

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
DECEMBER 10, 2009**

(APPROVED: 1/28/2010)

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Randall Endo at approximately, 1:39 p.m., Thursday, December 10, 2009, 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.)

Chairman Randall Endo: This meeting of the Board of Variances and Appeals will now come to order. It is 1:39 p.m. on December 10, 2009. Let the record reflect we have a quorum present of six Members of the Board. Unless someone raises their hand with an urgent need to testify in advance, we'll take public testimony as to each agenda item just prior to the agenda item being called. Seeing no one in the public raising their hand, I'll ask the Planning Department to call the first item.

B. APPEALS

1. Determine a hearings officer to preside over the following matter:

SVO PACIFIC, INC. appealing the Director of the Department of Public Works' determination that in accordance with Maui County Code, §18.04.030, the Community Plan designation of Open Space is inconsistent with the County Zoning designation of H-M Hotel District, and therefore cannot be processed, for the proposed Westin Kaanapali Ocean Resort Villas (Building Permit Application Nos. B T2008/0972-0977) located off of Honoapiilani Highway, in the vicinity of Airport Beach, Hanakao, Kaanapali, Maui, Hawaii; TMK: (2) 4-4-014:005 (BVAA 20090004)

a. Appellee Director of Public Works, County of Maui's Motion for Appointment of Hearing Officer; Memorandum in Support of Motion; Exhibits A - C; Certificate of Service

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

Chairman Endo: Will the parties please come forward and state an appearance?

Mr. John Rapacz: Good afternoon. John Rapacz on behalf of SVO Pacific.

Chairman Endo: Good afternoon.

Ms. Mary Blaine Johnston: Deputy Corporation Counsel Mary Blaine Johnston representing Director Arakawa, Department of Public Works.

Chairman Endo: Good afternoon. I take it that we are now going to decide on the County's motion for appointment of a hearings officer, is that correct?

Ms. Johnston: Yes. Mr. Rapacz and I had a chance to talk and we are in agreement that a hearings officer should be appointed. And we have agreed to have the Board appoint E. John McConnell as the hearings officer, if the Board so chooses.

Chairman Endo: Okay, before we take action, I'll now elect to open it up for public testimony as to this agenda item only. Is there anyone who wishes to testify on this matter? Please step forward and write your name on the sign-up sheet. Seeing no one stepping forward, we'll now close public testimony as to this agenda item. And do you have a backup hearings officer in case Judge McConnell's not available?

Ms. Johnston: Yes, we've agreed our backup is Paul Horikawa.

Chairman Endo: Okay. And both of them are duly allowed hearings officers on our approved list of hearings officers?

Ms. Kapua`ala: Yes.

Chairman Endo: Okay. Any questions for the parties? No? Alright, the Chair would entertain a motion to approve the motion and allow for the appointment of Judge McConnell as hearings officer in this matter. And if he is unable for any reason to serve, then Paul Horikawa will be retained.

Ms. Johnston: Okay.

Mr. James Shefte: So moved.

Mr. Harjinder Ajmani: Second.

Chairman Endo: Okay, it's been moved and seconded to grant the motion as I just stated. Discussion?

There being no further discussion, the motion was put to a vote.

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

VOTED: To approve the motion and allow for the appointment of Judge E. John McConnell as hearings officer in this matter. And if he is unable for any reason to serve, then Paul Horikawa will be retained.

**(Assenting: J. Shefte, H. Ajmani, W. Kamai, R. Phillips, K. Tanaka)
(Excused: S. Duvauchelle, R. Shimabuku, S. Castro.)**

Chairman Endo: **The motion is carried, and the two hearings officers are appointed in the way we just stated.**

Ms. Johnston: Okay, there are three other issues that Mr. Rapacz has raised that are not part of my motion for the appointment of a hearings officer. And maybe why don't you outline what they are and then I respond to them. It's nothing really for a decision, I don't think, today by the Board, but he wants to put them on the record.

Mr. Rapacz: Thank you, Mr. Chair and Board Members. The first issue is a question of a possible conflict of interest for Corporation Counsel in the matter. We can see that it's gonna be a little – we think a little difficult for your regular Counsel to advise you or to take positions that are contrary to the position of the Director who will be advised by one of his colleagues. Or the positions that are contrary to a Corporation Counsel opinion signed by his boss which will have a direct impact on this matter as well. So we do see that there would be a conflict. And I'm not sure to whom I should make the request for the Board to seek independent counsel to advise it in this matter. And I guess the question being whether that is the – within the Board's authority to decide that they wish to have independent counsel, or whether it's a question for the hearing officer. I don't know. So I'm just raising that question now and asking for your direction on how to proceed with that.

