the Council. So he would send that communication probably to a committee. They would have to decide what committee to send it to. It could be the Planning Committee, or could be the Budget Committee, whichever one they deem to begin that conversation as far as trying to create some kind of ordinance.

Chair Endo: Okay. I think what I want to do is just for everybody's information, procedure-wise, I'd like to make sure that the applicant's presentation is over. Then, I want to take public testimony, if there's anybody in the public who wants to testify. Then, I think I want to hear the staff's recommendation. And then we'll go with – you can still further questions afterwards, but I think at that point, we'll come back, and you can ask more questions of the applicant, and also deliberate on potential conditions or suggestions.

Mr. Giroux: Randy, can you have them waive the reading of the report?

Chair Endo: Yeah, they did.

Mr. Giroux: Oh, you did.

Chair Endo: Yeah, so they waived the reading of the report so it's part of the record without reading.

Mr. Nakamura: Yeah, you already asked that, I think.

Chair Endo: Right. So at this point, if the applicant's presentation is over, we'd like to—

Mr. Nakamura: We'd just like to add later on after the staff's presentation or recommendation.

Chair Endo: Okay. Sure. So at this time we'd like to open the discussion up to anyone who wants to give public testimony.

Mr. Keoki Freeland: Good afternoon. My name is Keoki Freeland. I'm with the Lahaina Restoration Foundation. We are the ones that have the parking lot that's available for this so-called phantom agreement. I just want to add on to this concept of phantom agreement. We've disagreed with it for years. It exists in Lahaina, but I just would like to add some more information to you.

In our studies, it's not on line, the Restoration, other organizations have looked into this: the volume of phantom parking monies. Nobody can come to a pinpointed figure, but it's our assumption, which is a pretty good calculation is about a million dollars a year in Lahaina alone. And we certainly would like to see this million dollars, if it was that figure, put into a fund like you're talking to and generate more parking. What it's doing right now is it just makes it inconvenient for the new business. It doesn't create more parking. Sure, some of the parking lots are real happy by pocketing this extra money. Although we're a parking lot, we're not happy about it because it doesn't create any more parking. And what we've been talking about, if you had enough money, buy more parking areas outside of Lahaina Town and have a shuttle system coming through. And the primary people or the first users of this new parking lot should go to the employees of the businesses that are paying into this parking fund, and give those employees a break. Let them park up there, jump on the shuttle, go to work, go on back. Anybody else parking up there, pay, but have a free ride on the shuttle and come on through.

So the more we talk about this, I think it'll go down the road better than what it's been in the past. It's always been talked about in the back closet, and it hasn't gone anywhere for years. So it's just my comment. Are there any questions?

Chair Endo: I have one question: those 20 stalls that you would be leasing to the restaurant, would those be marked and reserved only for Tony Roma's?

Mr. Freeland: No, at a hundred dollars a stall, I'd be losing money because I can sell those stalls at seven hundred bucks a month. So at a hundred dollars per stall, per month, I cannot reserve it for them. I'm just making it – giving them the ability to get their permit by selling it to them at a hundred bucks a stall. But if I'm going to reserve it, the only way I'm going to do it is that I'll have to sell it to them at seven hundred dollars



a stall per month.

Chair Endo: Any other questions? Thank you.

Mr. Freeland: Parking is a good business.

Ms. Acks: I was just going to say I'm in the wrong business.

Chair Endo: Is there anyone else interested in testifying? Okay. Then let's move on to the staff report, or staff recommendation, rather.

Mr. 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. In other words, offsite parking approval has been granted. Therefore, the variance is not necessary to reasonably use the subject property.

Recommendation: 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, the Department 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 April 26, 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 Endo: Mr. Nakamura, did you want to make another statement?

Mr. Nakamura: Very quickly. As I'm sure the members that have been on this Board for a while know there are three criteria for granting variances, and those are all set forth in the staff report.

The first is exceptional, unique, or unusual physical or geographic condition on the property. Basically, the staff says that we have met that requirement due to the conditions that we've discussed.

The second one is the strict compliance one that they mentioned. And I want to come back to that one because they're saying we don't – that's the one we don't comply with.

And the third is the condition creating the hardship were not the result of actions taken by the applicant. And the staff again agreed that we meet that requirement because we're not – we didn't create the condition that we're applying for.

So two, at least, from the outset, two of the three conditions have been met. The third regarding the strict compliance, I would say that from our point of view – well, the staff, first of all says that we have not met this requirement because we already have the offsite parking. And that's basically what their position is. I would say that given the circumstances that we're in, strict compliance does create or does prevent us from reasonable use of the property because of the amount that we're required to pay for this parking. Although we have it, we're required to pay a substantial sum. And it's really for parking that's not going to be used. I mean, it's like an unnecessary charge that's being assessed against the tenant. And certainly, the money could be better spent. So I think in that respect, I think we do meet that requirement. The staff goes into some other discussions regarding criteria, but I'll reserve that argument. Thank you.

Chair Endo: Okay. Any questions for the applicant or discussion? Why don't you go ahead, Warren?

Mr. Shibuya: Mr. Nakamura?

Mr. Nakamura: Yes?

Mr. Shibuya: A couple easy questions. On the parking, you're – we are – even though we disagree in terms of phantom parking, we are actually contributing to phantom parking, are we not?

Mr. Nakamura: Yes.

Mr. Shibuya: Because as stated before, the parking stalls are not designated, but yet you are paying a fee of a hundred dollars a stall, and that's two thousand dollars a month. And so, if let's say, the County Council would be – to pass an ordinance requiring a separate fund, would your clients be amenable or agreeable to paying into this fund?

