

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
APRIL 12, 2007**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Vice-Chairman Warren Shibuya at approximately, 1:30 p.m., Thursday, April 12, 2007, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

**B. INTRODUCTION OF NEW MEMBERS: RACHEL PHILLIPS AND  
STEPHEN CASTRO, SR.**

Mr. Shibuya: I just want to first thing introduce or have the new members introduce themselves. I guess, Ms. Rachel—is Keoni's sister, by the way—Phillips. And she's not necessarily replacing Keoni, but we have lots of vacancies that we needed. And this — like someone mentioned earlier that we had lots of vacancies and we're very appreciative of having you serve with us. Also, Mr. Stephen Castro, Sr., thank you very much.

Mr. Stephen Castro, Sr.: Glad to be here.

Mr. Shibuya: And I'm going to let everyone introduce themselves. We'll start out with Jim Shefte. And so you new members have a chance to meet all of us.

Mr. James Shefte: Yeah, I'm Jim Shefte and I live up in Pukalani. I've been on this for two years now and it's an interesting process. I hope you new guys enjoy it.

Mr. Harjinder Ajmani: Okay. My name is Harjinder Ajmani, but I go by Hari Ajmani. I'm on the Board for two years now and I live in upper Kula.

Ms. Kathleen Acks: I'm Kate Acks and I've been on the Board for four years. And I teach math over at Maui Community College.

Mr. Shibuya: And I'm Warren Shibuya. I've been on this Board going on my fourth year. And I found it's very challenging.

Mr. James Giroux: James Giroux. I'm with the Corporation Counsel and I've been assigned to this Board. I believe I'm going on my third year. I haven't been fired yet so—

Mr. Castro: I'm Stephen Castro and I'm from Kahului. And it's a pleasure to be here amongst you and look forward to some interesting days.

Mr. Randall Endo: Good afternoon. My name is Randy Endo. I live in Wailuku and this

would be my second year on the Board. I'm enjoying it a lot.

Mr. William Kamai: My name is Bill Kamai. This is also the start of my second year and I live in Wailuku.

Mr. Uwe Schulz: I'm Uwe Schulz. This is my third year on the Board and I'm from the Lahaina side. That's the side nobody else visits.

Mr. Shibuya: Well, thank you very much, members. And welcome aboard, brand-new members.

**C. ELECTION OF CHAIRPERSON AND VICE-CHAIRPERSON FOR THE 2007 - 2008 YEAR**

Mr. Shibuya: The first here, the next item, would be the election of the Chairperson and Vice-Chairperson. How would you like to proceed with this? Would you like to start with the Chairperson first or go with the Vice-Chairperson?

Ms. Acks: Chairperson.

Mr. Shibuya: Chairperson, okay.

After nominations duly made and seconded, the Board elected the following:

**Randall Endo to the Office of Chairperson**

Chair Endo: I just want to thank everybody for your vote of confidence. I'm happy to be Chair. I'll try and run all the meetings with fairness and partiality, and work on efficiency also so that we can do our business in a good manner. I also want to say that it's the first election I won since Baldwin High School. I remember losing in Iao School when I was seventh grade and losing in eighth grade. So it's quite an honor to be elected.

So the next order of business is to see if anybody will make a motion to elect a Vice-Chair.

After nominations duly made and seconded, the Board elected the following:

**Warren Shibuya to the Office of Vice-Chairperson**

Chair Endo: Okay, with that, we'll just move on to the next order of business which is Orientation.

**D. ORIENTATION WORKSHOP**

- 1. Sunshine Law**
- 2. Ethics**
- 3. Maui County Charter**
- 4. Sexual Harassment Policy and Training**
- 5. Rules of Practice and Procedure for the Board of Variances and Appeals**
- 6. Area Variances**
- 7. Use Variances**
- 8. Reference Correspondence**
- 9. Chapter 91, HRS**
- 10. Chapter 92, HRS**
- 11. Title 12 - Streets, Sidewalks and Public Places**
- 12. Title 16 - Buildings and Construction**
- 13. Title 18 - Subdivisions**
- 14. Title 19 - Zoning**

Mr. Allan Delima: Good afternoon. My name is Allan Delima. I'm the Administrative Assistant for the Planning Department. And this afternoon, I'm going to give you a brief overview of the County's Sexual Harassment Policy.

The County of Maui's Sexual Harassment Policy will be in your binders, and it's a fairly clearly written document in lay language. And it should be very easy for all of you to read and understand. And you're encouraged at the first opportunity to read the document completely, because today I'm only going to touch on the high points for this.

The first thing we'll cover is the definition of sexual harassment. Sexual harassment means unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct, or visual display of a sexual nature directed by an officer or employee to another officer, employee, or a private individual.

All personnel must refrain from this particular list of conduct: making unwelcome sexual advances or request for sexual favors; making remarks of a sexual nature; using gender-based or sexually abusive language, and sexual innuendos; visually displaying materials of a sexual in nature; physical nature of a sexual nature; and the catchall phrase, "any other similar actions."