Ms. Johnston: Yes, I'd like to speak to that issue.

Chairman Endo: Okay.

Ms. Johnston: It's the County's position there is no conflict of interest. And there's some authority, legal authority, to that position. That is an issue. If he wants to raise it, we believe that perhaps that could be an issue that would be presented to the hearings officer as part of the considerations before him. The problem won't arise at the level of the hearings officer because the Board won't be involved in that immediately. But subsequent to that, that issue might be appropriately addressed or addressed ahead of time. We agree to submit that to Judge McConnell.

Chairman Endo: I guess I have a procedural question. It seems like you were also asking us whether or not you should be making an independent request to some other Board, or if we should independently – we should decision whether or not to raise the issue and seek counsel – seek an answer to the question of the conflict.

Mr. Rapacz: Well, I'm just not sure who has the authority to say we need independent counsel. I don't know if that's up to the Board because the Board is the one that's being advised by counsel, and they might be the ones that recognize a potential conflict, or as Mr. Johnston had said, whether that's an issue for the hearing officer. I would probably want to treat it as a preliminary motion because at least in my experience, the hearing officer – hearing officers do occasionally consult with Corporation Counsel on procedural issues or questions. So there's a chance that a hearing officer may also need counsel from an outside counsel on the issues. So I'm happy to file a motion with the Board, or file it with the hearing officer, or whomever you think is appropriate.

Chairman Endo: Okay, let's get our advice from our Corporation Counsel, unless that's a conflict.

Mr. James Giroux: As far as the agency law, oftentimes government attorneys are put into this type of precarious situations, so we're used to it. What the law looks at is whether or not either the agency or the applicant feels that their– Either for the agency, as I'm your attorney, if you feel that I cannot independently or adequately give you unbiased legal advice, you do have the right to

request independent counsel. On the applicant's side, if they feel that my advice is so tainted that I can't give you independent advice, then they would raise the issue of whether or not they would have a fair tribunal. So that would be an appellate issue. And the appellate Judge would look at what my advice was to you, and to see if absent my advice, or with my advice that was so horribly tainted, did the applicant get an unfair shake at getting a decision. So they would actually look at the case on its merits and look at my legal advice, probably de novo, to see whether or not it actually did influence the decision. And that's a factual base. The courts would have to look at the case after it was done in order to make that determination. But as my client, if you feel that my advice – you know, I cannot give you independent advice, then you do have the right to raise that issue independently and request for independent counsel. You would probably have to either go to Corporation Counsel to raise that issue, or staff would probably have to go to Council to justify the need for an independent counsel. So I hope that clarifies the issue.

Chairman Endo: Okay, does either of the parties wish to speak to that or are you okay with it? In that case—

Mr. Rapacz: I'd just like to reiterate that we do believe there is a conflict of interest, or at least the potential for it sufficient to justify having outside counsel.

Chairman Endo: Okay. I think what we should do at this point, and this is subject to the Board's approval, I think we throw it out to the Board. If anyone wants to make a motion to that effect right now that we need independent counsel, we'll vote on it. If there is no motion, then we will take no action, and we will leave it up to the attorneys. They can file a formal motion at the appropriate time either with the hearings officer or also afterward. I think that's an appropriate way to proceed. Yes, Hari?

Mr. Ajmani: I don't have a motion, but I have sort of a general question. How is this case different from the other cases we have seen where this issue was never raised?

Chairman Endo: Are you asking Mr. Rapacz that or you want to just throw it out?

Mr. Ajmani: No, I'm just throwing it out. I don't know who can answer it.

Chairman Endo: I think that's a good question you raised because to a certain extent, there's always a certain amount of conflict of interest, or a potential for conflict of interest because the Department of Corporation Counsel serves multiple roles. But my guess would be that Mr. Rapacz feels that this is such a critical issue and important to the County, and therefore, he feels that it's important to go the extra step, but I won't put words in Mr. Rapacz's mouth.