Mr. Nakamura: I think instead of paying for the phantom parking, they would be.

Mr. Shibuya: They would.

Mr. Nakamura: Assuming that the fund was created, yes.

Mr. Shibuya: Right. Now, let's say that this phantom parking – I mean, this new central parking – I mean, this new central fund managed by maybe either the County or another agency for development of parking in Lahaina, if the fee was larger than a hundred dollars a month, would you still support that concept?

Mr. Nakamura: I can't speak for my client on that just because it's kind of a speculative

thing. I would say, though, that being that they're willing to pay a hundred dollars a month per stall, certainly they would be required – I mean, they should, logically, I mean, participate in the fund to that extent.

Mr. Shibuya: Right. Understand.

Mr. Nakamura: They'd rather pay the money there where it's actually going to be used for something than to just pay it for something that's not going to be used.

Mr. Shibuya: That's correct. And so that's my point here: is your client willing to go the extra mile, and perhaps maybe have to pay a double or triple the amount of the hundred dollars a stall? And not seven hundred dollars a stall, but somewhere in-between to put into a fund to develop parking that's actually going to happen. And I think the intent that – I'm getting the sense, I know you cannot get a firm commitment at this time, but I think the general direction or consensus is that you'll be supportive of it.

Mr. Nakamura: Yes. I think all the businesses in Lahaina should be supportive of that because that's what everybody needs is more parking.

Mr. Shibuya: Right. Mr. Untermann stated in the earlier hearing that he would be very supportive of such a fund, too. So you're expressing not only one view, but another owner's view especially, in the same building.

Mr. Nakamura: Right. Exactly.

Mr. Shibuya: Okay. Thank you.

Ms. Acks: I have a problem with cutting the parking back from 20 to 10 in the sense that if we make that precedent, and then this other parking gets established, that ten is going to be on the record. I think given that there are approximately, 40 tables, 20 parking stalls is certainly justified in my head. I personally would like to keep it 20 and see you guys make some things happen. We've written a letter. Hopefully, more of the people in Lahaina can also have a community meeting, bring the County Council in, and have some way of directing this money into that fund. But I'm not comfortable at this point in time cutting back from 20 to 10.

Mr. Stephen Castro: Yes, I have a question. Right now you're currently paying a hundred dollars per stall. Would seven hundred dollars guarantee reserved parking?

Mr. Nakamura: We haven't discussed that with Lahaina Restoration Foundation. I don't know. As you saw in the photographs, I think that the stall or the lot is being used for paid parking now. At least from my experience in going there, I think it's one of those where you're kind of – there's a box, and then you feed the box for your particular stall.

So they probably have some kind of an agreement with a parking contractor to lease out the entire parking lot, but I'm not sure. So I don't know if we could then pay more. There's probably a set agreement already for the entire lot. I don't know if allowing us to pay more per stalls would work in terms of that agreement.

Ms. Acks: I would think that that additional money would bankrupt the company. You're talking about \$14,000 a month. That's any kind of profit that you make. So I wouldn't blame you for not making that commitment from – I wouldn't touch that one with a ten-foot pole.

Mr. Nakamura: See, what I'm saying is though, instead of paying the two thousand dollars a month for this parking that we don't use, I mean, certainly, I would encourage my client to pay the same amount for a parking fund, you know, something that – if there's actually going to be parking created. But again, the two thousand dollars a month is kind of a hefty amount just for parking especially, if it's not being used.

Ms. Acks: And I agree with that. I just think that by continuing to pay the two thousand a month, it's going to motivate people in Lahaina to make some changes that really need to be made. And I think we've made our attempt to do what we can other than being the ones to go up there. You are the guys that are – the people that are living with it. I think certainly once that would happen, then the money would go from one fund into another, and you wouldn't be continuing to pay double.

Mr. Shibuya: I think it's an issue of integrity here. And you proposed a very good proposal and solution here. And like Kathleen, I agree that it adds towards developing a more permanent solution to this current problem of parking, limited parking. And it was not a problem that you created. You just inherited it. And you're trying to do the best you can. And we are trying to improve the services on Maui available to both residents and the visitors. And this is a service that would add to the community. And I see all sides benefitting from this. And so, I'm very supportive.

However, I just want to go through the numbers. Francis, if you wouldn't mind going through the numbers with us. I just want to run through my mind and seeing whether the 20 stalls are adequate. And can you tell me on these numbers – it's in fine print. It's on Figure 3. And there is a Tony Roma's floor area calculation. And the first floor, or however you want to do it, can you explain or walk us through the numbers, and then come up with your 20 stalls? I'm just checking the arithmetic. I'm sure it's correct. It's just that in my mind, I just want to be sure it is correct.

Ms. Kapua`ala: Mr. Shibuya, are you referring to the ZAED plan check? Okay. Now, the offsite parking ordinance says that for a restaurant, one stall is required per 100 square feet of serving and dining area with an additional three parking stalls for employees. So the dining area, which is listed here as 1,704 square feet would trigger

the requirement for 17 parking stalls. Now, we wouldn't calculate the bar, the kitchen, the restrooms, the corridor, or the entry into this equation as those all will be used – well, the kitchen and bar area, corridors, entry, that's all considered what staff would use. Employees would require three parking stalls. So 17 plus three equals the 20-stall requirement.

Mr. Shibuya: So you're saying the interpretation of that Chapter 19.36.10 is actually – the interpretation is that it's just the dining area plus three employee parking?