Now, the County of Maui has a zero tolerance policy against sexual harassment. And this policy is applicable to you as Board and Commission members as well as it is to officers and employees of the County of Maui.

The process for filing a complaint: an individual who feels that they have been subjected to sexual harassment should immediately make a complaint to his or her supervisor. Now, in your case as Board and Commission members, you would make your complaint to your Chairperson unless the Chairperson should be the alleged offender. And in that case, you may make your complaint directly to the County's Equal Employment Opportunity Officer who is also our Managing Director. And with this current administration, that would be Sherri Morrison.

But you do have a few other options in regards to who you may file your complaint with. And this is pretty much how the hierarchy is set up: you may file it with the Planning Director, the Planning Deputy Director, your Board or Commission Chairperson, the Managing Director, or you may go the Hawai'i Civil Rights Commission, or the Federal Equal Employment Opportunity Commission, but you are encouraged to try to deal with these issues in-house before going to outside agencies.

Now, your complaint may be in a couple of formats. It may be an informal complaint, which is simply a verbal or a written complaint that is unsigned. And a formal complaint would be a written allegation that is signed. You may at any time change from an informal complaint to a formal one.

The investigation process: the investigation will be conducted in an unbiased, fair, and discreet manner. There will be all the appropriate safeguards to maintain confidentiality and protection from embarrassment that the law allows. Of course, when you read your policy, you'll notice that there are some individuals that must be notified as to the content of the complaint.

Now, an individual who has been found after an investigation to be an offender will receive the appropriate warning or disciplinary action. And any disciplinary actions prior to its implementation will be reviewed by our Director of Personnel Services and approved by the County's EEO Officer, again, the Managing Director. And there should be no retaliation or discrimination against an individual who has made a complaint, conducted the investigation, or acted as a witness in the investigation process. Retaliatory conduct is in itself illegal and it constitutes a completely separate violation.

And that's really pretty much it, folks. We've hit on all the high points. And I think we're going to hold off on all questions until after all the presentations have been completed. And if you should come up with a question at a later time, pass it on to Tremaine. She'll make sure that it gets over to me, and I'll see that your questions are answered. Thank you for your attention.

Ms. Trisha Kapua`ala: Aloha, Board members. My name is Trisha Kapua`ala. I'm the Staff Planner for the Zoning Administration and Enforcement Division. I'm assigned to serve you, the Board. I will be presenting today on six topics. So what we'll be

covering today are area variances; use variances; Title 12, Street, Sidewalks, and Public Places; Title 16, Buildings and Construction; Title 18, Subdivisions; and Title 19, Zoning.

Now, use variances versus area variances. Area variances are generally considered to a less serious deviation from zoning requirements. Area variances are based on practical difficulty whereas use variances are based on unnecessary hardship. Use variances are generally subject to a higher level of scrutiny.

Now, let's talk about area variances. I passed out Corporation Counsel's memorandum. This legal opinion was drafted ten years ago; however, we still use it as guidance. It outlines five criteria to consider, which balances the need, the harm, and alternative solutions.

Now, these five criteria: how substantial is the variance in relation to the requirement? If the variance is allowed, the effect of the increased population density thus produced on available government facilities; whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created; also, whether the difficulty can be obviated by some method feasible for the applicant to pursue other than a variance; and five, whether in view of the manner in which the difficulty arose. And in consideration of all the above factors, the interest of justice will be served by allowing the variance.

This is an example of a setback variance. You may be familiar with this property. This was a highly contested case. This is Maui Oceanfront Inn, and Sarento's on the Beach Hotel and Restaurant property. This structure is located in the parking lot at the zero lot line. There is no setback. Now, this was highly contested because the neighboring property didn't like the view, as well as the odor, so it was a nuisance. In the end, the Board granted the variance and we're ongoing enforcement on this.

Same property on the restaurant, they erected this wall, an awning and dining area abutting the property line. And this was contested because it made the property appear to have a setback which is actually public access. So this was also granted.

Now, to area variances, in general, the scrutiny is less strict for area variances than for use variances. The greater the deviation, however, the more scrutiny should be given. And these considerations are not a substitute. They're simply guidance. So County Code criteria still applies, but this should guide you.

Now on to use variances, again, we have a Department of Corporation Counsel memorandum, and it outlines guidance for variances in the interim zoning provision. However, we at the department apply this to all zoning districts.

The Board should consider – the Board should determine whether a denial of the variance would result in unnecessary hardship. And unnecessary hardship is a higher standard in practical difficulty.

There are three elements of unnecessary hardship, so let's talk about them here. The land cannot yield a reasonable return if used only for the purposes of that zone. The plight of the owner is due to unique circumstances and not to general conditions of the neighborhood which may reflect unreasonableness of the Zoning Ordinance itself. And the use to be authorized will not alter the essential character of the locality.