Mr. Rapacz: Thank you. One factor that may be different here and I don't know about the other cases is that there is a Corporation Counsel opinion on record which has served as the basis for the decision that Public Works has made, and we're appealing that decision. So for your Deputy to – if he believed that the Corporation Counsel opinion wasn't correct, for example, or that it hadn't been applied correctly, he would essentially be telling his boss he was wrong, and that creates issues.

Mr. Ajmani: But I think, as I understand it somewhat is that almost all the cases that come before us are a case of some ruling by the County agency. And usually Corporate Counsel or somebody

comes in to justify those decisions on a legal basis before us. So isn't it always the case that Corporate Counsel is supporting County rulings? And Mr. Giroux works for Corporate Counsel so how is this situation different? I still don't get it. Am I making any sense?

Mr. Giroux: Do you want me to address that? I don't know. I mean, you're getting as independent as you get right now. I mean, I haven't seen the case or its pleadings. When I – on the most part when I advise the Board, this Board and Commission, 99% of it is usually on procedural matters. I look to matters of due process, procedure, fairness, Sunshine Law issues, those types of things. So a lot of times, I'm very – not that I'm uninterested, I'm disinterested in the outcome of what the litigation itself is. So my conduct is really an agency law type of support to you. So I can see where if there were cases where if I actually advised Public Works, if that was one of my assignments within the office, and I relied on that opinion to advise Public Works on this decision, and then I was sitting here, I would kind of have a vested interest on being right because that's my legal advice, even though it comes from my boss, but then I would – I could see where if that was the situation, I would probably raise the issue myself. I would say, you know, I'm not comfortable advising you guys because it really – it's like me advising a Commission that's reviewing my decision. I don't see it as being the case. I don't work that closely with Public Works in that capacity to really have any vested interest in that legal opinion which may be out there, and which my boss may or may not have made. It may be another Corporation Counsel from the past. I'm not sure. And that's why I'm telling you right now, I really don't have a vested interest in the decision because I'm not really sure what the litigant is talking about. And if my boss approached me and told me, hey, you need to have an outcome here in my favor, I would surely tell this tribunal that you need to get rid of me. I'm not effective. But that – you're depending on my integrity to do that. And I'm assuring you that I really want to – hopefully, over the last four years of representing agencies in this County, I hope people do understand that I do work on a very high level of integrity. I really respect the process and I respect the rights of the applicant to have a fair hearing. So like I said, the courts will have to look at the facts of the case. We don't have all the facts in front of us. At this juncture, we probably wouldn't be able to make a decision if there's a conflict or not. There wasn't – with the information I have at this point, I can't say that I have an opinion on whether or not there's a conflict. Just because there's a County attorney sitting here advising you and a County attorney on the other side litigating does not in and of itself create a conflict. It has to be looked at on its factual basis.

Mr. Ajmani: Thank you. I think the last four years of my being here, you have been very, very independent thinking on those times, so I don't have any concern about your integrity. I just was curious to see why this case is turning out to be so different from the others that the issue was raised.

Chairman Endo: Any further questions?

Ms. Johnston: May I make comment?

Chairman Endo: Sure.

Ms. Johnston: It seems to me that putting this issue in front of the hearings officer is neutral. A former Judge to give a recommendation to you guys that you can look at it at the time the matter comes back to you where you have to make a decision about the recommendation is a logical thing

to do. We get two for the price of one. We get a decision on the procedural issue and maybe a decision on the facts too. So that's what I suggest that we – and Mr. Rapacz is not opposed to that. I think in his remarks he said – you know, throw it out there and see what you think.

Chairman Endo: Thank you. Jim?

Mr. Shefte: I'd just like to say that I agree with Hari. In all the four or five years of experience that I've been here, I've never seen James try to influence any decision we ever made. He always gave I think just the best legal advice that he could. And therefore, I would like to move that we defer this matter to the hearings officer. Is that proper?

Chairman Endo: Okay, so rather than defer, I guess you're saying you're going to give an instruction to the hearings officer once they're retained that this is within their scope and you'd like them to address it as a motion before – a non-dispositive motion before the hearings officer.

Mr. Shefte: That's correct.

Chairman Endo: Okay. Is there a second?

Mr. Kevin Tanaka: Second.

Chairman Endo: Okay. Moved and seconded. This matter shall be initially addressed by the hearings officer. Discussion?

