

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
JANUARY 10, 2007**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Lance Holter at approximately 1:33 p.m., Wednesday, January 10, 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.)

Chair Holter: Will the staff read the notice of public hearing, please? Seeing that staff isn't here presently, what I'd like to do is move up the agenda here just quickly so we can deal with the – your case, Mr. Untermann, if that's okay? And this is the case regarding the Koa Aina Ventures.

C. MOTIONS

1. **JOSLIN GROUP, representing KOA AINA VENTURES, INC., requesting approval of variances from the following sections of the Maui County Code: Section 19.36.010 to reduce the number of required parking stalls from 26 stalls to 16 stalls; and to delete the requirement of one loading stall; and Section 19.36.030 to allow the 16 designated parking stalls to be located in an off-site location within 300 feet away from the subject property, for the proposed Diamond Head Gallery at the Old Kishi Building, located at 736 Front Street, Lahaina, Maui, Hawaii; TMK: 4-6-009:057. (BVA 2005004)**
 - a. **Applicant's Motion for an Amendment to Docket No. 20050004 to Replace Certain Wording in the Variance and Delete Any Requirement for Off-street Parking.**

Mr. Kent Untermann: Yes, thank you, Chair. My name is Kent Untermann. I had submitted five or six pages to Francis pleading our case to include Tony Roma's. Unfortunately, he, to the letter of the law, couldn't agree with that. And I think there was some counsel legal concerns also. So what – since we could not agree, what we have done is agreed to agree. And we're asking to now just amend the existing uses with the existing changes in space, in the configuration of the gallery and building as it stands.

You have a bunch of pages there. It looks like it's more than it really is. What I tried to do – the three main topics here originally, it was 9,242 square feet comprised of 6,864 square feet of the gallery. To allow Tony Roma's, we have shrunken the space for access both downstairs and upstairs. The current gallery configuration and space which I have attached as page two is 4,193 square feet. So kind of the net/net of it is –

and under the gallery interpretation would be 14 stalls; under retail uses, nine, assuming the gallery – the more conservative and gallery approach, we're asking to amend BVA – the previous BVA variance from 26 down to the now required 14 stalls, and then reduce from 16 to four, or preferably zero. I'm asking for zero. And I attached also, the five stalls that we are renting and the lease agreement that we have. Maybe I should stop there for a second.

The thinking here is that the difference in space – Tony Roma's is going to come before the Variance and the Planning Commission separately since the – Francis was uncomfortable with this. We are going to go in separately. And once again, we're just asking to amend the previous variance based on the new space, and the existing use, and the existing owner.

Chair Holter: Is there any discussion from the Board or any questions? So in the original variance, you had a variance to supply 26 stalls?

Mr. Untermann: Yeah, the requirement was – and there's a lot of puts and takes because we had some things grandfathered in. Whenever you change the use, you lose your grandfathered stalls, but originally, we were under – the way we had proposed it before, we were required to have 26, and we had that reduced to 16 assuming we're using the whole building.

Chair Holter: Okay. Let's let Francis. Francis, so Mr. Untermann said that he had spoken to you – staff regarding the parking adjustment for their application, Koa Aina. And we have some difficult math here regarding their parking requirement.

Mr. Untermann: Yeah, if I could just interject for a second? I had – Francis, I had told them that I had submitted some opinions and testimony to you in hopes that we could include Tony Roma's. And you basically, flat out said no because of the change of use. And so because of that, we have come back. And you may not even be familiar with this part of it yet is that we are asking to just amend our existing uses, and change the parking requirements as it is existing today. And then Tony Roma's is going to submit to the variance and planning application separately. So we basically, have agreed with your ruling and concerns, and are now just asking to amend the existing uses based on the existing square footage and configuration. So that part, I think, is new to Francis. What was old is – I've heard through Trisha that he wasn't going to agree with my pleading on the previous request.

Mr. Francis Cerizo: Yeah, if they put that into a motion, I don't think we have any objections. So basically, all they're going to do is take out the second floor out of the whole equation. And whatever they do on the second floor, they'll have to comply with.

Chair Holter: Come back later.

Mr. Cerizo: Yeah, either come for a variance here or just get the required parking that would be required for that use.

Chair Holter: All right, so we need a motion from the floor. If we could rephrase this motion so that--? I mean, the map here is a little confusing.

Mr. Cerizo: I think they're required to file a motion for the change. I'm not sure if that -- I'm not sure if we have a motion from -- in writing.

Mr. Untermann: Yeah, no, that's correct. We haven't -- we're under the previous motions. So whatever you need us to do -- that has not been done.

Mr. Cerizo: Yeah, so a formal motion should be filed with the -- with our office, and then we would bring it up to the next agenda with our recommendations.

Chair Holter: So do we need a motion from the floor for this?

Mr. Cerizo: No, I think -- we can't -- we don't have anything to--

Chair Holter: Okay. So this is continuing Director's business. So you'll come back with this motion to the staff?

Mr. Untermann: Yeah, okay. I just want to make sure I'm clear on what I need to do so that for everybody's time, we can--

Chair Holter: Well, I think we're content as long as it passes the Planning scrutiny, I think we can work with that.

Mr. Untermann: Okay. Just so I'm clear, can we answer any questions? Would it be okay just to answer any questions on the math just so that when we do the motion that we understand what we're asking?

Ms. Trisha Kapua`ala: Kent, I'll do the math. I'll call you next week.

Mr. Untermann: Okay, okay. But in principle, we're okay, but we just need to go through the procedural -- the protocol? Okay.

Mr. James Giroux: Francis, what would be the challenge to get the variance and the motion on the same day just so it's abundantly clear about what's happening? I mean, because when we originally went through this, the main concern that I had was that by -- the motion that they had filed, if we had granted it that day would've left the building pretty much half not needing any parking. And so, I think the idea was the new use would come in for a variance. The old use, that variance would be stricken, and then

the existing use on the bottom floor would have a reduced – the motion would be that they would reduce the necessary parking.

Mr. Cerizo: I'm not sure if – maybe that's something we have to talk about. I'm not sure if we can change – the hearing says the original variance is for – to reduce 26 to 16. Now, that's something that – can we actually change that requirement? I'm not sure if we can or not. So that's something that we have to discuss. But if they're going to just say we're taking the second floor out, and we just don't change anything else, just take out the second floor, just for the record–

Mr. Giroux: And all of the parking requirements would be for that bottom floor as existing?

Mr. Cerizo: Right.

Mr. Giroux: So the variance would just continue to exist for the bottom floor only?

Mr. Cerizo: It may have been – in order to change the 26, we might have to do – I'm not sure if we have to do a re-noticing saying, okay, now we're going to go instead of 26, it's 22 to 16, or 20 to 16. We might have to go through a whole new variance because we're actually – it's not – you're not asking–

Mr. Untermann: Well, my understanding originally was that we had to change it because we were changing the use which we are now no longer changing. So the use change, we are going through the variance process, but I thought it was okay to amend it as long we're only amending the existing use based on the existing changes.

Mr. Cerizo: Well, maybe that's a question for counsel. Can we actually change the – can they amend – if they take out the second floor, can they amend the application from the required stalls for the amended amount? Let's say they take a thousand square feet out of the whole equation, and they reduce the area by two stalls, so we would have – the variance would say a reduction of the required 24 stalls to 16. Can that be something that we can resolve with a motion?

Mr. Giroux: I would be more comfortable to have the variance and the motion done together so it's abundantly clear that if when the motion is granted that it's specifically for just the bottom floor. Because what we're doing now is – because if you don't amend the variance for the bottom floor, you're actually going to be giving us more parking than is required by law, right? And that's why we need to amend it. So I think we should take that into consideration. I think that if we do that in that fashion, I think that we can accommodate the applicant because we don't want the applicant stuck with having to provide more parking than is required by law.

Ms. Kapua`ala: The next available hearing date will be March 8th.

Mr. Untermann: Yeah, I guess the other issue – I mean, the number one most pressing issue for us is to get this cleaned up so that Tony Roma's can get on with their permit. So I'm willing to be patient on what we need to do on the other things. It's just because of this variance as it exists today, Tony Roma's is stuck in neutral. So I don't – I'm open to all options that we can do that will allow us to ultimately get the whole thing fixed. But if we have to do it simultaneously, then that pushes everything back. And what we were planning with Tony Roma's is just go to the Planning Commission and get their parking approved that way, and then ultimately, come back and clean it up. If we're not able to amend this, then they're not able to do that because they can't – and Don, you might need to help me here. Is that–?