Ms. Kapua`ala: Yes, sir.

Mr. Shibuya: Okay. I just wanted to confirm.

Chair Endo: Does anyone want to make a motion? Folks are still thinking about it? Let me ask staff a question then, just to put us back– Earlier, I know Board Member Acks mentioned about whether or not they could offer up a monetary contribution of some sort in lieu of – well, a condition in order to get the variance reduced, the parking reduced from 20 to 10 stalls. And I think to summarize your answer was that that's not possible at this time because there's no fund. Is that correct?

Ms. Kapua`ala: Yes.

Chair Endo: But if they were to just make a commitment to us that they would contribute a certain amount of money in the event that a fund is created in the future, can that be a legitimate condition?

Mr. Giroux: It might be a shot in the dark, but – I mean, if you get to the point where you are going to say that it meets the criteria for a variance, your rules allow you to craft conditions which would be– Let me see. It says, "To prevent any detriment to the public's interest, health, safety, convenience, or welfare, and to ensure substantial compliance with representations made by the client." I think that last phrase, "representations made by the client," allow you to try to frame some type of condition that would – if it would fall fairly in some type of pro rata share type of language– You could probably look at language that would say that in the event that the County were to establish a parking fund for the Lahaina area that the applicant shall participate as to his pro rata share based on 20 stalls, or something to that effect in light that the condition would allow for if a trigger was met in the future that the Planning Department could go back to the variance, and look at the condition, and the applicant would then at that time be assessed some type of pro rata share. I think if that type of condition were made, in order for that to actually happen, not only would there have to be some kind of mechanism within the bill itself, but I think the bill would have to address those types of situations where people have received variances that they would have to then look at– Because I think in order for the Council to come with that, they would have to do a study

and an analysis to say that this number that they would ask per stall would actually be proportionate to the impact of the development. There would have to be a nexus study and then a proportionality test that would have to be met. So you would want your language – because this is kind of throwing it out way in the future, and we don't even know if this bill would even be created, but in order to give it the best shot of surviving, you would want to try to follow the constitutional text of – you know, that they would do their fair share, and that they would contribute per, I guess, whatever the ordinance requires which would be the 20 stalls per their use. And you would want to structure the variance per their use.

In your conditions, one of the first conditions, because this is kind of a use variance, that you want language within your conditions to say that this variance would be only applicable to the request that was approved. So if they later in the future decided to do something that was more intensive that would require even more parking, you would basically want this language to limit your variance and your conditions to this use.

Ms. Acks: Could we put a timeline? Could we waive this fee for a year? So through May 2008, which would give a year to hopefully get the process moving, if the process was moving by May 2008, you could come back and then request a continued variance. If nothing has moved, then I think– I'm a little concerned about making it open-ended because if we made it open-ended, it could be 50 years before anything happens. I think by – if we could put a timeline, which would basically, get people motivated to work for the next year to start the discussion, and try to trigger the process, I mean, I think we're all empathetic towards the situation, but we want to see something positive go forward from this decision. And I think if we just make a blanket waive, then we're opening ourselves up where nothing happens. So can we possibly waive it for a year? Or I'm open to a discussion about what the timeline would look like.

Chair Endo: Probably if you want to do that, you should just deny the – my thought would be you should just deny the variance request then. I mean, they can come back in a year with a proposal if they have – if something has changed in the County, and there is a fund or something, rather than giving them a variance for just one year. I think what you're saying is give them a variance for a year, and then it would expire after a year unless they come back and something more permanent has taken place. Is that sort of what you were saying?

Ms. Acks: I'm not sure. I'm trying to think of something outside of the box that's really going to trigger this discussion to go forward instead of stagnating. I really do have issues with knocking it down to ten. I hope Tony Roma's has 40 cars that you need to find parking spots for, but that again is going to acerbate the problem. So I'm trying to think outside of the box.

Mr. Shibuya: And I appreciate you, Kathleen, saying that. The problem here I think is if

we deny this variance, then they cannot proceed with the building and activating their business. So that's my concern. I'm saying let's approve – this is my thoughts here: approve the variance. And allow for a delay in paying for the parking, or allow the parking to continue, but with the proviso that if the County should have an ordinance for it, a special parking fund, then they should contribute to that fund.

Ms. Acks: I thought the permit was already approved. I didn't think the permit was based on this. I thought they had already–

Mr. Nakamura: If I might add? When the landlord's previous variance request was amended, the Planning Department let Tony Roma's proceed with its offsite parking application approval. So they did, and they did get their building permit. So that's not the issue at this point.

Mr. Shibuya: Okay. Good. Thank you. So then it's not a problem then. They can proceed, and continue with their building, and conduct their business.

Chair Endo: Yeah, I think the issue is that they have to pay this two thousand dollars a month that doesn't actually improve the parking situation for anyone, either themselves or anybody else in Lahaina since those stalls are already there, already available to the public. It's like paying money just to satisfy some technical requirement that doesn't actually benefit anyone. So if we could waive it somehow, give them a variance of some sort, and in return get something of real benefit for the County, that would be the best, but if we can't figure out a way to actually do that, then we're stuck.

Mr. Shibuya: Using Kathleen's idea here, if we went ahead and approved this variance, and then with the proviso that after a year, we could delay the actual payment for the 20 parking stalls initially, for a year. And then after that year, they would start paying into this 20 parking stalls regardless of whether we have a central parking fund or not.

Ms. Acks: I think the variance is asking for ten spots. And I don't want to go there, I don't think.