There being no further discussion, the motion was put to a vote.

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

VOTED: That this matter shall be initially addressed by the hearings officer.

(Assenting: J. Shefte, K. Tanaka, H. Ajmani, W. Kamai, R. Phillips.)

(Excused: S. Duvauchelle, R. Shimabuku, S. Castro.)

Chairman Endo: **Okay, the motion is passed.** Is that all clear, Mr. Rapacz?

Mr. Rapacz: Yes, thank you.

Chairman Endo: Okay. Was there another issue you wanted to raise?

Mr. Rapacz: Yes, another issue is the issue that was raised in Corporation Counsel's memo in support of this motion for a hearing officer, and that is the reference and attachment to a bill that's in front of the Committee of the Whole. And that bill, as the memo says, may or may not resolve this issue. And just statements for the record because there's no motion on the floor or before you, a statement for the record that Starwood believes that that bill is not relevant to this matter, to this proceeding. No one knows where it's gonna go, what it's gonna to say, if it's gonna pass, or when it's going to pass. And so it is more a matter of some collateral information that shouldn't bear on

this proceeding in any way. In other words, it shouldn't influence how this matter proceeds forward just because there is some legislation pending that deals with the issue.

Chairman Endo: So noting your position for the record. Okay.

Mr. Rapacz: Thank you. And then the last item is just an administrative one which Corporation Counsel wasn't aware of, and I wasn't until just recently as well. It's the matter of the application fee for appeals before this Board. In the County budget every year, there is a fee schedule for all kinds of hearings whether it's Planning Department, or BVA, or Planning Commission. And it breaks it down into matters that require a public hearing and matters that do not require a public hearing. Now, BVA variances clearly by code and by statute require a "public hearing." There's notice to the surrounding parties. There's three publications in the paper, etc. Appeals are different. They don't require a public hearing. The notice requirements are different, etc. But in the fee schedule, the appeals are treated just like a variance as though it requires a public hearing. I raise the issue because the difference in the fee is \$5,000 to file this appeal which is what Starwood had to pay because it's listed as a non – as a public hearing item. As you can see today, there's no public hearing. There's – it doesn't go through that same process. It's a non-public hearing item. The fee should be \$165. So I know that's something that probably no one's aware of. And I – as I said, I only just discovered. So that's an issue that we'll need to resolve. And once again, I'm here just to ask who should I seek resolution on with that issue. I don't know who to proceed with whether with staff or–

Chairman Endo: I guess an initial issue with that would be whether or not you can actually try and seek adjudication as to that issue as part of your appeal. It's not actually part of your appeal. It's just an administrative matter on the side. It would seem like you might also need a separate appeal as to that.

Mr. Rapacz: And that will cost \$5,000 to file that separate appeal. That's the problem.

Chairman Endo: Yeah. Well, maybe the Planning Department can–

Ms. Kapua`ala: Mr. Rapacz, you can write a letter to us. And you raise a good point and we'll look into it.

Mr. Rapacz: Okay.

Ms. Kapua`ala: We'll respond to you and act accordingly as far as the fees.

Mr. Rapacz: That's fine. Thank you.

Ms. Kapua`ala: Thank you.

Mr. Rapacz: Okay. Thank you.

Ms. Johnston: If I might add that he probably missed the appeal deadline on that – the issue of the fee . . . (inaudible) . . . As far as the objections, I actually have a copy of the proposed ordinance. I felt it was appropriate to just inform the Board what was going on. As I indicated in my motion

because we don't know what's going to happen, whether it'll ever pass, ever see the light of day that we're, you know, in favor of proceeding and getting a hearings officer appointed. So he may object to it, but I think it was appropriate. So that's all I have to say on that.

Chairman Endo: I guess for the record, if the ordinance is passed, and if the County believes that the matter is moot, then you can file a motion, and we can address that.

Ms. Johnston: I don't— In talking to Mr. Rapacz, we're not even sure if the ordinance passes, what the effect will be. So it's important to keep this process going. And if it seems like the ordinance passes and resolves it, then we will – this procedure, we can agree to just dismiss it.

Chairman Endo: Okay. Is there anything else on this matter? No? Okay, thank you. Okay, at this point, we're gonna call the next agenda item. At this time, I will be recusing myself, and turning the matter over to Member Tanaka.