So going into depth, the first criteria—cannot yield a reasonable return. You look at the permitted uses as determined by the Zoning Ordinance. This criteria is considered met if the uses will not allow the landowner a reasonable return. Now, a reasonable return does not mean maximum return. What it does mean is that the Zoning Ordinance itself prevents reasonable use of the land, and would pretty much amount to confiscation of property, or regulatory taking due to the application of the Zoning Ordinance. It's the landowner's burden to prove reasonable return. And our Corp. Counsel memo outlines five types of evidence that was used in case law: the initial purchase price of the property, the market value of the property, the expenses for maintenance of the property, the amount of the mortgage of the property, and the annual income. Failure to sell the property for permitted use is also evidence that the land will not bring reasonable return.

So the second element—due to unique circumstances, the focus must be on the features of the property rather than in the circumstances of the owner. And the reason for this, Board, is that variances run with the land. If we base our variance approvals on personal situations of present landowners, then that would be considered an unlawful reason for granting a variance.

The third element will not alter the character of the neighborhood. Now, it's important to prevent a use variance which results in an intrusive, incompatible use. We must consider the applicant's interests, but also protect the interest of the neighboring community.

An example of a use variance—Board members, you're familiar with this—this is Pacific Biodiesel's operation to convert used waste cooking oil into biodiesel in the interim district at the Central Maui Landfill. The variance was approved by the Board. And it became a recommendation for County Council action because it's located in the interim district. That's a perfect example of this memo.

Now, onto County Code. The Board – the Maui County Charter gives the Board the authority to grant variances and appeals from Titles 12, 16, 18, and 19 of the Maui County Code. For Title 12, this is the list of the chapters that you have the authority

over: streets, sidewalks, and public places.

There's four conditions which must exist on the property to justify the granting of a variance: one, the exception or – the exception or variance desired arises from peculiar physical conditions not ordinarily found in most districts, or because of the peculiarity of the business; the exception or variance desired is not against the interest, safety, convenience, and general welfare of the public; the granting of the permit for the exception of the variance will not adversely affect the rights of adjacent property owners or tenants; and the strict application of the terms of this chapter will work unnecessary hardship and practical difficulty on the property owner or tenant.

On to Title 16, Building and Construction. These are the chapters that you have authority over: fire, housing, energy, electrical, plumbing, building. There's four conditions to justify the granting of a variance: one, is that the strict application, operation, or enforcement of the code provisions appealed from would result in practical difficulty or unnecessary hardship to the applicant; the granting of the variance shall not be detrimental to the public health, safety, or welfare; the granting of the variance would not be injurious to the adjoining lots and the buildings thereon; and the granting of the variance would not be contrary to the purposes of this code and the public interest.

Title 18, this is the Subdivision Ordinance. These are the chapters you have the authority over. There's five conditions which must exist to justify the granting of the variance. As you can see, each chapter has different criteria or each title. One, that there are special geographical or physical circumstances or conditions affecting the property, which are not common to all property in the area. That the variance is necessary for the preservation and enjoyment of a substantial property right of the petitioner. And extraordinary hardship will result from the strict compliance with the provisions of this title because of the special geographical or physical circumstances or conditions affecting the property. The special geographical or physical circumstances or conditions affecting the property are not the result of previous actions pertaining to this subdivision. The granting of the variance shall not be detrimental to the public healthy, safety, or welfare, or injurious to the property in the vicinity. And the property has obtained appropriate zoning and it cannot be interim.

And finally, the Zoning Ordinance. There's two articles within the Zoning Ordinance: Article 1 is the Interim Zoning provisions and Article 2, the Comprehensive Zoning provisions. Now, by far, this is the most comprehensive title within the County Code that you have the authority over. Each of these chapters are the different zonings we have in Maui County.

And some important things to remember: the Board shall comply with the General Plan and Community Plan provisions of the County; the Board shall not grant an application for a variance which requests a use that does not conform to the community plan. So

one, you must comply with the General Plan, and two, the community plan designation.

Also, for the Interim Zoning provisions, any Board approval becomes a recommendation for County Council. And County Council may override any action of the Board by an affirmative vote of at least five members.

Now, there's two conditions that must exist to justify the granting of a variance within Interim Zoning. And one is strict enforcement of any provisions of this article would involve practical difficulty or unnecessary hardship. And two, desirable relief may be granted without being detrimental to the public interest, convenience, and welfare.

On to the Comprehensive Zoning provisions. So the main thing about comprehensive zoning is that we base variances due to physical surroundings, shape, or topographical conditions, and not based on hardships which are mere inconvenience or economic hardship.

There's three criteria to justify the granting of a variance. And the first one is—you're very familiar with this, Board members—that there's an exceptional, unique, or unusual physical or geographical 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 would not alter the essential character of the neighborhood. Two, that strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property. And three, that the conditions creating the hardship were not the result of previous actions by the applicant.

Now, appeals. A member of the public can appeal any decision of the Director that has jurisdiction over any one of these titles of the County Code. So you have the authority over Title 12, 16, 18, and 19. And this also includes the Department of Water Supply. If the Board of Water Supply or—I'm sorry—the Director of Water Supply makes a decision, that appeal can be seen by you. There's a time period specified by law for an appeal. For the Subdivision Ordinance, it's 15 days. Every other ordinance, it's 30 days. And you have the authority to grant time extensions.