Mr. Shibuya: That's correct. I'm saying only 20. And so I'm willing to delay the payment for all 20 the first year. And then the beginning of the second year onward, they would contribute 20 stalls, for 20 stalls.

Mr. Giroux: Warren, I'm following you, but basically, what we have to do is we have to work with the application. The Board is given jurisdiction over either allowing or not allowing what was applied for. So like Randy said before, we have the decision: do we find that it meets the criteria? Then we allow for a variance that was asked for. If we can't find that it meets the criteria, then we have to look at a denial. But if you find that it reaches the criteria, you can grant the variance with conditions within the bounds of

your rules.

So in structuring – where the flexibility is, is within the granting and conditioning. And that's where the – if you want to look at creative solutions, or things that would be within the realm of your conditioning powers, that's where it would be. But the conditioning powers would only be triggered if you found that they met the criteria to grant the variance itself. And what they're asking for is the ten stalls. So it's – you've kind of got to buy the horse first, then you can get the cart, and then you put the apples in the cart. But no horse, no cart, no apples.

Ms. Acks: So what I'm hearing is – maybe I'll make a proposal to deny the variance with the understanding that there's another way of writing up a different variance that we might be able to approve?

Mr. Nakamura: If I might add? I think what Counsel is saying is based on I think what happened before, which is I don't think that procedurally, they want us to amend the request for a variance to change it drastically from going from in this situation we're going from 20 stalls to ten to what Mr. Shibuya is suggesting we go from 20 stalls to zero, and donate the entire – money for the entire 20 into some fund. The reason we went from 20 to ten was because I think the general feeling was maybe 20 to zero was a little too drastic, to tell you the truth, but although I think the concept is correct. And if need be, we would amend that variance application, if that was the disposition of the Board to go from 20 to zero, and to able to contribute the amount for the entire 20 stalls into a fund that would be useful. Am I making myself clear?

Mr. Shibuya: You're exactly what I'm saying.

Ms. Acks: It's not making sense to me because it seems to me if we put on a record, zero parking stalls, then anything the County comes up with, they've got on record, zero parking stalls, and they don't need to contribute to anything. So that's why I'm concerned about going below the 20 parking stalls. I think that 20 parking stalls is minimal.

Mr. Nakamura: I think what Corp. Counsel is saying is that we can condition – you can go to ten, but we can put a condition on that that the applicant would need to comply with regarding the donation as part of the—

Mr. Giroux: It would be based on 20 stalls, the donation itself. Hypothetical on hypothetical, if the ordinance is passed that they would agree, as part of their condition, that they would actually contribute to the fund based on the requirement of the 20 stalls.

Mr. Nakamura: Or the ten stalls, right? Because what the application right now – the amendment – the application right now is to go from 20 to ten. So we'd be contributing



based on the loss of ten stalls.

Mr. Giroux: I think what the Board is going at is that the break comes now, but when the structure or area needs to be purchased and built, we wouldn't want the County to be losing out on the ability to collect the full amount of money that the statute would allow them because now, the County would be getting shortchanged ten stalls because of the variance granted today. And I don't think that would be something that the Board wants to look at. I think they're looking at the short term. The short term is having you – if granted, it would be based on giving a variance of ten stalls. But within its conditions, if in the future an ordinance was passed that you would contribute fully to the fund based on your requirement per statute of 20 stalls.

Mr. Nakamura: That would be – also – I mean, I think you used the term “fair share” which I think is a good term. But also, it would be based on the – then, we would no longer have an obligation to provide even the ten stalls, right? Because we're then contributing based on 20 stalls.

Mr. Giroux: Well, that's why I'm having a hard time advising because I'm trying – here we are trying to structure a condition that would survive the creation of a statute that in its terms, we do not know how that statute would be framed or formed. And that's very difficult. And that's why I'm saying. It's a total shot in the dark to create conditions based on the hopeful passage of a future ordinance. But with language such as “fair share and contribution to the amount that is statutorily required,” that's the broadest language that you could possibly have in a condition that would in the future, if the Council passes an ordinance that people who have received variances from parking wouldn't be shortchanging the County when they need the money the most to actually get a structure built.

Ms. Acks: Can we put conditions on a denial in such a way that we deny the reduction from 20 to ten stalls, but we waive the fee for ten of those stalls for the first year until—? We cannot?

Mr. Giroux: No. Once you enter into a denial, you will lose jurisdiction over the parking ordinance because then they would have to abide by the parking ordinance as stated in the statute. And their remedy would be that they could come back in six months if they have a substantially different factual basis in order to ask for the variance, or they can come back in a year and ask for the exact same thing. But once you deny, you will lose jurisdiction of the parking ordinance itself. The only reason they're before us is because they're asking for a variance of the parking ordinance. This Body doesn't have – we're not the administrators of the parking ordinance. We can allow a variance from the strict interpretation of the parking ordinance.

Chair Endo: But, Ms. Acks, technically, you could achieve what you just said by granting

the variance, but having the variance lapse after a year. That would have the same thing. They would have a price break of ten stalls for one year, if that is your objective.

Ms. Acks: Okay. So we can reduce the requirement to ten stalls for one year through May 1<sup>st</sup>, 2008, and then it returns to its original 20 stalls? Is that what you're saying?

Chair Endo: Yeah, I think you could do that as long as it's properly worded as a condition.

Mr. Giroux: You should probably check with staff to see if that would be something that they could actually deal with as far as on the enforcement side.

Mr. Aaron Shinmoto: Realistically, the County's not going to have an ordinance in place in one year. Are we going to have a parking plan, a shuttle plan, purchase the land where we're going to build this so-called parking structure? It's not going to happen within a year.