C. UNFINISHED BUSINESS

- 1. MAUI LAND & PINEAPPLE COMPANY, INC. requesting a variance from Maui County Code, §18.04.030 to allow a proposed two (2) lot subdivision of a 2.461 acre lot that would not conform to or be consistent with the County general plan, community plans, land use ordinances and the provisions of the Maui County Code, as it relates to the community plan designation of public/quasi-public and multi-family residential, for the proposed Kapalua Bay Park Subdivision (Subdivision File No. 4.906) located at One Bay Club Drive, Lahaina, Maui; TMK: (2) 4-2-004:025 (BVAV 20090008) (Deferred from the November 12, 2009 meeting.)**

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

Mr. Tanaka: I guess as a deferred matter from our last meeting, what we'll do is we have some new information that was given to us this afternoon. But the first thing would be to open the item up for public testimony. Is anyone here that would like to testify on this matter? Please step forward and identify yourself. Seeing none, the Board needs to address – we have in front of us, a motion for reconsideration, as well as opposition to the motion for reconsideration. Okay. Okay. To the Board Members, being that it was placed in front of us this afternoon, we'd like to— Okay. Again, I apologize. Excuse me, but again, because this is placed in front of us afternoon, for myself, I'd like to recommend to the Board that we move forward with the item itself without – because the motion and opposition was not on the agenda itself for the Board to move forward without hearing this matter. Board Members, any input? Thoughts from the Board?

Mr. Shefte: So what you're proposing is that we do not hear the reconsideration for – to intervene, as well as the memo – the reconsideration issue?

Mr. Tanaka: Yes.

Mr. Ajmani: I have a question. I wasn't here at the last meeting when the intervention issue came

up. And I guess it was voted by the Board and denied on the basis that it wasn't timely and so on. So my question is for Corporate Counsel that looking at it today, how do you find it— procedurally correct or not, or what is your opinion?

Mr. Giroux: Motions to reconsider – well, the motion for reconsideration, there's two bodies of law that we have to look at. There's the contested case, and then there's also your *Robert's Rules of Order* because you're functioning as an agency. Under *Robert's Rules of Order*, usually a motion to reconsider a decision comes from the Body itself unless the rules, your own rules, allow specifically for a motion to reconsider. In this case, your rules of contested case state that motions can be made before, after, and during a contested case. However, your decision was not – well, your decision to not allow for intervention was a decision not to make somebody a party. So now since you're in a contested case and you are functioning under your adjudicatory function, then extraneous motions can be ignored because they're not part of the case. They are no longer – they are not a party. And therefore, the rules of the contested case are for the parties. So if you decide that you don't want to hear the motion to reconsider, then that's your prerogative. If, however, you've seen the correspondence and it raises an issue of wanting to revisit the issue, *Robert's Rules of Order* allows the Member who voted in favor for it to do a motion to reconsider. And the Body can either get a second and dispose of that, or just the motion could also fail. But once you get the motion to reconsider, all that does is open up the issue again to look at the merits of the purpose of a reconsideration, which is, are there new facts or circumstances that could not have been addressed at a prior meeting.

Mr. Tanaka: So, Hari, what we have in front of us, for the intervenor, there is no intervenor as far as the Board is concerned, so they are not a party to this case.

Mr. Ajmani: So this is not a contested case?

Mr. Giroux: It is a contested case. However, the issue is who is the party to it. I don't think this Board would want to be taking extraneous motions from the public on an issue that at this point is now becoming a private issue. You are now moving away from your public hearing and into your adjudicatory function.

Mr. Tanaka: Hari, does that answer your question?

Mr. Ajmani: Not fully. I don't quite understand, but – the difference between the two, but–

Mr. Giroux: Okay, I'm going to expound. Hari, don't worry about it. I'm just talking legal talk, because I have to be accurate. There's a lot of lawyers in your stadium here.

Any time a citizen's rights are being, I guess, oppressed on, or challenged, or they have to come before the government and they have the burden of presenting, you know, evidence and the law in order to get something basically to assert a right, a private right, they have certain expectations of the tribunal—that it be fair and such. What we have in this – in our rules is the ability for other members of the public to – because it may concern them also to come to the Board and say, can we have a say, can we participate as a party to those proceedings, because their rights may be affected by your decision also, So at that point in our rules, we usually go into what's looked at as a formal contested case, but even though an intervention isn't granted, it's still a contested case.