The Board shall conduct a contested case pursuant to Sub-Chapters 3, 4, and 5 of your rules. Now, the Board may act as the hearing officer; however, it's been the advice of Corp. Counsel that we appoint a hearing officer, and I'll get into the reasons why later.

There's three standards for an appeal. And unlike variances, an appellant must only meet one of these three criteria whereas variances, they must meet all. The three standards of an appeal: that the subject decision or order was based on erroneous findings of material fact, or erroneously applied to the law; that the subject decision and order was arbitrary or capricious in its application; or that the decision or order was a manifest abuse of discretion.



These are the duties of a hearing officer. It pretty much sums up to pre-hearing procedures, the contested case hearing, and conducting post hearing procedures.

In the pre-hearing, this is just a brief list of what a hearing officer does: issue pre-hearing orders; serves notice of hearings; they limit testimony and the number of witnesses; issue subpoenas; allow motions and memos in opposition; allow a discovery process.

During the contested case hearing, they swear under oath – swearing witnesses under oath; allow the examination and cross-examination of witnesses. And in the post hearing, they review parties' proposed decision and orders; prepare and submit to the Board a recommendation of the proposed findings of fact, conclusions of law, and decision and order. And these reasons – for these reasons, it is why Corporation Counsel recommends that a hearing officer be appointed because who we appoint usually has the training in law that they can conduct these services.

Now, at the post hearing procedures, during the post hearing procedures, the parties will come back to the Board. The hearing officer will submit their report to you. And it will include the exceptions to the hearing officer report, the support of hearing officer report, and the Board may allow the presentation of oral argument with the applicant opening and closing. So the decision that the Board can make then is either affirm the decision and order of the department, remand the case back to the hearing officer, or reverse the decision and order because the substantial rights of the petitioner have been prejudiced.

And finally, the appeal process. Once you have made your decision, we produce a final D&O, and that D&O can be appealed to the Second Circuit Court. The Second Circuit Court may affirm, remand, or reverse the decision of the Board. And finally, the aggrieved party may then appeal to the Hawai'i Supreme Court, if that's their choice. And this process also goes for intervention. Say there's a variance applied for, and there's a party that's adverse, and they'd like to appeal, this process will take over.

And with that, that's the conclusion of this presentation. Thank you very much for listening.

Chair Endo: Thanks, Trisha.

Mr. Giroux: I guess it's my turn. James Giroux, Deputy Corporation Counsel. I'm going to be going over—if you look at your agenda—Items 1, 2, 3, 9, and 10. And they kind of all kind of blend together in some way – oh, and 5.

But I want to bring your attention to three things that may have been in your packet and that I handed out today is we have an "Orientation for Board and Commission

Members.” It looks like this one. That’s a thinner packet. And the other one is “Information Packet for New Board and Commission Members” with the seal on it. And the thick one is the “Open Meetings, a Guide to the Sunshine Law.” And that’s our Sunshine Law packet.

I just want to touch briefly on some of the high points of these documents. And you’ll have a chance to read these over yourself, and if you have any questions, always feel free to – you can call me and clarify things, and you’ll be free to ask questions today, too.

One of the big things that I want to go over is the Sunshine Law, and that’s codified in HRS, our Hawai’i Revised Statutes. And basically, the Open Meetings Law or the Sunshine Law, the premise is that the legislature wants the government to do its work in the open. And what that means is that the community should be allowed to see how the government works and how it comes to its decisions.

The Sunshine Law, one of the basic premises is that more than two Board members cannot convene together to talk about Board business. If that is done, that would be a violation of the Sunshine Law. Now, two Board members can meet, and you can talk story. That’s not a violation of the Sunshine Law. Two members can meet and talk about Board business, but cannot encourage each other to vote in any certain way. You cannot try to get somebody to commit to a position. You cannot get that person to – to lobby that person for a vote.

There was an opinion from the Office of Information Practices. And that’s the State agency that kind of governs this area of law. And what was happening in Honolulu at the Council level was that people were meeting, talking to one person, and then that person would go talk to another member, and then that member would talk to another member. And what the OIP said is that although this is not a technical – because if you read the law, technically, it says, two or more. And at no time were there two people in the room, more than two people in the room, but they said, they’re going to see that as a violation because it’s a blatant attempt to get around the Sunshine Law.

So the Sunshine Law is going to be liberally construed in favor of openness. So if there’s any question in your mind is what we’re doing a violation of the Sunshine Law, then you should look at the purpose of the Sunshine Law, and also to see if you are talking about Board business. And those would be the two flags.

The Sunshine Law requires that in order to have an open meeting, you have to have an agenda. The public is to be given fair notice of what is going to be talked about at the meeting, and that the discussions about the decisions to be made at that meeting are to be made in the open. There are some exceptions to those rules, but those exceptions are interpreted very narrowly.