Mr. Giroux: The County's been trying – the Wailuku Municipal Parking Lot has been in the conceptual stage for about 30 years. So that's just to give you– And Wailuku, I think everybody agrees would really benefit from a parking structure. So you are dealing with conceptual ideas at this stage. You're not even to the part of actually land acquisition, and planning, and engineering. So I don't know if a year would do anybody good. And again, it does put an enforcement burden on the department.

Mr. Francis Cerizo: Well, to answer your question, whatever time limit that you would give the variance, we would – it would be our responsibility to either inform the owner that your variance has terminated on this day, and you need to provide the 20 stalls, or obtain 20 stalls, otherwise you'll be entering into a violation stage.

Ms. Acks: Or they could reapply for a different variance at that point?

Mr. Cerizo: Yes, if it's done before it expires.

Ms. Acks: So now maybe we're looking at timeline? What's reasonable?

Mr. Shibuya: Two years?

Mr. Shinmoto: I think you should either approve the variance or deny the variance. If they need to come in again, they can come in again.

Mr. Shibuya: I think the main concern here is if we do, we're drawing a line in the sand, and allowing for less than adequate-type parking. And I think Kathleen's concern is that–yes, and I agree–that the 20 stalls are minimal. And I think that's very satisfactory

in terms of supporting this activity. But this Body should, I think, consider something more temporary if you are going to be less than the standard. That's my feeling. That's why I'm supportive of what your feelings, I think, Kathleen, are to keep the 20 as a standard. I don't mind putting time limits on it. Two years, maybe.

Chair Endo: Well, to make this discussion become more focused, maybe someone should make a motion. And they could always withdraw it, or amend it, but I would encourage someone to make a motion. Sort of describe how they're feeling, what they want to do.

Ms. Acks: Well, I'm not exactly sure what words to use, so help me, gang. But I'd like to keep the requirement for 20 parking stalls with a waive of ten stalls for three years. And then at that point in time, we can come back to the drawing board, if need be, but at least that's a requirement of ten stalls for three years with the returning of to 20 stalls at that point in time.

Mr. Giroux: Okay. Let me just kind of throw this back out, and you tell me if I'm close. It looks like it's a motion to approve the variance with a time limit of three years. At the end of the three years, they will be required to give the County 20 stalls.

Ms. Acks: Okay. I'll move that we accept the variance for a specific timeline of three years through May 1<sup>st</sup>, 2010. You're opening May 10<sup>th</sup>, right? So that's three years. I think that's what I saw the sign say, May 10<sup>th</sup>.

Chair Endo: Okay. Is there a second?

Mr. Shibuya: I'd like to make little bit changes here. I can't, right?

Chair Endo: Well, you can second it, and then you can move to amend it.

Mr. Shibuya; Okay. I'll second it, and I'd like to make a motion to amend it that if there is an ordinance that allows for a central parking fund for Lahaina that the owners be allowed to contribute to this central fund in lieu of or of purchasing these ten slots.

Chair Endo: Okay, so a motion to amend the main motion has been made. Is there a second to the motion to amend? Okay.

Ms. Acks: So what you're saying is if the County gets their ducks in order in less than three years' time that the monies designated to go into these ten slots would revert to 20 stalls at that point in time, and go into the County fund?

Mr. Shibuya: It would go into the County fund, but they would have to pay whatever the assessment is for 20 stalls, not ten stalls.

Chair Endo: Okay. Just so that we're all on the same page, the main motion is to approve the variance with a time limit of three years. That was moved and seconded. There was a motion to amend that to add on an additional provision saying that if there is a new parking ordinance that creates a fund where you can pay into it instead of physically providing stalls that the applicant would be allowed to avail itself of that in lieu of providing the stalls.

Mr. Giroux: At a rate of 20 stalls?

Chair Endo: At a rate of 20 stalls.

Ms. Acks: I would say "be required to." I mean, that's my understanding is they would much prefer doing that. So not "allowed to," but "would require to."

Mr. Shibuya: I agree.

Chair Endo: Okay. You agree. Then you are saying that you are – well, there's no second.

Ms. Acks: I'll second.

Chair Endo: Okay. You're seconding his revised amendment? Okay.

Ms. Kapua`ala: May we add the hold harmless agreement?

Mr. Giroux: They're going to take up just the amendment first. And then we can go through discussion. I think there's a couple of conditions, too, that I want to kind of throw out for discussion also. But we should dispose of this to see if it becomes part of the main motion.

Chair Endo: Right. So let me just try and restate the motion to amend. Essentially, Warren, I think you're saying if an ordinance is passed while this variance is in effect that – and this ordinance relates to paying into a parking fund that the applicant would then be subject to all terms of that ordinance.

Mr. Shibuya: That is correct.

Chair Endo: Okay. So that's been moved and seconded. Discussion on that motion to amend?

Ms. Rachel Ball Phillips: I have concerns about the three-year time limit on this because I think there's going to be a parking ordinance that's going to take many years. So by placing the three-year limit on this, we're just requiring them to come back in three years

and present this whole thing to us again. But by putting the condition that when it becomes into effect, if ever, they'll be bound by those conditions. And that would seem to me a little bit more reasonable to have it when the ordinance becomes in effect, then they would have to comply as opposed to arbitrarily stating three years.

Chair Endo: Okay. Just to get some clarity here. I know it gets confusing when you have a main motion and a motion to amend. Are you speaking to the main motion because the main motion is the one that has the three-year limit after we grant the variance? Right now we're taking up Warren's request to add on an additional part of the granting of the variance such that they would be – the applicant would be forced to comply with any new ordinance that is created in the future.