Mr. Don Freeman: I'm Don Freeman with Joslin Group. And my understanding is the motion was filed last time to basically – to amend certain wording on the – due to the existing variance. It covers the entire building. Tony Roma's is trying to take over the second floor. Diamond Head Art Gallery, Koa Aina Ventures is the first floor. What we'd like to do is to amend the existing variance so that it changes the area that the variances cover. So that eliminates the second floor. That'll allow Tony Roma's to go before the Commission for off-site parking approval. However, then his motion will cover his first floor, his 26 stalls – the 16. The number can stay the same. And then a separate variance can be applied for to amend the quantity of parking at a later date. And so basically what we're asking is that certain wording be amended; however, the parking remains the same at this time.

Ms. Kapua`ala: Excuse me, Don. What was filed by Crockett and Nakamura for Tony Roma's? I know an application was filed, but I haven't had a chance to review the file. I was assuming it was a variance for Tony Roma's parking.

Mr. Freeman: There will be a – we will request a reduced amount, but it will happen after-the-fact. We'd like to get before the Committee to approve the off-site parking.

Ms. Kapua`ala: So when we complete that application, the next available hearing date for Tony Roma's parking variance, like I said, is March 8th.

Mr. Freeman: And that would be fine; however, with the changing of this, if we reword this motion at this point, that will allow us basically that now we can proceed to approval for off-site parking on the 20. And we have already submitted our application for the 20 stalls required by off-site parking. And then we will be able to possibly make the next available Planning Commission hearing on I believe it's the end of or early February.

Ms. Kapua`ala: I see. So, James–?

Mr. Giroux: I think that if you do the motion by just eliminating the space and the actual what you're required to do right now as far as what is existing in the variance that was granted does not change. I think that as long as the department will allow you to file the variance and have that processed, I think that could work because you're not going to be reducing the amount of required parking spaces.

Mr. Freeman: Absolutely. And then any changes at a later date, we can address that later, but our main concern at this point is that this permit has been held up for quite a long time on this issue, and we need to move forward in order to get this moving. And this would allow with this motion approved and changing the use – the area that is proposed for that, by that means, we can move to get off-site parking approval.

Ms. Kapua`ala: I know this is a – we're getting closer to the next mailout already. Would you be able to submit a new motion on what we're speaking about today by January 15th which is a Monday?

Mr. Freeman: For–?

Ms. Kapua`ala: For the new motion. Then we can agenda you January 25th. Other than that, you would have to wait 'til February 8th.

Mr. Freeman: You're talking about the Planning Commission for off-site parking approval?

Ms. Kapua`ala: No, no, this motion.

Mr. Untermann: Yes, we can.

Ms. Kapua`ala: Okay.

Mr. Freeman: Okay.

Chair Holter: All right.

Mr. Giroux: Trish, Monday is a holiday, just to be clear.

Ms. Kapua`ala: Oh, what is it?

Mr. Freeman: Martin Luther King Day.

Mr. Untermann: Hey, Don, you and I could work on that.

Mr. Freeman: Oh, absolutely.

Ms. Kapua`ala: Friday, it would have to be Friday.

Chair Holter: We're talking this Friday?

Mr. Freeman: Yeah, no problem. In other words, we need to amend the – you want to see the actual wording on this motion. Right now, we're asking approval to amend that motion by the nature that I've just asked.

Ms. Kapua`ala: I would need to call you. You want to meet today?

Mr. Freeman: Absolutely.

Ms. Kapua`ala: Okay. Let's meet at 4:00.

Mr. Freeman: Thank you.

Chair Holter: All right. Thank you. Now, will staff please read the notice of public hearing for the Rochelle Ka`ula of Munekiyo & Hiraga representing Akolea at Kehalani?

B. PUBLIC HEARINGS

- 1. ROCHELLE KA`ULA of MUNEKIYO & HIRAGA, INC., representing AKOLEA AT KEHALANI, LLC, requesting approval of a variance from Maui County Code, §19.80.020(B) to allow 10 dwellings to exceed the maximum building height of 30 feet by 1.90 feet to 5.75 feet for the Akolea Subdivision at Kehalani located at 101 Kuikahi Drive, Wailuku, Maui, Hawai`i; TMK: (2) 3-5-001:076. (BVAV 20060010)**

Ms. Kapua`ala read the notice of public hearing.

Chair Holter: Is there a video presentation?

Ms. Kapua`ala: No, our video camera – we'll be able to show you videos next month. For today, I have some pictures. I passed it out. It's before you. If you would just run through me – run this with me – run through this with me?

The first page, I show you the ten lots, the highlighted in yellow. Now, if you're looking at this grading plan, the straighter road or Kuikahi Drive, that's the road up to Wailuku Heights. So to the left, that's going mauka to Wailuku Heights and the West Maui Mountains. So to the right, that would be looking down towards Wailuku and Kahului.

So first of all, I take three pictures of Lot 65 and 66. The first picture: that is from what

they're calling the South Collector Road. So that's Lot 65. Pictures no. 2 and 3 are actually from what they call Roadway B looking down. And the third picture is looking up. So this picture looking up towards the West Maui Mountains, the third picture, that is the lot that will be affected possibly, by the view.

Next, we have Lots 23 through 28. The first picture, I'm standing on Lot 28. In the middle of the lot, you can see how the property is graded. Now, this looks down. The second picture looks down and this is still all the same properties: 24 through 28, and then the street below.

The next group of pictures is of Lot 3. Again, looking down. And the last group of three pictures is Lot 10. The first picture: that is Kuikahi Drive. To the right is going up towards the West Maui Mountains. And the second and third pictures are – second, looking down towards Kahului, and the third picture looking up towards the West Maui Mountains.

So I'm hoping that you can get a feel of the natural grade or the finished grade of this subdivision. Every single lot has a steep slope. And Rochelle and Mr. Munekiyo are here for their presentation.

Mr. Mike Munekiyo: Good afternoon, Mr. Chair, Board members. My name is Mike Munekiyo. And I have Rochelle Ka'ula from our office assisting. What we'd like to do, if we may, is just to give the Board an overview of the project area, the lots that are affected, and the nature of conditions that bring us to you today for the variance request.

So again, this is affecting ten lots at Akolea at Kehalani. The applicant for the project is Akolea at Kehalani LLC. The tax parcel: 3-5-001:76. It is located within the Kehalani Project District. And also, I'll show you some aerial photos and location maps in a second. The County zoning for the property is Wailuku-Kahului Project District 3. And within the Project District 3, it's within the SINGLE-FAMILY-7 Subdistrict. Again, the project name is Akolea at Kehalani, and it's a 97-lot single-family subdivision.

This is the project site itself. Honoapiilani Highway is running in the north-south direction here, Kuikahi Drive leading up to Wailuku Heights here. And I think as Trisha mentioned, the Kuikahi Drive borders the project site to the south. This is Parcel 76 at this location.

Again, this aerial photo is intended to just give a better idea of where the project is located. Again, Honoapiilani Highway. This is towards Wailuku Town here. This area here, this is referred to as the Ohia Subdivision. This area is the Maunalea Subdivision. This is the Iliahi Townhouse Project. Up above: Koa Subdivision. Again, this is the Akolea Project site right here, and the Wailuku Heights Subdivision. So that kind of

gives you a context in terms of existing uses, surrounding properties, so forth. Makai of Honoapiilani Highway is also part of the Kehalani Project District. Again, primarily consisting of single-family units.

This is a closeup picture, an aerial photo. And this photo was taken in the beginning of December, so it's a more recent photograph. Again, this is the Kuikahi Drive leading up to Wailuku Heights. But the intent of this photo is to kind of show you the construction status here. We have the collector road here. It's kind of a spine road moving in an east-west direction, and the cul-de-sac roads here connecting to the collector road at this location. So if you can imagine the subdivision layout is basically, framed by Kuikahi Drive, the collector road here, and then cul-de-sacs then connecting to the collector road. There's no direct vehicular connection to Kuikahi Drive. The lots then border either side of the cul-de-sac roads.

This is just a – again, a ground level shot. And I'm not sure if this kind of a picture was conveyed in the photos that Trisha had taken. But basically, looking uphill, looking up-slope you can kind of take note of the terracing and Wailuku Heights, of course, mauka, West Maui Mountains beyond.

This photo just shows a picture taken from Kuikahi Drive looking at the cul-de-sac roads. Again, the lots, single-family lots are on either side of the cul-de-sac road.

So what those photos attempt to do is to give the Board an idea of what the ground conditions are like, what the existing construction status is. And generally, what is conveyed there is that we do have a fairly significant topographical condition that we need to deal with, and I'm going to go into that in a second.