There's an exception such as going into executive session. And I think this Board has experienced that where the rights, duties, and powers of the Board is under question, and you want to ask your attorney in private about what your rights, duties, and powers are, and liabilities. So what would happen is I would suggest to the Chair, I believe this is an issue that we need to talk about in executive session. He would give the vote over to the Body as far as a motion to go into executive session. You would need a second. And two-thirds of the Body would need to vote in the affirmative in order for us to go into executive session. And on the record, it has to be said why we're going to into it. And usually, it's pretty evident that, oh, somebody just said they were going to sue us, and so we're going to discuss that. There's a lawsuit, or somebody appeals our decision. I think we went into executive session where there was a law – somebody had appealed our decision, and we wanted to talk about how we were going to deal with that appeal to the Circuit Court. So I will bring those types of issues to you.

Site visits are considered meetings. I think we went to Lana'i recently. We went and looked at a person's property. That was a properly agendaed meeting. Public was given notice. They had a right to come to give testimony. And our discussions were in the open and they were recorded. So those are two exceptions to the – well, one is an exception, and the other one is an example of how something that doesn't look like a formal meeting needs to follow the Sunshine Law.

Sometimes things will be either not on the agenda and people want to talk about it. You'll hear me say this may be a violation of the Sunshine Law. What I'm saying is, is that the public wasn't correctly notified about what we're discussing, and we probably shouldn't be discussing it. And we can put it on the next agenda for full discussion.

If an error is on the agenda and we catch it in time, I probably will discuss it with staff to see if that error is so great that it would tend to be a violation of the Sunshine Law. And you'll probably hear that staff and I have recommended that this be deferred until it's correctly agendaed. So those are some examples of how the Sunshine Law affects this Body.

The other thing I wanted to point out is this Board is a Chartered Commission meaning that within the Charter of Maui County, you are created and you are given your powers and duties. It also means that you fall under the Charter's section regarding ethics, and that's Article 10. And I just want to quickly go over that in that section, you have conflicts of interests, and you have disclosure of financial interests.

The conflict of interest is usually a red flag if you have business transaction, or an activity, or a financial interest in the project at hand. Whether or not you're loaning money to the person who's building this structure that's trying to get a variance, or something like that where there's a business transactional – you're going to get a benefit of that. If you have any qualms about it, if your gut feeling is that there might be

a conflict, you can bring it to me, and we can talk about it. And hopefully, you bring it to me early enough where it's – you get the agenda six days ahead, and we can try to talk about what are the options. If I can't clarify it, or say, no, that's not a conflict, it's clear, you can vote on this, if I can't make you feel that comfortable, then you can get a formal opinion from the Board of Ethics. And that's another Commission that will take – you'll give them all of your facts about what is your dealings with this person or whatever, and that they will actually write you a formal yes or no. Yes, this would be a conflict. You should not participate. Or, no, this is not a conflict. You can participate in voting. And in our rules, you have to bring that conflict up as soon as – as early as possible. And you cannot participate in the discussion, and you cannot vote, if there is a conflict.

The other one is disclosure of financial interest that because of the nature of the permits that are issued, you are asked to give a financial disclosure to the County. And that is confidential for County purposes.

The other section is the receiving of gifts. You are not to receive gifts if it is reasonably – can be reasonably inferred that that gift is to influence your decision on the Board pertaining to a particular project. If somebody does offer you gifts, and you don't feel good about it, you should bring it to my attention, and I can talk to you about it, and see what our options are.

A lot of these issues are really case-specific. So again, feel free to talk to me about it, and let me know. I'd rather hear about this early on, and talk story with you about it than find out afterwards in the paper. The consequence, not only if malfeasance is found, and you can get kicked off the Board and such, but a more immediate consequence is that if your vote is the determinative vote, let's say five people show up to a meeting, and you're the fifth vote like Randy was today, and that vote is found to be – have been a conflict, what happens is that the courts will basically, void the action of the Board. So a permit could be voided, an appeal could be voided, or some – and you don't want that to happen because then we've got to do that all over again, and the members of the public really aren't served very well. So it's better to be cautious, bringing it up early, and try to discuss it. And we've got various avenues to work on that.

Other than that, the other thing I wanted to talk about is that this Board is one of the boards that I would say a 100 percent of your duty is what's called, adjudicatory, meaning that HRS, Chapter 91, governs your procedures along with your rules as far as a contested case. And you're going to hear that word "contested case." And basically, what the laws says is that when somebody from the public is coming before you, and their rights or privileges are going to be infringed on, taken away, or there's going to be some kind of hearing necessary before that happens. And that person has certain rights. They have a right to a hearing, a right to be heard, a right to a cross examination of witnesses against them, and the ability to bring their own evidence in their support.

And when we have a variance and when we have an appeal, those are always contested cases. We have what are called a more formal or formal contested cases. I think we've seen where we've had variances where just the party comes up, and they want to just give their side of the story, and say why they think that their variance meets all the criteria, and then staff gives us a recommendation.

And we've also seen situations where somebody wants to intervene on a variance. A neighbor wants to intervene. And then we've seen that more intensive type of what we call a formal contested case go to hearing officers because usually lawyers are involved. It becomes more litigious. They want to use all the tools available to them such as discovery: doing interrogatories, doing depositions, subpoenas, duces tecum, all the tools of discovery which can be very burdensome. And also, there's rulings of evidence that needs to be made.