Ms. Phillips: Yeah, I guess I support the additional requirement, but it's the three years that I have concerns with because there's no indication that there'll be an ordinance in effect within three years.

Chair Endo: Okay. Any further discussion? Mr. Nakamura?

Mr. Nakamura: I don't know if it's appropriate for me to chime in at this point, but if I could?

Chair Endo: Sure.

Mr. Nakamura: I understand what the amendment is, but does that mean that if the applicant is required to contribute its fair share based on the 20 stalls, then we would no longer have a requirement to provide offsite parking for the 20 stalls at the property? Because right now, we're still required to provide ten, right? But then the amendment was that if we have to contribute for 20, so I'm wondering if then we can – the variance would've been amended to so that we would not have to provide any. Am I making myself clear?

Chair Endo: Right. It's difficult because we don't actually know what the specifics of the ordinance are. Because in my mind, I would assume that this ordinance that the County Council would pass would be for people to pay in money in lieu of providing those stalls. So that's what the ordinance conceivably would be.

Mr. Nakamura: And that's good. What I'm wondering is–

Mr. Giroux: So when you're lobbying at the Council, you've got to make sure it's clear that that's–

Mr. Nakamura: See, my problem is right now, we're still required to provide ten. So if we've got to come back and pay for 20, of course, we would be willing to do that, but we

don't want to have to still pay for ten.

Mr. Shibuya: That's right. It's not that. We're not trying to hold you double jeopardy there, and get you 30 slots. No, no, that's not the intent. The intent is just to stay within the realm here. And the County ordinance, if they do have it, would have to provide offsite parking, probably. And they have to transport to facilitate the customers being serviced in this Lahaina area.

Mr. Nakamura: Okay. So, but how does that amendment affect the variance application, then because if we're still required – if we're then required to pay for 20, what happens to our requirement that we lease the ten stalls?

Mr. Shibuya: It should be removed or dropped.

Mr. Nakamura: So that's going to be added as part of that condition?

Mr. Shibuya: I would say, yes. I would be standing correct. I would be corrected to make that change to the amendment, yes. And that's a good thought that, no, there was never in my intent to continue with the charge of ten onsite parking stalls. It was a total amount of only 20 to comply with the ordinance.

Mr. Nakamura: Okay. Thank you.

Chair Endo: Okay. So if there's no objection, we'll just take that friendly amendment that Warren just stated – restating his motion to amend. Seeing no objections, we'll do it that way.

I think we're trying our best to work through a very complicated issue. I do have some concerns I think as raised by Mr. Shinmoto that it's getting kind of complicated. And if we are going to do something like this, probably it should be reduced to writing, and then reviewed more carefully before we adopt it because it's – because you're trying to predict what might happen in the future, the County Council, and there are a lot of twists and turns that could happen in the interim, and you need to really try and lay it out clearly. Otherwise, you're just creating more confusion and mess for everyone rather than fixing the problem. But with that in mind, any further discussion? So we'll just vote on the motion to amend at this point just so we get back to the main motion, okay? So all those in favor of the motion to amend the main motion, say aye. Oppose?

It was moved by Mr. Shibuya, seconded by Ms. Acks, then

**VOTED: To approve the motion to amend the main motion as discussed.**

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

Chair Endo: **Okay, so the amendment passes.** And so we're back to the main motion, which is to grant the variance with the time limit of three years, and as amended as Warren stated, which was to require them to comply with any new parking ordinance in the future as if they still had the 20-stall requirement, but with the proviso that – my understanding is that the ordinance would then – once they pay into that fund, it would relieve them of any requirement to actually, physically, provide stalls.

Mr. Giroux: Randy, as part of the discussion, I just wanted to suggest that part of your – this type of variance is a use variance. So I would suggest that you have as your standard condition that the variance shall be applicable only to the request as approved by and as reflected in the record of the Board so that way it's very clear that if the use changes in the future that all of this is moot. There would be no variance because variances traditionally, run with the land, but in this case, we are trying to create a variance that runs with the use. So it has to be very clear in your findings of facts and order that if the use changes that the variance would then be moot. They would have to apply – whatever new use would have to go back to the statute and they would have to start over.

Chair Endo: That was Kathleen's – so if there's no objection, we will assume that that condition is part of the motion, the main motion.

Mr. Shibuya: I just want to bring up a point and address what Rachel is talking about in terms of the probability of an ordinance coming in, in three years. But I have – I'm very optimistic in terms of thinking that the County Council will take action because it is an ordinance and I don't see that as being detrimental to the actual community of Lahaina, much less other country town communities of Paia and Makawao. The intent is to provide for more parking for the customers. And it allows for a freer more pedestrian-friendly type of atmosphere there. So I don't see this as a – stalling beyond the three years. I think this is very generous of this Board to provide this proviso. And I hope that this will be an incentive for the County Council. It is not a club. It is just an incentive in showing that we have positively gone forward in a very positive, helpful way of supporting this community need for more parking, but denying phantom parking. I just don't want the public to be held or the businesses to be held hostages to a very suspect type of system of phantom parking.

Chair Endo: Okay. Staff, just so that you folks are clear since you folks have to implement this as it may be adopted, are there any concerns or questions?