What we're here for today relates to Maui County Code 19.80.020B. And if I may just read that?

This establishes the standards for the various single-family residential subdistricts of the Wailuku-Kahului Project District 3 or the Kehalani Project District. The Akolea at Kehalani Project is within the SINGLE-FAMILY-7 Subdistrict. The maximum permitted height in this subdivision or in this zoning subdistrict is two stories not to exceed 30 feet in height.

And what's really the governing parameter here is identified in Maui County Code 19.04.040 and that's the definition of height. According to code the definition of height reads:

The vertical distance measured from a point on the top of a structure to a corresponding point directly below on a natural grade or finished grade whichever is lower.

So that's the criteria that we're working with.

The variance request before you today involves ten lots of the 97 lots at Akolea. And specifically what we're asking the Board to consider is to permit these ten houses to exceed the 30 feet height limit. And the variance request ranges from 1.90 feet to 5.57 feet. In other words, there are ten houses. At its lowest extreme, one of the houses crosses the threshold, the 30-foot threshold by 1.9 feet. At the greatest extent, one of the houses crosses that 30-foot threshold by 5 and 3/4 of a foot.

Just some background information relative to how the project district has progressed over time. The original approval for the project district was granted back in the early 1990s. That included a project district phase 1 approval, and also, a project district phase 2 approval.

Back in September of 2002, there was an amendment to the project district phase 2 approval. And just as background information for Board members, if you're not familiar with the project district phase 2 process basically, the project district phase 2 approval is a site plan approval. It's granted for the entire project district, and it basically, sets forth the spatial allocations, the relationships between the residential areas, the park areas, and in this case, there's a school site. It sets forth the locations of major roads that will run through the overall project district. So it's a site map which basically, again sets forth the general master planning parameters for the Kehalani Project District.

Now, in June 2005, the grading permit for the subdivision was issued. And subsequently in October, the project district phase 3 approval for the subdivision was granted. And again, just for background, the project district – because this is a project district, it actually involves a 3-step process. The phase 1 and phase 2 approvals occurred back in the early '90s with the phase 2 again being amended in 2002. The phase 3 approval is more of a construction document level of approval where you have detailed plans available for review by the Planning Department for a particular site. And so, the applicant has gone through all of the project district approval processes with again, phase 3 being granted this past October. To start the process for actual home construction, building permits were actually filed in August of last year.

I just wanted to show the Board members what the project district phase 2 map looks like. The yellow area is the entire Wailuku-Kahului Project District 3 or Kehalani. And as I mentioned earlier, the project district phase 2 approval basically sets forth the site plan, a master plan for the entire project district. And if I can give some reference to the Board, this again is Kuikahi Drive leading up to Wailuku Heights. Honoapiilani Highway. This was the Ohia Subdivision that you saw in the aerial photograph. Maunaleo Subdivision. Akolea is actually in this area right here along Kuikahi Drive. This is the Iliahi Townhouse Project. And again, Wailuku Heights is up here.

Now, what is important to understand about the phase 2 approval as I mentioned, it sets forth the relationship between the various land uses. Again, the parks are shown in green. There's a school site here, I believe, a community center, various residential types. But it also sets forth the overall roadway configurations. This is the Kehalani Parkway here looping around and tying back. This was the – or is the collector road that I referred to in the aerial photos. So these roads and general spatial allocations for land uses are set forth by the phase 2 map. And the phase 3 approval basically then looks at the individual project area in more detail. And that is the approval which the Planning Department issued in October of 2006.

I thought it might be helpful for the Board members to understand what the grade conditions are or the natural grade conditions are at the site. From this point here, this is Kuikahi Drive here. So this is the top of the project. Wailuku Heights is up in this area. The top of the project here to the bottom here roughly, overall we're talking about 11% grade on an average. Of course, there are site specific undulations which we'll get into in a minute, but again from an overall standpoint, we're averaging roughly, 11%.

Now as Trisha mentioned, we have ten lots which we are asking for consideration from the Board today. There are a total of 97 lots and ten are affected by this variance request.

What I'd like to do is very briefly, if I may, go through the conditions at each of these lots. It should not take very long, but I think it's important for the Board to understand what the underlying characteristics are of the property that causes the height requirement to be exceeded.

Again, this relates to Lot 3. I hope the Board members can read this, but this light line at the bottom here, that's the existing natural grade. And the existing natural grade has a slope of 9.4%, roughly. This green line here is the finished grade, as you saw out in the field or as shown in the aerial photograph. So again, the bottom line: 9.4% on the existing natural grade. This is the finished grade, house pad. This right here is a cul-de-sac road. So this is where the lot ties into the roadway here. Now, what happens then is the actual building height is about 28 feet. If you were to take the building height from the green line to the top of the roof, it's 28.25 feet, I believe. So it's below the 30-foot threshold.

What creates the variance or the need for a variance is the fact that we do have some fill on the property. And so when you consider that this is the natural grade here, and the fill height here, the definition of course says in order – in measuring height, take it from the top of the structure to the finish or natural grade, whichever is lower. So in this case, we worked with the lower natural grade. And the 30 – the actual height then, by definition, by code definition becomes 33.46. And with 33.46 of course then that exceeds the height, the permitted height limit by 3.46 feet. And so the variance request

for Lot 3 is 3.46 feet. And I note that just – this crosshatched area is that portion of the house which actually crosses through the 30-foot threshold. And if you can imagine, this is a hipped roof, so it's that portion that penetrates through that 30-foot plane.

And I can now go through a little bit more quickly, but this is Lot 10. Lot 10, I might add, has a somewhat more unique or exceptional condition than some of the other lots, but nonetheless, I just want to note it here. Same thing: the light line at the bottom, existing natural grade. The green line is the finished grade. The height of the house: roughly, 28 feet. And because – in this instance, this area here is where it penetrates that 30-foot plane.

Now what happens here in this particular instance is, I'm not sure if you can make it out here, but there is a drainage gully here. It's a natural drainage gully here, which runs right along here. And what happens is, this dip here is really – a part encroaches into the property as part of that drainage gully. So what happens is, you've got this dip because of the drainage channel, and so the fill condition is a bit higher. And so you've got – although the overall property slope is on a longitudinal basis, 18.8%, which is still fairly significant, when you look at it from a, I guess, from a sectional standpoint looking through the lot, you've got a really more severe condition because you're dealing with this drainage canal. And so for that reason, this area here penetrates that 30-foot plane. And we need, therefore, to ask your consideration for a 2.2 feet variance request.

And I'll run through these a little bit quicker because I think the conditions and the explanations run parallel. This is Lot 23, but again, Lot 23 has an 11.1% natural slope. The shaded area again is that area which penetrates the 30-foot plane. And the variance request we're seeking for Lot 23 is 2.44 feet.

This is Lot 24. And again, Lot 24: 12.4% slope, natural slope here. The green line again representing finished grade. And again, this area of the roof, the hipped roof penetrating the 30-foot plane. And we are seeking for Lot 24, a 3.81 foot variance request.

This is Lot 25. Again some thing, Lot 25 has a natural grade of 10.3%. Again, the area penetrating through the 30-foot plane, and our variance request is for 4.12%. And again, just a reminder here that the reason for the variance request is because of the fill condition, the difference between this green line and the natural grade here.

Okay, 26, and it's the same thing here. Lot 26 has an approximately, 11% slope, and the variance request: 2.82 feet. Again, this is the area exceeding the 30-foot limit.

Twenty-seven, and again, I'll point out that this line up here is the 30-foot threshold as it runs parallel to the natural grade. So at any point, this is 30 feet here. This is 30 feet

here. So again, the crosshatched area is that area which exceeds the height limit. And the variance request we're seeking for Lot 27 is 1.9 feet.

Again, Lot 28, very similar conditions. A 10.6% slope, and a variance request of 2.24 feet.

Lot 65, you'll notice now that the variance request is a bit more: 4.89 feet. And the reason for this is you can see that the fill amount is a bit higher than the previous lots. We're dealing with a 10.6% slope here.

Finally, Lot 66, a 9.6% slope. Again, the fill conditions are a bit more than the other lots. And I'll kind of go through the reasoning for that, but the variance request is for 5.75 feet.

So this is just a summary of all the lots that we just went through, but again, we do have ten lots. Again, the variance request on the height then ranges from 1.9 feet here at Lot 27 to 5.75 feet at Lot 66. And again, the reason for that variance is the slope condition and the need for fill to match the grading requirements for the property.