And so those formal contested case hearings, as you've heard Trish say, I, a lot of times have advised you that this would be a situation where we would rather have a hearing officer take care of it because of the amount of time that it would take to process one of these cases. And we've had formal contested case hearings go for three, four, five, six, seven, eight weeks. They're very time-consuming, very contentious, very technical, sometimes, as far as the types of evidentiary rulings and procedural things that can occur.

One of the most important things to remember about this Board because you are an adjudicatory board is to avoid all appearance of impropriety just as you were a judge. And what I try to remind people is make pretend that you're wearing a black robe because you are in a position in the community now that you are as you are a judge. And you're going to be held to the standard of that.

If somebody is before you, and they can make a case to say that I feel that so and so is prejudice against me because, and then there's a newspaper article, or there's something that says – that a court would say, you know what? That person would be better off having a hearing without you on it.

And so you need to just be aware of your conduct as far as – I think I've made comments in the past where – we don't want to make comments about people's projects until we've heard all of the evidence. That's really important. If there's things that are before us that we might – we have a feeling might be before us again, we don't want to make comments that are, oh, I hated the color of that house. It was crap. You know something like that where you're like, okay, wait, wait, this is about a variance, folks. Those are the types of things where I'll try to pipe in and say, you know, we've got to avoid statements that are beyond the scope of our duties, because you don't want your rulings to be collaterally attacked by things that are unnecessary.

And I don't think so much on this Board, but I think on the Planning Commission where they do see projects over and over in different stages, I think I've had to jump in, and – oh, okay, I know you don't like swimming pools, but stop. So I just want to make you aware of that so you're sensitive to the issues of holding all of your comments pro or con until all of the evidence is presented before you.

And I know it's hard because sometimes we get into the situation where we're actually just deciding if we want a hearing officer or not, and we start hearing about the case. I think those are the – for me, that's when I get white knuckles as an attorney because you do want enough information to decide whether or not you want to hear the case as a body or not, but you don't want to be given so much information that people start making up their minds halfway. And that's where really, you've got to avoid making comments about the project, and just look at strictly, the procedural issues at hand.

And the only other thing I wanted to talk to is that we do have your own rules of procedure—Rules of Practice and Procedure. All of your rules are pretty much modeled after Chapter 91 and Chapter 92, which is your contested cases and your open meetings.

Specifically, I wanted to touch on quorum because the amount of people on this Board I believe are nine. So five affirmative votes are necessary to take action. If you have four votes, that's non action. And what would most likely happen if another motion didn't prevail is that that item would be deferred. You have to be cautious about that because most permits, and variances especially, have time limits on which you have to act if they don't follow certain exceptions to the timeframe. I think in the past we've dealt with the 120-day rule. You have to make a ruling within 120 days after the permit has been deemed complete by the Director. And also for variances, within 60 days of the last public hearing, you have to have issued an order.

So it's very critical that we have a quorum, that we listen to the evidence, and that we make a ruling, and get those orders out quickly, because those people also may be waiting for other permits pending the giving or not giving of a variance. Building permits, SMAs, there's other permits out there that are waiting to be processed. So we need to make our decisions, make them according to the facts in front of us, and then, make sure that we follow we process.

So those are most of the things. And I just encourage you. I know reading through rules and stuff may be boring, but every once in a while, just kind of go through them and get familiarized – familiarize yourself with them, because your going to have five years to— It helps me out if you are familiar with the rules, and all I'm doing is clarifying. But I think this Board as a whole has done a really good job at following its rules, looking at the standards, and trying to do a complete analysis and discussion as far as when doing its job. So I just want to encourage you to keep it up.

Mr. Ajmani: I have a question.

Chair Endo: Hari?

Mr. Ajmani: Could you clarify this no. 92-2-2.5, which is on page 30 of HRS 19, the interaction of members?

Mr. Giroux: Where is that, Hari, 92-?

Mr. Ajmani: -2-2.5.

Mr. Giroux: Oh, okay, Permitted Interactions of Members?

Mr. Ajmani: Yes, the first one.

Mr. Giroux: Okay. It says:

Two members of a Board may communicate or interact privately between themselves to gather information from each other about official Board matters to enable them to perform their duties faithfully as long as no commitment to vote is made or sought.

So two people, you can talk to each other about what matters are before you, but like I said before, you cannot try to lobby that person, or commit them to vote, or to try to lock them into a position, or any type of influencing that person. If like – let's say you wanted to ask Jim about some blueprints. And you're like, hey, Jim, is this symbol here – does that – you know, if you're an architect, and the other one's an engineer, you know, in your field, does that – would that mean vertical? And the other person would be, oh, yeah, that symbol means this, and in our field, we always look at that as being that. So you have two people talking about Board business, but you're not trying to influence a person's vote. You're looking at a technical issue. And you both, with your expertise, one being an architect, and one being an engineer, can share that type of information, because that's going to help you perform your duties faithfully. But you can't then go, oh, so if that means that, then that would be a violation, and then go further. You don't want to – you just want to have information.