Ms. Kapua`ala: The only concern would be one. I mean, it seems that the Board is granting this variance for economic purposes which is not a just cause to satisfy strict compliance – is preventing reasonable use of the subject property. Could we somehow state some facts of land attributes, physical and geographical characteristics that justifies the granting of this variance in relation to criteria no. 2? And also with the Board – should the Board grant this variance, if there's going to be a hold harmless agreement and insurance policy naming the County as an additional insured, if you could state that into the record, please?

Mr. Shibuya: I'll start it off in terms of exceptional, unique, and unusual physical and geographic condition existing on the subject property, which is not generally prevalent in the neighborhood or surrounding area. And the use sought to be authorized by the variance will not alter the essential character of the neighborhood.

Ms. Kapua`ala: Excuse me, Mr. Shibuya, if I may interrupt you? That criteria has already been justified.

Mr. Shibuya: Okay.

Ms. Kapua`ala: No. 2.

Chair Endo: So for no. 1, we can just assume that we adopt the Planning Department's report with regard to item no. 1.

Ms. Kapua`ala: Yes, I thank you, Mr. Endo, and no. 3 as well. So just no. 2 needs justification into the record as to why–

Mr. Shibuya: Okay. Over a period of time, uses of specific structures and buildings change. And this allows for the use as a restaurant rather than as a storage area. And it makes better use of the property, and it allows for this particular building to provide a service to a community or a group of visitors that is sorely needed. And I think that need is being satisfied with this restaurant. Is that adequate?

Chair Endo: Sure, we'll just take that. At the same time, someone should discuss the staff's request for the hold harmless agreement conditions, or if no objections, we'll just include it as part of the motion.

Ms. Acks: The standard?

Chair Endo: The standard hold harmless condition.

Ms. Acks: Okay, we can include the standard unless somebody has–



Chair Endo: Or does it apply in this type of variance?

Mr. Giroux: That's up to the Board. I think as far as a liability, I don't have any analysis as far as – I mean, it's not like we're dealing with a structure. I don't think we're going to be involved in any grading, or grubbing, or construction of the parking stalls.

Ms. Acks: Can I ask staff what kind of threat there is to the County?

Mr. Shinmoto: That's just a general hold harmless for anything that may occur. Let's say I park in this offsite lot. I walk with my children. They get run over. And I say because you folks don't have a parking lot onsite, I got hurt. I mean, anything can come up. That's why we have this thing. And again, it's just a general hold harmless, but I think the applicant should know that it is a one million-dollar insurance policy.

Mr. Nakamura: The hold harmless applies to the variance, not the initial requirement, right? So the hold harmless would apply to the – I would assume to the reduction in the number of stalls from 20 to ten, not the provision of offsite parking. So as far as liability for the reduction in the number of stalls, I don't really see any. And I would suggest the same as far as the insurance requirement.

Ms. Acks: So the standard hold harmless.

Mr. Shibuya: Standard hold harmless, but the reduction of a number of stalls is actually lessening the chance of anything happening. So it's really a moot point. We can discuss the matter. If we can do – have some statement to the effect that does it have to be a dollar amount before the hold harmless kicks in? Or can we just state that the County or this variance would be approved based on a hold the County harmless of any injuries that may result with this reduction in the parking stalls?

Mr. Giroux: Just as a little discussion. As far as – the idea of hold harmless, you can have language such as like “defend and indemnify hold harmless.” Basically, that language is only as good as the amount of money that the person who's indemnifying you has. So that's kind of why we have the insurance and the hold harmless because insurance is a defense because that's the one – the insurance is the one that buys you the lawyer. As Corp. Counsel, we represent the County, but we're self-insured. So basically, if somebody sues us, the County, the Board, that we still have to go out and hire outside counsel if we don't have a hold harmless and an insurance policy. What our litigators would do is they would look at our order if somebody twisted their ankle and said, hey, I was at the parking lot or whatever. We still have to go and get outside counsel, but that would be paid by the indemnifier's insurance. So in the end, the County, in defending itself against a frivolous claim, would end up paying nothing because the insurance of the other party would pay it. But in the situation where you're dealing with business people and restaurants, I don't think you're dealing with an empty

pocket. And they would be carrying their own liability insurance and that type of protections.

Basically what they would do is if they did have a requirement, they would have to take that up upon their – on top of all their other insurance because they already are going to be getting a lot of insurance for running a restaurant and all of those types of liabilities. An umbrella insurance policy would probably – it would just be a matter of paying more money to their premium, and then getting a signature on their umbrella policy. So as far as that goes, as far as the dollar amount, you have to look at what is the exposure to say that if we were to be sued for giving some kind of permit like that. So that's just the analysis that you want to use as far as what insurance does and what indemnification and hold harmless does.

Chair Endo: Mr. Shibuya?

Mr. Shibuya: Well, I'm more aligned in terms of – thinking in terms of not even having this hold harmless agreement. The reason for this is that we're just talking about parking, and the parking is offsite. If it were parking onsite and there was some kind of a problem with the parking stalls in terms of their arrangement or the geography of it, I would have some concerns, but this one, no. It's offsite. It's available. And everybody else uses the same parking stall. I don't see it as somewhere the County would be liable.

Mr. Nakamura: I just wanted to add – you know, what Mr. Shibuya was saying earlier, too, is correct. Really what the hold harmless applies to is not the offsite parking itself, but only the approval of this particular variance request. So if I could read from a previous approval that was given to the landlord on its previous variance request, it's saying that the indemnification is for any claims for property damage, personal injury, or death arising out of this variance approval. So if there's some claim that's made because of the variance approval, in other words, the reduction in parking from 20 to ten, that's what we're required to indemnify the County for. But I think what Mr. Shibuya is saying is that in this situation when you're just reducing the number of stalls, we're not – it's not like we're providing offsite parking. We're just reducing the stalls from 20 to ten. I don't know – I can't really think of any instance where there would be a claim made for reducing the number of stalls.