It's just not as formal as when other parties are admitted. In a contested case, parties have the right to present evidence and arguments. They have a right to cross examination and to have a fair hearing. So with that, even though we don't have a hearings officer, or we don't have other attorneys involved, it's still considered a contested case. It's just that who are we considering as parties.

So we had a hearing to determine who are we going to allow in and who are going to – you know, not allow to be a party. And the last decision was that somebody asked to be a party, and the decision was that you did not see that that it was – that they met the criteria to be a party. So now that you made the decision, that party is asking for reconsideration. However, they're not a party to the proceedings, and there's nothing in your rules that specifically say that you have to hear a motion to reconsider. The rules do specifically say that the party who's denied intervention has a right to appeal that decision to circuit court under an agency appeal under Chapter 91. So we're not denying anybody any rights that they didn't already have. It's just that they're asking for further consideration which the Body can except or deny consideration at this point. So the recommendation from the Chair was that you move on without considering that motion, if there was no objection.

Mr. Tanaka: Did that help, Hari?

Mr. Ajmani: Okay.

Mr. Tanaka: That helped me as well.

Mr. Ajmani: So I think the thing is that the intervenor can still be . . . (inaudible) . . . have testimony during the contested case proceeding, is that true?

Mr. Giroux: Not necessarily. Not necessarily. They're not a party. And it's not– A variance has a portion of it that there's public testimony, but they're not a party to the actual hearing itself.

Mr. Ajmani: In the previous deliberations of two weeks ago, or a month ago, whenever it was, one of the reasons to deny their intervention was that they did not have the standing of – they could not present to you who they belonged to or were the members. And they could not really judge what their interest in the matter was. So I knew that was part of the basis for denial of the appeal last time. So I was wondering if any new evidence has come, or has anything in this document, they have shown something, enlightened that a little more or–

Mr. Tanaka: From what I read in what was based in front of us, their reasoning was not – they were just citing law going back to our rules and procedures for this Board. But what I had said was that there is no intervenor regarding this case. Something from – asking for reconsideration from someone who is not recognized as a party to this that is the reason for my suggestion as far as moving forward without recognizing.

Mr. Ajmani: Okay. And then you are sure that this not going to somehow create a shadow on our decision we take later on?

Mr. Giroux: No, because you're not taking away the movant's right to appeal in the circuit court over

the original petition to intervene. That would be looked at de novo.

Mr. Ajmani: Okay, thank you.

Mr. Tanaka: Trisha, I guess for the Board as well as for Hari, if we can – can you give us an overview of what was presented to us just as a review?

Ms. Kapua`ala: You mean from the previous hearing?

Mr. Tanaka: Yes.

Ms. Kapua`ala: Maui Land and Pineapple submitted a variance request, and Mr. Collins submitted a motion to intervene. In response, Mr. Horikawa, on behalf of Maui Land and Pine submitted a motion in opposition. Am I correct in the title? And also, Jane Lovell, representing the Department of Public Works and possibly the Department of Planning made an appearance with no pleading before you saying that she was – was a request to defer any decision because she did not have enough time to consult with her client as far as what position her client was going to take. The Board denied Mr. Collins' motion for intervention. And the prevailing party, which is Mr. Horikawa, Maui Land and Pine, was to prepare a decision and order, which has not been agreed upon yet, as far as the facts are concerned, so not served. And Mr. Collins, as well as Mr. Horikawa submitted their motions after the agenda was mailed out to you, and that's why it's not on the agenda today as far as each pleading, specifically.

Mr. Tanaka: Thank you, Trisha. Okay, public testimony is still open. In fact, I see – we'll take your public testimony now. Come up to the mic. and identify yourself.

Mr. Paul Horikawa: Well– I'm Paul Horikawa. I thought we already closed the public testimony portion at about two o'clock this afternoon.

Mr. Tanaka: Well, specific to this item.

Mr. Horikawa: Well, I would also note that at the last meeting, the Board also closed the hearing on this agenda item. So I just – can we just make an objection . . . (inaudible) . . . Just proceed how you want, but I would just object.