Mr. Ajmani: So can you draw the attention to the other member about information that you have uncovered that you may have overlooked, or-?

Mr. Giroux: As long as it's information that's open to the full Board. Like it's in the report, or it was an exhibit that was entered into evidence, and it's something that catches your eye. And that's probably the type of things that you might want to bring to attention of the whole Board being that if you have a special expertise, and you can

interpret that piece of evidence to enhance everybody's understanding, that would be encouraged. But if you just leaned over to your neighbor, and said, hey, that's a funny-looking – I mean, is that a hollow wall or something, because we are dealing with a lot of technical things? We have subdivision plans brought before us. We have blueprints. Sometimes we just have artist renderings that may or may not be – although it's in front of everybody, you may not all have the same interpretation of it.

Mr. Ajmani: Thank you.

Chair Endo: Bill?

Mr. Kamai: Regarding any plans for subdivisions or a project, can you do a site visit by yourself?

Mr. Giroux: That is going to be discouraged. In the sense that if it's something that's opened to the public and you just so happened like, oh, I always go to that beach, and I always see the shoreline, and it changes all the time. Those are things that – the reason we have people from the community is because everybody has a unique experience, but what you don't want to be caught in, and there has been case law, is that if one member without the permission or vote for that specific task to go out, and start measuring, doing your own investigation, what's going to happen is, because we are in an adjudicatory position is that the Body may rely on your findings. And what they need to be doing is relying on the findings that are presented either by the applicant, or the intervener, or the staff because then it's something that you know that everybody kind of has an equal weight. In law, you want everybody to look at all of the evidence with equal weight unless there's somebody that can show you that whatever you're looking at is not reliable, contradictory evidence, things like that.

Mr. Kamai: So that's regardless of the fact that you're familiar with the project, subdivision, in the area that you pass by daily, you cannot bring that before the – what you know about the area before the Board?

Mr. Giroux: Yeah, well, that's really–

Mr. Shibuya: Jim, I think what Bill is saying is, he doesn't want to take sides. And he wants to share his information. And through his questioning, maybe he can reveal this because the person, the applicant, did not reveal all this facts and figures. But Bill knows more, so therefore, he's asking these questions. And I think that's appropriate to reveal that fact.

Mr. Giroux: Yeah, if you're asking the applicant the questions, and the applicant will be giving the facts, I think that's a little different. But also, I think you want to avoid the conclusion. You know what I mean? Like a good interrogator, you want to be able to



ask the questions that would elicit the facts, but you want the facts to be in front of the whole Body. And I think that's important.

Mr. Shefte: Can I ask you, is it proper for us to ask that we have a site visit sometimes?

Mr. Giroux: Yeah.

Mr. Shefte: Because I can remember that one situation where we had that park area in the subdivision in Kihei. And I was uncomfortable because I didn't have a clear vision of what it looked like. Although the staff did an incredible job in presenting it, an actual site visit would've made a big difference in my feelings about the thing, perhaps.

Chair Endo: That would probably be that somebody just makes a motion, and then we can vote.

Mr. Shefte: Yeah, because that hasn't happened yet in the two years I've been on the Board. I think in a case like that, maybe, it would've been appropriate.

Mr. Kamai: I think first we have to ask if we're under time constraints to make a decision.

Mr. Giroux: That's an important factor: time constraints. I think when I first came on the Board, I think there was a case where there was a site visit made, and there were some timing problems. But if it can be done, you can do a – as long as it's agendaed, and you get out to the site, and do it, and it's something that the Board all agrees that needs to happen.

Chair Endo: I was just reading here, James, that we could also by motion, appoint a couple of members to go out and do a site visit as a subgroup of the whole Board, if we wanted to.

Mr. Giroux: Yeah, and that's the investigatory exception, and that one has its own special procedures. You have to vote. You have to appoint the people who are going to be on that investigative committee, and then you have to specify on what the parameter of their investigation is going to be.

The only thing with that one is, those people have to come back and report, and it's not at that meeting that the discussion can happen. A subsequent meeting has to happen for there to be discussion. So it's a very formal process, I guess, because it's an exception to the Sunshine Law, so there's some additional safeguards. And that additional meeting is the safeguard that the report is made in public, and the people – then the audience can digest that, and then a discussion and action will be made at a subsequent meeting.

Mr. Shibuya: So, Jim, in the procedure now, let's say we have a site visit, and five people appear on the site visit, so it's a legal site visit?

Mr. Giroux: It's a meeting. It has to follow all of the trappings of an agenda.

Mr. Shibuya: Do we have to report back to the remaining four members at the following meeting to bring them up to speed?

Mr. Giroux: Not if it was agendaed as a regular meeting. I think what you're trying to hint at is a separate issue because the other four members—

Mr. Shibuya: Did not have the—

Mr. Giroux: Yeah, so there might have to be some type of—

Mr. Shibuya: That we could just present the information and then have discussion at the following meeting.