This slide I just wanted to call attention to the Board because I think it's somewhat important in this instance. And let me just read it, if I may, Mr. Chairman?

Pursuant to the Charter of the County and in accordance with the provisions of this article and the procedures established in this Chapter, variances from the provisions of this Title may be granted by the Board of Variances and Appeals if the Board finds that due to the particular physical surroundings, shape, or topographical conditions of the subject property, compliance with the provisions of this Chapter would result in hardship to the owner, which is not mere inconvenience or economic hardship on the applicant.

In other words, the conditions that I just spoke of at each of these ten lots are not merely something that we're seeking from the Board because it'll be economically advantageous to the applicant, or a mere inconvenience. Indeed, it is a substantial set of concerns that faced the applicant.

And if I may then at this point, Mr. Chairman, refer the Board to page 7 of the staff report because I think it's really important to understand the progression of thinking that the applicant went through to get to the point of actually deciding to come before you today.

Now, the staff report, you may recall as I mentioned, the project district phase 3 approval was granted the Planning Department in October of '06. And in that letter, the

department correctly cites – and I'd like to read just portions of actually, Item No. 3. That's under the background. And it starts with a statement on October 5, 2006. I'd just like to read a couple excerpts from that conditions because I think it's really important to understand the context and how we got to where we are today. Basically, the Planning Department in issuing the phase 3 approval stated that:

Lots identified on the fill and excavate plans dated September 5, 2005 with fill material of more than five feet may be limited to one-story structures due to the 30-foot height limit currently measured from existing or finished grade, whichever is lower.

In other words, at this time, or in September when the phase 3 plan was submitted, there were notes that because of the fill conditions and because of the slope that certain lots may be subject to limitations of height and that the applicant should be aware of that. And as a result, there were 36 lots that the Planning Department identified and those are stated in the subsequent sentence. So a total of 36 lots were identified as potentially problematic from a height standpoint because of the grading conditions and the topographic conditions at that location.

And so the Planning Department actually went on to say that:

Future property owners of these lots shall be notified by deed restrictions that height restrictions may be applicable to the lot in order to meet the current height definition of the zoning code. Should the zoning code be amended to redefine height which deletes this restriction, then the restriction shall no longer be applicable.

So I think what the department recognizes is that we indeed had a somewhat difficult challenge in terms of addressing the grade conditions. And there were, in fact, 36 lots that were identified as being potentially, problematic. Now, the applicant was aware of that. They've, at that time, went back and looked at what could be done in terms of making sure that all of these lots, houses, could meet the 30-foot height requirement. And indeed, they were able to work with grading adjustments, and siting adjustments, house siting adjustments, to make 26 of the 36 lots work. However, the ten lots that we bring before you today are the most problematic. And this is where the design considerations were really difficult to achieve or, if not, impossible. And that is why we are here before you today.

Again, the facts are that there 36 potentially problematic lots. And the applicant tried as much as they could from a design, actual grading, regrading standpoint to accommodate this. But again, the ten that we brought before you today are the problem lots again or very well constrained with respect to grades.

So again, I just want to call out the general criteria for the granting of a variance. And that is, variances may be granted due to particular physical surroundings, shape, or topographic conditions. And again, it should not be granted for purposes of economic benefit or avoidance of inconvenience. Indeed, these conditions that we face are somewhat problematic or quite problematic.

Okay, so if I can go to the next slide then. As you know, for Title 19 variances, there are three criteria which the Board needs to consider. I'll go through this really quickly:

Exceptional or 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 will not alter the essential character of the neighborhood.

That's the first criteria. Secondly, "Strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property."

And no. 3, "The conditions creating the hardship were not the result of previous actions by the Applicant."

So if I can go to the next slide? I'd just like to talk a little bit about the first criteria: the exceptional, unique, or unusual physical or geographical condition criteria. Now, I spoke about the 11% average annual – average slope condition at the property, but the range is actually between 7 to 20%. And again, we went through each lot with the specific slope conditions at each of those lots.

Now, I'll run through these really quick, but – and then maybe I'll go back to a specific example, but lot grades were based on grades already established by the primary collector roads, specifically, the South Collector Road. So the South Collector Road is that road that lies to the – borders the property south. And that road is master planned, as you might recall because of the project district that we are in. And so the grades of that road really dictate the grades of the cul-de-sacs that are then connected to the South Collector Road, and I'll kind of go back to that in a minute.

Number three, cut and fill conditions were needed due to the site's sloping topographic condition. These sloped conditions are not prevalent in nearby adjacent residential areas in Wailuku Town or in the newer Kehalani Subdivision makai of Honoapiilani Highway. Now, I point this out because this is where the project district concept comes into play. Project district basically looks at the master plan area as a whole, and how do you integrate the infrastructure, the land uses, and plan it accordingly. And so, what we like to think of is that the project district really sets the framework for Akolea, Akolea being one component of the project district. And that the surrounding areas of Wailuku

Town or areas makai of Honoapiilani Highway are those areas which don't face similar kinds of topographic condition. So from a uniqueness standpoint, we're saying that the project district and Akolea within that project district is really a unique set of physical circumstances presented. And it's not prevalent in the area which surrounds it in either areas makai of Honoapiilani Highway or in Wailuku Town.

And no. 3 – no. 4, the granting of the variance will not alter the essential character of the neighborhood, the essential character of the neighborhood pertaining to the Maunalea Subdivision, Ohia Subdivision, and so forth, those subdivisions which surround the property.

Okay, at this point, if I could refer the Board members, if I may, Mr. Chairman, to Exhibit B of the Planning Department's report? Because I think it's real important to understand the context of – the project district context. And I'm hoping that maybe it'll clarify why it is that this particular amendment which the Planning Department has proposed is quite important. And if I might read – this is an amendment that was generated by the Planning Department, requested by the Planning Department, and it's an amendment to the definition of height. Basically it says this, if I may just read it because I think it's important:

“Height” means the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finished grade whichever is lower.

That's the existing definition. And I think the department's proposed amendment goes on to say:

For structures within projects that have received site plan approval in association with a special management area permit, project district phase 2 approval, or planned development approval, the finished grade shall be used to determine height.

And so I think there's a recognition that there are limitations when you look at larger projects and how the grades are altered from a mass grading standpoint. And again, in the case of Kehalani, you've got the roadways set by a master plan or the phase 2 plan. And so there's certain limitations which maybe wouldn't ordinarily apply to a single-family unit on a single lot, as an example. So I think the Planning Department I think – well, from our standpoint, we really appreciate the Planning Department's effort to kind of call this to the attention of the Council members so that ultimately, interpretation can be – have a little more flexibility for the master planned projects, at least. Again, this is not an approved amendment as the staff report says. Once this amendment is approved, then of course, we wouldn't need to come before you, but it's still pending before Council.

The next criteria which the Board needs to consider is that strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property. Strict compliance of the code would require regrading of the lots and construction of single-family homes only. For the ten lots, this requirement would result in a hardship to the owner which is not mere inconvenience or economic hardship to the applicant. And I might add that, if you recall, there were 36 lots which were potentially, problematic. The applicant actually went through the whole process of identifying which lots can accommodate a single-family lot, which lots could be re-graded. The regrading was done. And again, what was left at the end of the day out of these 36 lots or ten lots which were deemed to be quite problematic – and maybe I can cite an example.

Maybe I could ask Rochelle to – let's use Lot 3, the first one, as an example. Again, this pertains to the criteria that strict compliance would preclude a reasonable use of the property which goes beyond mere inconvenience or economic benefit to the applicant. And I think the Planning Department recognized the alternative means of addressing a condition like this. And that is, put a one-story house is one possibility. The other possibility would be to re-grade the property. But again, going through the process of looking at each of these lots, the 36 lots individually, and trying to make all of them work, this is what was left at the end of the day with the ten lots. And if I can just maybe go through this as an example because the logic kind of carries on through all the other nine lots as well.