Mr. Shibuya: The chances of an accident happening would be twice as much less, 50% less. I don't know how you would say it.

Chair Endo: Okay. It looks like we're all in agreement that we should ask for a condition that they indemnify the County for any liability arising out of the approval of this variance, but nothing more than that. Is that correct?

Mr. Shibuya: Yeah, that's fine.

Chair Endo: Okay. So if there's no objection, then we will consider that a friendly amendment to the main motion. So now we're back to the main motion whether to approve as we have added all of these things to it. Further discussion? If not, all in favor, say aye. Oppose?

It was moved by Ms. Acks, seconded by Mr. Shibuya, then

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

**(Assenting: K. Acks, W. Shibuya, W. Kamai, S. Castro, and R. Phillips.)**

**(Excused: H. Ajmani, U. Schulz, and J. Shefte.)**

Chair Endo: **Motion is carried. The variance is granted as described.**

Mr. Nakamura: I know it was kind of complicated. I thank you very much for your time, and your patience, and understanding. Thank you.

Chair Endo: Okay. Moving on to the item of business, the approval of the March 22, 2007, meeting minutes.

### **C. APPROVAL OF THE MARCH 22, 2007, MEETING MINUTES**

Chair Endo: The Chair will entertain a motion to approve these minutes.

Mr. Kamai: Motion to approve, Mr. Chair.

Mr. Shibuya: Second.

Chair Endo: It's been moved and seconded to approve the March 22, 2007 minutes. Any discussion? Seeing none, all those in favor, say aye. Oppose?

It was moved by Mr. Kamai, seconded by Mr. Shibuya, then

**VOTED: To approve the March 22, 2007 meeting minutes as presented.**

**(Assenting: W. Kamai, W. Shibuya, K. Acks, S. Castro, and R. Phillips.)**

**(Excused: H. Ajmani, U. Schulz, and J. Shefte.)**

Chair Endo: **The minutes are approved.** Moving to the next item: Director's report on contested cases.

#### **D. DIRECTOR'S REPORT**

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

Ms. Kapua`ala: Yes, sir. The Department of Parks and Recreation has submitted to the Second Circuit Court an amendment – an amended appeal clarifying that they are directly appealing the Board of Variances and Appeals. So you are now named as an appellant in the civil court, civil matter. So we have done the request to Corporation Counsel, and I think now they'll begin to assign an attorney to represent you.

And also, for the Waihe`e Valley Subdivision appeal, which you just sent to a mediator, which we typically do not pay for – we don't pay for mediation. We pay for a hearing officer. But because the Board moved and approved mediation, we will pay for one time, and we just hope it doesn't happen again. And that's scheduled for May 20<sup>th</sup> or so.

Mr. Shibuya: Is that why the County does not have an ombudsman-type operation?

Ms. Kapua`ala: I'm sorry, sir, I don't know what that means.

Mr. Shibuya: An ombudsman is just like a mediator, some disinterested third party hearing two conflicting sides and – to come up with a resolution without going to the courts, without going to a hearing officer.

Ms. Kapua`ala: Both my bosses are saying the State does that. And actually, the County, the Department of Planning is asking County Council to approve in the next budget funding for a hearings' officer. So that's a step in a good direction.

Chair Endo: A full-time hearings' officer?

Ms, Kapua`ala: A full-time hearings' officer.

Chair Endo: It would be employed by the County?

Ms. Kapua`ala: Yes, sir.

Mr. Shibuya: And I do want to ask that if you do look for a counsel to represent this Body, I recommend, and of course the other members can chime in, too, and vote me down, but I highly recommend that James Giroux represent this Board because he's sat

on this Board. He heard all the arguments, and he heard all the presentations. And he's probably the most qualified person to represent us, and that's why I'm saying this. And I appreciate if you can express those thoughts to the County Council, or the—

Ms. Kapua`ala: Mr. Brian Moto, Corporation Counsel, will make that decision, and we will express it for you.

Mr. Shibuya: Thank you.

Chair Endo: I think previously when that litigation first started, I think we already said that we really recommended that we – or urge that we wanted Mr. Giroux to represent that. I'm not sure if that ever went up.

Ms. Kapua`ala: It did go up, and it did happen, yes.

Chair Endo: Okay.

Ms. Kapua`ala: We did a second request to make it an official response.

Chair Endo: Going back to that appeal, we weren't individually named, right? It was just the Board of Variances and Appeals?

Ms. Kapua`ala: Oh, yes, sir. It was the Board.

Mr. Shibuya: But not individually?

Chair Endo: No, not us individually. Okay? Okay. Is that it for the report?

Ms. Kapua`ala: Yes.

**E. NEXT MEETING DATE: May 10, 2007**

Chair Endo: All right. The next meeting is May 10, 2007. If no one has any other announcements, meeting adjourned.

**F. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at approximately, 3:04 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairperson  
Warren Shibuya, Vice-Chairperson  
Kathleen Acks  
Stephen Castro, Sr.  
William Kamai  
Rachel Phillips

**Members Excused:**

Harjinder Ajmani  
Uwe Schulz  
James Shefte

**Others:**

Aaron Shinmoto, Planning Program Administrator  
Francis Cerizo, Staff Planner  
Trisha Kapua`ala, Staff Planner  
James Giroux, Deputy Corporation Counsel