Mr. Giroux: We've had situations where Board members have missed parts. And what we've done to cure that is to have them read the minutes. And that's why it's very important that you have either a transcript or minutes of a properly agendaed meeting because there are gaps. Sometimes people miss a section. Or in the middle of it, we'll lose a member because their term is up. And then a new member has to come in, and they'll be a huge box of stuff to read. So those are things that do happen on boards and commissions.

Mr. Shibuya: Jim, I have another question. Real simple. The Sunshine Law, it says it does not apply to the judicial branch and to certain boards exercising the adjudicatory functions. This Board does exercise adjudicatory responsibilities. So it does apply, and yet, we are not — we are actually not immune to this Sunshine Law.

Mr. Giroux: Yeah, the — this Board is — one of the strange things within the Charter, and this is what brings it all back is that if they're — within the Charter, it says that the Board of Variances shall have a public hearing. And that is really what kind of shoots us back. The strange thing is that same language is not in the section where your appeal jurisdiction is given. So actually — and one of the unique things is that an appeal is automatically treated like a formal contested case within the rules. So it automatically goes to like either our hearing officer. And once it gets into that stage, it is an adjudicatory function. And a hearing goes on without the public participating unless they are entered in as parties, as interveners. So that's one of the unique parts of how State law, our rules, and the Charter kind of — we have to deal with these nuances of openness, and yet dealing with people's private rights. Because once it does get into that formal contested case, basically, it becomes a very formal adjudicatory function.

And the public is not – cannot just go in and start participating at that stage.

Mr. Shibuya: So it applies and it doesn't apply at certain stages?

Mr. Giroux: Yeah, like we got into the weird situation where we were putting it on the agenda, but it was an appeal. But we were going to be deciding whether or not we were going to send it to a hearing officer. Because it was on our agenda, the public, according to our rules, has a right to testify. So they can testify, but there's no real evidence being presented at that point because the decision that we are going to make at that stage is just whether or not we were going to take it on as a case that we wanted to hear, or send it to a hearing officer. And what was going to be discussed was what hearing officer we were going to choose, and if there was going to be mediation hearing officer, or was somebody going to be chosen as the actual hearing officer. So that's the kind of the flow between your rules, the Charter, and the Sunshine Law.

Mr. Shibuya: Okay. Thank you.

Chair Endo: Any more questions for any of the staff or Corporation Counsel? Are we done, Trisha, with all of the items on the Orientation Workshop?

Ms. Kapua`ala: Yes.

Mr. Giroux: And so actually, we should probably allow the public a chance to comment, speaking of the Sunshine Law.

Chair Endo: Okay, at this time, we'll open up for public testimony. Seeing no one interested, we'll move on to the next item of business, which is the approval of the March 8, 2007, meeting minutes.

#### **E. APPROVAL OF THE MARCH 8, 2007, MEETING MINUTES**

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

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

Chair Endo: Director's Report is the next item of business.

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

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

Ms. Kapua`ala: As far as the BVA contested cases, the Department of Corporation

Counsel has decided to hold off on appointing an attorney to serve you as far as Liloa Villages. The reason for this is that the parties are undergoing discussion right now that may make the appeal moot. So they're going to hold off for a little while. And we'll let you know as soon as a decision has been made.

Mr. Giroux: Yeah, just to follow up on that, my – I talked to the litigators, and my understanding is that we have technically, not been served. And that was one of my main concerns was that my understanding was that there was going to be an answer necessary within 30 days, I think, according to civil procedures. So technically, there was a hearing in Circuit Court. Our names were told to be put on the pleadings. And as of today, we have not been officially served those documents with our name on it because the original documents did not have our names. It was actually the County appealing. And it only had the applicant's name on it, the County and the applicant, not the Board of Variances, which technically, they would be appealing our decision which the judge felt that their names – our names should be on the pleading. So until we are served with that, I think we're cool. So hopefully–

And this is an appeal. It's an administrative appeal. So you're not being sued personally. When I advise the Planning Commission, and permits are being denied, and constitutional issues are raised, sometimes the applicants have sued the Board personally, and within their powers, I guess, as Board members.

So, yeah, if that situation arises, that's usually when I call an executive session to let you know if we're making a constitutional – treading into constitutional waters because part of my job is to make sure that you are not personally liable.

Ms. Kapua`ala: And everything else is going smoothly as scheduled.

Chair Endo: Okay. Thanks, Trisha.

**G. NEXT MEETING DATE: April 26, 2007**

Chair Endo: Our next meeting is April 26, 2007. If none of the members have any announcements they want to make on the record, and seeing none, the business is concluded, and this meeting is adjourned.

**H. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at approximately, 2:42 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  
Harjinder Ajmani  
Stephen Castro, Sr.  
William Kamai  
Rachel Phillips  
Uwe Schulz  
James Shefte

**Others:**

Aaron Shinmoto, Planning Program Administrator  
Allan Delima, Planning Department's Administrative Assistant  
Francis Cerizo, Staff Planner  
Trisha Kapua`ala, Staff Planner  
James Giroux, Deputy Corporation Counsel