Here we have Lot 3 which has a 9.4% slope. Again, this is the finished grade: the green. This again, is the roadway, cul-de-sac roadway. And I can't read it. Is this 422, Rochelle? So at the cul-de-sac, now what's going to happen is the lot grade has got to connect to the cul-de-sac, as you realize. So we have a 422 elevation here. Originally – and this is 420. So at the sidewalk, 422, we drop down two feet to get to the garage at 420. Originally, these lots were actually graded as a flat slope or a flat lot. But even with that, a single-story house would not work because a single-story lot at this – off of this grade would still penetrate the 30-foot plane. This grade configuration I think works probably better. The alternative then to the single-family lot because a single-family lot would be somewhat problematic, too, to address the 30-foot limitation, the alternative then would be to drop the grade, this green line here, down by 3.46 feet, which is the variance that we're requesting. And if we were to drop this by three feet, of course what happens from a grading standpoint is this green line theoretically, or in actuality, would need to drop as well, 3.46 feet. Now, of course, we need to connect to the cul-de-sac up here at this point here at 422. We're already down two feet. If we drop– And so what's going to happen is, you've got to connect to the roadway here. If we were to drop the lot pad by another three feet, we'd be at elevation 49 – 417 at this location here. And 417 to 422, that's five feet over 20 feet. And the slope conditions, I think, five over 25 is a substantial drop. If I may just–? I think it's kind of important to understand. Five divided by 25 – there's a 20% slope off of the driveway. So that would be the result of regrading to bring it down to meet the height limits. So effectively what would

happen is, in all of these conditions here, you get a very steep driveway well in excess of 10%. In this instance: a 20% slope. Now, you could make some adjustments by moving the house back, but you wouldn't gain too much in terms of a slope at a driveway because by that point, you'd be at the back here, and that's really not feasible from a living standpoint.

So really, what the engineer has told us is that a 10% driveway grade is probably the most you'd like to work with. Anything more presents a problem not only in terms of safety because especially if you're backing out of a driveway on a steep slope, or just going down a driveway on a steep slope, that's somewhat problematic. But the other, of course, is the more practical issue. When you're coming up a steep slope, and you've got a sharp transition to the roadway, then of course, you've got the bottoming-out condition for vehicles. So those are the practical considerations.

There are – it's really difficult on all of these to kind of address the grade conditions. And just because it is a steep slope overall, you've got some individual slopes which are steeper than others in some instances, but the overall grade conditions really makes it difficult to look at alternatives which might work without, I think, creating a house product condition which would be probably unacceptable or unsafe. And so, that is a situation we're left with. Again, we did start with 36. We're able to get it down to 10 that we're kind of left at the end of the day with some grade issues.

So if I could then go back to the last final criteria, or maybe back to the second to the last criteria, Rochelle, that strict compliance. And so, this is the strict compliance argument that we kind of offered to the Board that there are some unique grade conditions, exceptional grade conditions. And the variance that we're requesting is not intended to be a cost-saving item, nor is it intended to avoid inconvenience. It is indeed, a significant challenge that is being faced here that would prevent reasonable use of the property.

And so the last criteria that the Board needs to consider is that the conditions creating a hardship were not the result of previous actions by the applicant. And just to summarize, the slope conditions affecting grading requirements for Akolea is attributed to existing site conditions and not a result of actions by the applicant. And I appreciate the Board's patience in allowing me to go through all of that.

Chair Holter: Thank you very much. I think we have some questions from the Board. Warren?

Mr. Warren Shibuya: Thank you, Mr. Chair. Mr. Munekiyo, there's some concerns that I have, and I'm looking at Lots 23, 24, 25, 26, 27, 28. In my mind, I think that we can alleviate some of these problems here by possibly grading just two and a half feet, or so, or three feet. Because they're somewhat very similar, I don't see that as a problem.

But I do see problems with 65, Lot 66, Lot 3, and Lot 10. So that I can understand the structure, the design of the home, what are the ceiling heights for each of the rooms?

Mr. Shibuya: I wonder. Maybe I'll ask a representative of Akolea—they're familiar with the product itself—to come forward.

Mr. Shibuya: Thank you.

Mr. Munekiyo: Takeshi, would you like to respond?

Mr. Takeshi Matsukata: Hello, Mr. Chairman and Board members. My name is Takeshi Matsukata. I'm with Akolea at Kehalani LLC.

The houses that we have here is basically, a plate height. The parameter of the houses are nine feet. So we have a nine-foot ceiling. That's throughout the subdivision. We have a nine-foot plate house.

Mr. Shibuya: In these homes that are – especially, these ones that are above the height, could these be saving a foot from each of the floors by lowering it, instead of nine feet to eight feet, and also, the roof, instead of having it pitched that steep, a little flatter? Would you then be in compliance with these homes?

Mr. Matsukata: I think if we change the pitch of the roof from – what we have is 5/12 right now to 4/12, we can probably save about a foot or so.

Mr. Shibuya: That's correct. And you would save another two feet for each of the floors.

Mr. Matsukata: A foot.

Mr. Shibuya: Yes, each.

Mr. Matsukata: Yes.

Mr. Shibuya: Right.

Mr. Matsukata: Correct.

Mr. Shibuya: So now you have three feet that you've saved.

Mr. Matsukata: Correct.

Mr. Shibuya: So you don't need to grade in some respects: 23 to 28. I'm not telling you what to do, but I'm just suggesting some of these things. So I feel that—

Mr. Matsukata: That might be one of the solutions, yes.

Mr. Shibuya: Yes. The problematic ones would be Lots 65, 66, 3, and 10. However, we can possibly work the same type of design within a possible grading of maybe a foot, a foot and a half more. And then, it would be a variance of probably six inches to a foot using the same type of math.

Mr. Matsukata: I think we need to look into the details.

Mr. Shibuya: See, all I'm doing is proposing a compromise so that we don't have pilikea here.

Mr. Matsukata: Okay.

Mr. Shibuya: Thank you, Mr. Chair.

Mr. Matsukata: Thank you very much.

Chair Holter: Any further questions?

Mr. James Shefte: Yes, I have a question. What is the average size of these lots? Are they 10,000 square foot lots or less?

Mr. Munekiyo: 7,500, minimum.

Mr. Randall Endo: Mr. Chair, I have a couple questions. Mr. Munekiyo, I wanted to ask you a few questions about the intent of this ordinance and then the history of its application. I think that would give the Board members some insight into this predicament.

I'm assuming, and please correct me if I'm wrong, but the primary reason for this ordinance is basically, the County doesn't want a neighbor to just add 20 feet of fill to his lot, and then build a 30-foot house, and then block the neighbor in back from having a view. So it's primarily, a view issue. And so the idea was that you take an established neighborhood and you don't want your neighbor to just do something like that: add a lot of fill above the – what I like to call the base grade rather than the natural because to me, it's just a base standard is really the issue. Is that sort of your understanding?

Mr. Munekiyo: That's my understanding. And in fact, under the previous interpretations that the County had with respect to building heights for projects like this in the project district or those projects which receive project district phase two approval or SMA approval again, for larger projects which kind of are self-contained, they actually, in the

past, did use the finished grade as the base for measuring height. However, back in the end of 2004, there was a policy decision that said, no, let's go back to using natural grade. So I think again, this kind of goes back to my comment that there's a recognition that in certain instances, use of finished grade under a larger master planning context would be appropriate. But I think at this point, it's just a matter of having the Council go through that process. And in fact, as I mentioned in the past, that was a practice.

Mr. Endo: So in this case, just to carry that thought forward, there wouldn't be any neighbors in the same neighborhood of this subdivision that would be complaining that, hey, somebody just jacked up their fill and made their house higher because it's all one subdivision that's being built all at the same time? Everybody would know before they bought, what they're buying by looking at plans and specs. So you wouldn't have that situation of creating dispute with your nearby neighbor.

Mr. Munekiyo: That's correct. And again, the variances that are being brought before you today are not of that nature. It's because certain grade conditions over there require that certain portions of the roofs be actually popped through that 30-foot plane. And again, the applicant has done whatever it could to mitigate that at this point.

Mr. Endo: Okay. Thank you.

Chair Holter: William?

Mr. William Kamai: This is a question for the department. Trisha, those pictures you took are of finished grades?

Ms. Kapua`ala: Yes.

Mr. Kamai: Question for Mr. Munekiyo: so these house plans, they vary in design? The houses?

Mr. Munekiyo: There are a number of models, I believe. Takeshi? Seven models.

Mr. Kamai: And any configuration of swapping models would result in the same circumstances?

Mr. Munekiyo: I think for the two-story models, the condition would be the same.

Mr. Shibuya: Mr. Munekiyo, is it possible for your group to consider lowering the ceiling height of nine feet each floor to eight feet? And the slope, reducing it by one foot, and thereby minimizing the variance that is actually portrayed? In fact, you would eliminate more than half of the variance items here, if you did that.

Mr. Matsukata: I have to make one correction on the previous answer. You mentioned about we can possibly save three feet by lowering the plate height to eight feet on two floors, plus grading it one foot lower.

Mr. Shibuya: Yes.

Mr. Matsukata: But if you eliminate a foot from the bottom floor, that automatically creates a one foot decrease in the grade itself from the street level. So that's two feet plus one is double counting a foot. So it's only going to be able to do one or another. If you're lowering it eight feet, and then lowering the pad for one foot, it's a two-foot decrease in the grade height.

Mr. Shibuya: Understand. But the slope there is not as severe because all you're talking about is two feet, and we're not talking about three feet.

Mr. Matsukata: Correct. I mean, it's not three feet all the way.

Mr. Shibuya: That is correct. It would be two feet, and the slope is not now 25%. It would be less than that.

Mr. Munekiyo: Mr. Chairman, I wonder if it would be appropriate if we could request like a five-minute recess just to kind of study some of the suggestions that Board Member Shibuya has raised?

Chair Holter: Yeah, five minutes.

Mr. Shibuya: Okay. Thank you.

(Chair Holter then asked during the five minutes, if there was anyone from the public who would like to speak on this matter.)

Chair Holter: Hi.

Ms. Antoinette Woolley: Hello. Hi. My name is Antoinette Woolley. And I just got back from Australia, so I'm sorry I didn't meet your deadline to get you my letter. But I am protesting because – on two respects.

Number one is, I'm a resident – current resident of Iliahi. And my unit is 14-B which is adjacent to 23 to 28 on the other side, horizontal to those units. Also, I am also a new purchaser of Lot 97 which is in Akolea. And I'm looking down at 65 and 66 which is going to impede on my view. So those are the two. And then also, if my apartment that I'm at Iliahi right now, if I look to the right, I'll be looking at all these tall houses that are there.

And I also want to let you know that the board of Iliahi, we're in transition right now because February, we're starting a new board, and there's a lot of members in our board at Iliahi that did not get all the notifications that some of them did get. And so, the protest within our subdivision is being brought to our association in February when we have – the first week in February when we have our association meeting with all of our members. That would be our first one since we just started our association. So–

And that's it. My neighbors all – my neighbors are here. And all the neighbors that are in our complex on the ends that are on the edge of Akolea are all against this.

Chair Holter: Mrs. Woolley, would you mind signing the address board for testimony?

Ms. Woolley: Okay. And then one more question is, you mentioned wasn't people notified of the height restrictions? When I purchased my lot in '97, I wasn't notified that these lots had height restrictions. We weren't told in the subdivision when we selected. So we didn't know about it. Okay?

Chair Holter: Excuse me, any questions?

Mr. Shibuya: Yes, ma'am. Testifying: I appreciate that. Can you look on that map there? Give us some idea where your townhouse is located.

Ms. Woolley: Where am I?

Chair Holter: That's the bottom.

Ms. Woolley: It's the bottom here? Right here? Our townhouses are here. Iliahi is here. Iliahi starts from right here down to the bottom here. Right there.

Mr. Shibuya: Okay, but you mentioned Lots 65 and 66 which is much higher.

Ms. Woolley: I'm buying this lot right here: 97. And these – on the slope when you go down, I'll see their roofs higher because I'm right here going down this way. It's on a curb. (Inaudible)

Mr. Shibuya: Okay. Thank you.

Mr. Kamai: I have a question. Your house on Lot 97, is that a two-story as well?

Ms. Woolley: No, it's a one-story.

Mr. Kamai: Regarding the height of 23, 24, 25, so that would impede your view corridor looking at Waikapu?

Ms. Woolley: Yeah, from Iliahi. I'm in both. I'm in Iliahi, yes.

Mr. Kamai: What would anybody say if – if you told anybody – if they told you your current condominium blocked their view corridor?

Ms. Woolley: I'd be upset too.

Mr. Kamai: Thank you. No more questions.

Ms. Woolley: Okay? Next.

Ms. Diane Chaves: Good afternoon. My name is Diane Chaves. And I also am a homeowner at Iliahi. My unit is 14-C. First of all, I've never testified at any hearing of this sort, and I'd like to apologize for my letter that Trisha so nicely copied for me. I'm in-between computers right now, so it's a pretty rough draft.

I am against the amendment for this variance that is being applied for by the applicant because living in Iliahi, when we purchased our units, we were charged specifically, according to location of the unit meaning that where your unit is located, depending upon what type of view you have, you're going to pay more. So I personally paid \$55,000 more than someone else who has the exact same plan, floor plan, as I do because of the location.

When we moved into Iliahi, the Akolea had not started the process of the grading. And I know the applicant did speak about cutting and filling, but I saw mostly filling and not much cutting until after the fill was put in. There was hundreds of loads of fill being brought to this property. And every day I looked out, and pretty soon there was a mountain in front of me that was not there before. So I think that they should have known in the beginning that they were going to exceed some of the County allowance height restrictions. But also, I'm kind of surprised that there's no one here from Maunaleo because they had graded a huge wall of dirt right behind Maunaleo Subdivision. And I personally would be a little leery of that because there's no stone wall that is built to protect – what do you call? Restraining?

Chair Holter: Retaining.

Ms. Chaves: Retaining, sorry, retaining wall. There's a mound of dirt right behind their house, a mound of dirt, and then there's no retaining wall.

Also, the applicant mentioned that by granting the variance, it would not alter the character of the existing neighborhoods such as Koa, Maunaleo, Ohia, but he did not mention Iliahi. It does, in fact, it does—I'm so nervous, I'm sorry—alter the character of these subdivisions because when you – from my view point looking up to Koa, you

could see the homes that in Koa. Now, since they did the grading, you can't even see the homes. So they built a mountain in front of Koa also. They built a mountain behind Maunaleo. So the people in Maunaleo who could look straight up to the West Maui Mountains, they can't see it. There's a wall of dirt.

Anyway, I'm against it. And I think, you know, if they researched so many years in this project, they should've known that they were going to go over the restricted heights. So that's all I have. Thank you for hearing me. Sorry about the letter.

Chair Holter: Any questions? Thank you. So you guys want to take a break? So we'll take a break here for a couple minutes.

(A recess was then taken at 2:48 p.m. and the meeting reconvened at 2:55 p.m.)

Chair Holter: The BVA is back in session. Is there any further public testimony? Okay, Mrs. Woolley, you had a couple of letters you wanted to give the staff about—? Oh, okay. Well, maybe you could follow up and give it to staff. All right. So we'll close the public hearing. Shall we read the staff's recommendation? Yes, Mr. Munekiyo?

Mr. Munekiyo: Thank you, Mr. Chair, Board members. During the break and the testimony portion of the proceedings this afternoon, we looked at what Board Member Shibuya had suggested. And based on the conditions and the, I guess, the variance range that we are looking at – maybe, Rochelle, if we could go to through that summary table which contains all of the ten lots? What we think we can do is through a combination of grade adjustments and building design adjustments, we can probably get – reduce the overall height requirement by two feet. Again, this is a combination of grade adjustments and building adjustments. And we kind of looked at it very generically, but by both, we probably can accomplish a reduction of two feet.

So what that does is basically, eliminates Lot 27 from consideration because that would be doable. We felt that Lot 28 at 2.2 feet and Lot 22 at 2.2 feet we could probably accommodate it because it is so close. So we could probably take out – or we would offer to take out Lot – I'm sorry, not Lot 10. Lot 10 was that unusual condition, but Lot 28 at 2.2 feet. And the rest of it then, what we would ask the Board for consideration then is for a variance on Lot 3, it would be 1.46. Lot 10, 1. – doable? Okay. Difficult, yeah? So 10, if we could just leave 10 because of that gully constraint there. But 3 would be 1.46, 10 would be 2.20, 23 would be .44, and so on down the line. And what result is Lot 27 and 28 would be taken out of the equation. But I think through the combination of what Board Member Shibuya had suggested, we could make those adjustments, and we would ask for the Board's favorable consideration.

Mr. Shefte: I have a question.

Chair Holter: Yes, Mr. Shefte?

Mr. Shefte: Yes, your presentation, I wasn't quite satisfied with what you said about – why not just go to one single story house? What's the big problem? To me, that would solve the problem.

Mr. Munekiyo: Can we go to Lot 23 as an example? Yeah, let's do 23. This is Lot 23. As I mentioned, we looked at – this property was actually – the original grade for this property was actually a flat lot coming back here and back down. That's what a house pad was. And for a single-family house then – a single story house, you run into a same condition because we're not considering now this lower level, but a single story only would still be exceeding that 30-foot plane just because of the fill and the relationship between fill height and the – or in this case, the fill height would be here, and the natural grade. It's always going to be measured from this location here. So we did look at that option, but it just didn't – it wasn't able to be worked with a single story house as well.

Mr. Shefte: But why couldn't you just move the house forward – no, towards the back of the lot which would then change the grade of the driveway going up to the road?

Mr. Munekiyo: How's that again? We would move the house back?

Mr. Shefte: This way which then would change the grade of the driveway going up to the access road? Would it not?

Mr. Munekiyo: If we were to move the house back and lower the grade? In other words, what you're suggesting is to bring this green line down, in this instance, by two feet, and move the house back?

Mr. Shefte: Yes. A single story house wouldn't work then?

Mr. Munekiyo: Oh, not–

Mr. Matsukata: (Inaudible) . . . because this base frame would change.

Mr. Shefte: Oh, I see what you see mean.

Mr. Matsukata: If you go further back, this will go lower. So it's going to be – essentially, a single story structure would further penetrate the plane . . . (inaudible) . . .

Mr. Shefte: Thank you.

Chair Holter: I'm sorry, James.

Mr. Shefte: I'm finished. Thank you.

Ms. Kapua`ala: So, Mr. Munekiyo, you are amending your request by reducing the height request by two feet, which essentially, takes Lots 27 and 28 out of the equation?

Mr. Munekiyo: Yes, and with the exception of Lot 10. Because of that gully condition there, that needs to be at 2.2 feet.

Ms. Kapua`ala: And Lot 10 will stay as is at 2.20 feet?

Mr. Munekiyo: Right.

Ms. Kapua`ala: Thank you.

Chair Holter: All right. So is there any discussion amongst the Board members?

Mr. Endo: I'd like to make a motion, if we're at that stage.

Chair Holter: Well, actually, we should probably read the staff report, first.

Ms. Kapua`ala: Based on its analysis, the Department of Planning finds that:

1. There is no exceptional, unique, or unusual physical or geographical condition existing on the property which is not generally prevalent in the neighborhood or surrounding area;
2. Strict compliance with the applicable provisions of this title would not prevent reasonable use of the subject property; and
3. The conditions creating the hardship were the result of previous actions by the Applicant.

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 staff recommends DENIAL of the subject variance.

In consideration of the foregoing, the department recommends that the Board of Variances and Appeals adopt the January 10, 2007, meeting, and authorize the Planning Director to transmit said Findings of Fact, Conclusions of Law, and Decision and Order on behalf of the Board of Variances and Appeals.

Chair Holter: All right. Is there any discussion amongst the Board? Warren?

Mr. Shibuya: Mr. Chair, this area here is a very gulch/gully area. It appears like it has been leveled off. So the appearance of a lot of fill, and that is probably what's happened here, a significant amount of fill has been provided. And so it appears as though all of the lots are built up. And so the problem comes in, in a perception of the public in terms of how can the developer create these homes without disturbing the view plane of other residents surrounding this area.

I'm actually considering various aspects here. If we do go for the variance with these changes as modified/amended by the developer as he proposed now, I'm considering the hold harmless insurance to possibly be a little larger because of the value of the homes, but that's my concern now. I would like to see a little bit more fill removed in many of these cases. The driveway slope can possibly be increased to accommodate a lower profile. The County did give the developer that warning that these are lots that should be built and could have some problems with single floor homes. But the developer is trying to maximize floor space and I can understand that too. It also allows the homeowner a better living condition in this situation and that's my dilemma at this point. Thank you, Mr. Chair.

Chair Holter: Any further discussion? All right. So, Randy, you said you had a motion?

Mr. Endo: Yeah, I'd like to move to approve the variance as proposed and amended by the applicant with the reductions as stated. And I'd like to add that they have the hold harmless provisions, the standard provisions and insurance as part of the standard conditions.

Chair Holter: Do I have a second?

Mr. Kamai: Second.

Chair Holter: Is there any further discussion amongst the Board regarding the motion?

Mr. Endo: I could explain why I'm supporting the variance, if you want.

Chair Holter: All right.

Mr. Endo: I think that with the addition of the reduction by two feet for all but one of the lots, you get to a very diminimus situation. I mean, if you look at the chart, you're talking about six inches. In some instances, up to maybe two feet. I really can't see it really being a meaningful view impairment to the extent that any – the neighbors in Iliahi are going to have a view impairment. They're going to have it either way by the – just having all of the homes there. There's always going to be a view impairment when you go from nothing to a home, obviously. So we're not talking about that. We're talking about what's the impairment just from us granting this variance. So when you talk about

being 500 yards away and looking at a difference between six inches or a foot, it's really – it doesn't make any difference. So especially with their offering to reduce it, I think that the – it's a satisfactory request for a variance.

And one thing I didn't make as part of my motion, but I think is something we should consider, perhaps we can ask Corp. Counsel, that to the extent that Mr. Shibuya wanted to increase the hold harmless insurance, maybe that would be okay, but I would think in that case, there should be a time limit. Because anybody who would want to file suit against them for view impairment would be limited to a certain statute of limitations anyway. So I would think that the hold harmless, if it's at an increased limit, should probably be for a set time period that matches that statute of limitation period so that the owners or the developers don't have to carry expanded coverage in perpetuity, if that's the kind of risk we're concerned about.

Chair Holter: Any further discussion? All right. It's been first and seconded. Counsel wants to look at this amendment.

Ms. Kapua`ala: Mr. Endo, so you're talking about a million dollars?

Mr. Endo: That's the standard provision, right?

Ms. Kapua`ala: Yes. I just wanted it to be stated into the record.

Mr. Endo: Yeah.

Mr. Shibuya: My concern is actually, Mr. Chair, on this hold harmless agreement and insurance is because many of the homes will inflate over a period of time. And so maybe rather than putting a large amount, let's say two million, we could perhaps give a percentage of the current value or the home value. That is the total amount coverage that we would have for these lots that have the variances. Would that be acceptable with the other Board members? Rather than stating a flat amount, come up with a value or a percentage of the total value of 100. – let's say 100.1 or 100.3% of the value of the home.

Chair Holter: Of which homes are you talking about, Warren?

Mr. Shibuya: Only the values of the homes that are in variances. All the lots that have variances, only those lots, not the entire subdivision. Because right now I think we're having a million-dollar with the variance to cover these homes, plus the entire subdivision, is it not?

Mr. Endo: Yes, I think so. The insurance applies to the variance, right?

Ms. Kapua`ala: The insurance applies to the variance. It applies to the entire parcel as a subdivision. It has not been granted, it would really be a civil matter as far as how the hold harmless – I mean, the insurance policy would apply to each of the lots.

Mr. Endo: Right, so, just for example maybe, some neighbor says, oh, the BVA did something wrong in granting the variance. So they sue the County because whatever, because of that, and they seek a million dollars of damages, then we would be indemnified by the developer for that, for all liability, plus they'll be carrying, of course. So we have full indemnity, but in addition, they – assuming they didn't have any assets, they at least would have a million dollars of insurance coverage also. So we have full indemnity, plus a million dollars of coverage for that potential lawsuit. So I'm not sure how – to me, it's a little complicated to try and peg it on the value of the homes over time. It's kind of complex. And I understand why you're trying to make it vary with the times and everything. It's a good idea, but I'm a little concerned that it's a little bit too difficult to implement from a practical standpoint.

Mr. Shibuya: Okay. Taking it from the entire subdivision view rather than looking at just the individual lots, we could add an inflation factor, too, that as inflation goes, so does this million-dollar liability increase too.

Mr. Endo: Yeah, that would definitely be easier to calculate.

Mr. Shibuya: To manage, right?

Mr. Endo: Yeah.

Mr. Shibuya: Because we could use like GDP, Gross National – GNP, as an inflation rate. And it would be based on a national gross, or you could use an island-wide growth rate, however the statistics would be, and that would be the growth rate for the liability too. And for as you're saying, perhaps maybe for a limited time, we could set let's say ten years, no more than ten years. Is that an adequate thing? How long will it take to build all these homes? That's another consideration too.

Mr. Endo: We could ask the applicant.

Chair Holter: I have a question regarding the testifier mentioning this fact of notice. She said that there was not sufficient notice to some of the neighborhoods. And I'm wondering if there's a way – if we were aware of this, or what is the issue of this notice to these other neighborhoods and boards of these other projects?

Ms. Kapua`ala: Well, the applicant notified all owners and lessees of record according to Real Property Tax Division of Finance Department. If they didn't receive notice, it's possible that they are not recorded by the Real Property Tax Division. I mean, if you

notice in the application, there's a quite large amount of people notified. As to those who did not get notification, I cannot explain why other than that what I've just stated.

Chair Holter: Do you think I could ask again? The testifier, can you come up to the mic, please? Now, you said that some of the other boards were not notified, or they're restructuring, but—

Ms. Woolley: The buildings behind our level, which we're in Building 14, but all the top floors, they weren't notified. And then Building 15 and 16 were not notified.

Chair Holter: This is—?

Ms. Woolley: Iliahi. Not everybody had the notice. And I just asked them that, and they said that they sent it as recording, but depending – we all moved in – starting from September to December, we moved in. So not everybody who moved in at the later part of the project got notice of what was going on. That's why our new board, we're having a meeting in February. And everybody's been complaining to the current president, but he's saying that he can only collect the protest until we have our first board meeting in February.

Chair Holter: Thank you very much. All right. So, okay, it's been first and seconded to move to adopt Randy's motion. Our counsel has said that we could have a minimum amount of one million dollars insurance. And this can be reduced, but apparently, it can also be increased. Is that true?

Mr. Giroux: Yes, it states minimum, so you can go higher.

Chair Holter: So on the matter of Warren's discussion regarding the breaking up of the insurance, it seems to me that the insurance is on the project. And that at this point in time when there are no lots created, it seems awfully difficult to break it up unless Randy would like to adjust his amendment – I mean, amend his motion with Warren's input, or would you like it to remain the same?

Mr. Endo: I'm completely if – I can make a motion to amend the condition or Warren can.

Mr. Shibuya: Go ahead.

Mr. Endo: Okay. I guess I can move to amend my own motion, right? Okay. I move to amend my motion by altering the insurance provision such that it will start off at a million dollars and increase every year for ten years at the rate of – the LIBOR rate, the London rate. And then after ten years, it'll expire, and the insurance provision would no longer be required.

Mr. Cerizo: Can you explain the rate?

Mr. Endo: The LIBOR rate is the London Interbank Rate. It's the standard rate used for mortgages. And we could say we'll use the one-year LIBOR rate as published by the *Wall Street Journal* as of the date when they first commence construction? Oh, I'm sorry. I'm sorry. We're talking about a fluctuating rate, right? So we should be checking it once a year.

Chair Holter: It would increase by a factor of – the LIBOR rate factor.

Mr. Endo: Whatever the rate is. I'm sorry, right. So it should be–

Mr. Shibuya: Adjusted by.

Mr. Endo: Adjusted every January 1st of the year. You check the rate, and that's the rate that you add to the million dollars. So it would be compounded every year at a fluctuating rate checked on January 1st. Even that's kind of complex, but it's better than checking all the home values for ten lots. So it's a published rate, the one-year rate. It'll be like 6% or whatever. So you check what is the rate on January 1st, you add that to the million dollars. Then year two comes, you check the rate again, and you use that rate to add to whatever the prior accumulated balance was. So if after the first year it was a million dollars, the second year might be 1.6 million. Then the year after that might be 6% more of the 1.6 million. Every year it would kind of grow over ten years to match the times. Is that too complex?

Chair Holter: It's pretty complex.

Mr. Cerizo: We have to put it in a form that's going to be on the condition of the approval.

Mr. Endo: Okay, maybe – well, nobody seconded it so I guess it fails for a second anyway. So I'm going to make a new motion.

Chair Holter: Mr. Munekiyo has a question.

Mr. Munekiyo: Yeah, thank you, Mr. Chair. If the Board is willing to consider this, the applicant is willing to increase the amount from a million to 1.5 million. And just to give the Board an idea, whatever rate of inflation that might be applicable, say 4%, then year one it would be 1,040,000. Year two would be – let me just get that number. Then 1.5 in year two and so forth. But from the get-go, we're willing to go up to 1.5 million dollars, if that makes it easier for everyone.

Mr. Endo: That sounds good. I amend my – no, I restate my motion to amend the main

motion such that the insurance provision is changed to 1.5 million for a total of ten years.

Mr. Kamai: Second.

Chair Holter: There's a second. James?

Mr. Shefte: I was going to second it.

Chair Holter: All right. So it's been first and seconded together with the amendments considering Warren's discussion. So in order for us to continue this, we need to go through one, two, and three regarding the motion, which would be page two. And that it does not meet the—

Mr. Endo: Don't we want to vote on the amendment first?

Chair Holter: Okay. Well then, we're going to do this. So we need to know why there is no exceptional, unique, or unusual physical. If there is, strict compliance and conditions creating the exception. All right. So those in favor of this motion, please say aye. That's four.

I'm concerned about the notice of the rest of the neighborhood. And the Board wishes to pass this variance, but I am very concerned that there seems to be some people left out. And as I do – I'm grateful that we have a reduction in the height. I do – I am voting in favor of the variance, but I think there's a problem, though, with this notice. So I'll vote to— Sorry?

Mr. Endo: Point of clarification, Mr. Chair? I thought we were voting on the amendment to the main motion first.

Chair Holter: I thought you incorporate that into your motion, but with a second, right?

Mr. Endo: I thought technically, you should vote on it, but whatever.

Chair Holter: Well otherwise, you could withdraw the first motion, and make the second motion using that amendment.

Mr. Endo: Yeah.

Chair Holter: Would that be better?

Mr. Endo: Okay. So it's just one motion as I withdraw and restate it as an amendment. So it's actually just one motion.

Chair Holter: Yeah.

Mr. Endo: Okay.

Chair Holter: All right. So shall we vote again? All those in favor?

Mr. Shibuya: Now, we're voting on the amendment?

Mr. Shefte: On the whole package.

Mr. Shibuya: On the whole package. Okay.

Chair Holter: Okay, so we have four for and the Chair which makes it a quorum. I'm voting to approve the variance though I'm concerned about noticing the neighbors, the other neighbors. I think they've been left out, but the compromise to reduce the height I think should be sufficient. And so the variance has been approved together with the amendments.

The vote was taken as follows:

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

VOTED: To approve the variance with the amendments as discussed.

(Assenting: R. Endo, W. Kamai, J. Shefte, W. Shibuya, and L. Holter.)

(Excused: K. Acks, H. Ajmani, S. Alapa, and U. Schulz.)

Chair Holter: Now, what we do need is we need the basis of the variance: one, two, and three.

Mr. Endo: Okay. So shall I do this in the form of a motion?

Chair Holter: No, just state how the variance needs to meet these three criteria.

Mr. Endo: Okay. I, for the record, the thought process behind my making the motion to grant the variance was that the three conditions for the variance have been met. That there were exceptional, unique, or unusual physical or geographical conditions existing on the property which are not general prevalent in the neighborhood or surrounding area, in particular, the nature of the grade and the topography of the land in relation to other flat areas. It does make it a unique geographical condition.

I believe that strict compliance with the – no, 2, I believe that strict compliance with the applicable provisions would prevent reasonable use of the subject property. Therefore, granting of the variance was called for.

And I do believe that the hardship in light of the intent, overall intent of the ordinance, as well as its prior application would've created a hardship. Therefore, Item – or Criteria 3 was met.

Chair Holter: **Therefore, the variance is approved.**

Now, we have another agenda item. It's regarding the MEDO – we can move on to the Director's Report.

Mr. Munekiyo: Mr. Chairman?

Chair Holter: Yes?

Mr. Munekiyo: Thank you very much.

Chair Holter: You're welcome. It's the MEDO, Director's Report. We have a special – so we're going to have an executive – can we just have an executive session here for about five minutes? We have a member that's going to leave in four minutes, so we need to go over this real fast.

E. DIRECTOR'S REPORT

(An executive session was then taken at 3:26 p.m. through 3:32 p.m. at which time the regular meeting reconvened.)

Chairman Holter announced that a vote was taken and approved during the executive session to request that Corporation Counsel assign an attorney to represent the Board in the Liloa Village Subdivision appeal case.

D. APPROVAL OF THE DECEMBER 14, 2006, MEETING MINUTES

It was moved by Mr. Shefte, seconded by Mr. Endo, then

VOTED: To approve the minutes of December 14, 2006 as presented.

**(Assenting: J. Shefte, R. Endo, W. Kamai, W. Shibuya, and
L. Holter.)**

(Excused: K. Acks, H. Ajmani, S. Alapa, and U. Schulz.)

F. NEXT MEETING DATE: January 25, 2007

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:34 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Lance Holter, Chairman
Warren Shibuya, Vice-Chairman
James Shefte
Randall Endo
William Kamai

Members Excused:

Kathleen Acks
Harjinder Ajmani
Uwe Schulz
Shirley Alapa

Others:

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