Ms. Kapua`ala: That's right. I failed to mention the fact that after the intervention was denied that the Board proceeded to have the variance hearing. Yarrow Flower did present on the entire issue, and we could not – at the end of it – I'll look into the minutes as far as the – to confirm that the public hearing was closed, but the Board had a – yeah, that the Board in deliberation could not reach a quorum for a decision. It was deadlocked at four-one to approve the variance. It was deadlocked at four-one.

Mr. Tanaka: Okay, yeah, because it's the same agenda item, and we went through the process. We opened and closed public testimony at our last meeting. So it was mistakenly on my part, I opened public testimony again, which has already been opened and closed at the last meeting.

Mr. Dick Meyer: I believe the last meeting was not recessed. This is not – it's a new meeting and I believe public testimony is allowed.

Mr. Giroux: Technically, we're under the rules of Chapter 92. This is not a Sunshine Law issue at this point because we are in the middle of a contested case. We've opened public testimony. We've closed public testimony at the last hearing which is mandated by the Charter. Under Chapter 92, we are exempt. Once we start into the contested case, we are exempt from Chapter 91 rules because we are working as an adjudicatory Body. So at this point, we are in decision-making of something was presented. A motion was presented. We're disposing of that. And we actually need to proceed to the decision-making portion of the contested case. Sorry for the—

Mr. Meyer: May I ask a question? Are you saying that public testimony – at a new meeting, agended meeting, that public testimony cannot be given at an agended meeting on this item or on any item?

Mr. Giroux: We are in the middle of a contested case. If we had stopped and then proceeded again at the last meeting, we would not be allowing the public to testify in the middle of our decision-making and deliberation.

Mr. Meyer: Right, but since this is a new meeting, I'm just wanting to have you put this on the record that at a public meeting that's agended, I'm not allowed to give public testimony?

Mr. Giroux: Mr. Meyer, because this is a variance, this is an adjudicatory function, and that is why we're not allowing you to testify at this juncture, and we apologize for that.

Mr. Tanaka: Because this item was heard and we went through the process when we had public testimony. And we opened it and closed it. We moved past that point and we're at a point – you know, we went all the way through to a vote.

Mr. Meyer: Because I was under the belief that at a public hearing at an agended meeting, public testimony can give at every public hearing that's being held. And you're saying that I cannot.

Mr. Giroux: Not at this meeting. I'm sorry. This is – we are – like I explained before, I explained to the Members about the difference between a contested case and public hearing, and we are in the middle of a contested case variance.

Mr. Meyer: I object to the proceedings.

Mr. Giroux: So noted, Mr. Meyer.

Mr. Lance Collins: Mr. Chair, I'm sorry, earlier, you had indicated that you had opened public testimony, so I was not under the impression that this was just a continuation of the contested case. But since it is, I have submitted a motion before and because WMPA– I'm Lance Collins. I'm the attorney for WMPA. WMPA did file a petition to intervene. And although it was not admitted to a party, both under your rules and general legal principles, WMPA continues to have standing at least to ask this Board to reconsider. I disagree completely with your Corporation Counsel's advice that WMPA – that this Board has the power or the authority in denying a petition to intervene and then subsequently prohibit a petitioner from asking for reconsideration. It's not in your rules that a denied petitioner does not have the right to reconvene. The rules were followed. If you read *Robert's Rules of Order* for the motions to reconsider, it only applies to

members of a board, and it speaks nothing to your adjudicatory functions. So he is totally wrong. And I encourage you to seriously consider the motion for reconsideration. However, I was informed recently that your folks' consideration of the petition to intervene last month violated the Sunshine Law, and that's now being investigated, apparently. And so I don't know that I would encourage you to consider the motion for reconsideration at this meeting, but I know at the last meeting, the issue of the Sunshine Law issue was brought up and was not listened to. But I would encourage you to defer this matter so that the motion to reconsider could be heard at its proper format because I don't believe that it would benefit anybody to have to have a Judge send this back down to have to be re-decided. I think that would be a huge waste of everybody's time. So I'd encourage you in terms of efficiency to deal with these matters in the proper place, and to avoid having to come back and revisit all of this a second time. Thank you.

Ms. Nell Woods: Commission Members, my name is Nell Woods. And after your last meeting, I filed a complaint with the Office of Information Practices over your decision to close any further testimony from the public, and also your denial of the intervenor petition from WMPA. And I received a letter back from the Office of Information Practices which told me that they were opening the case and advising you to respond thereto. And I'd be very curious as to what response you plan on filing with them.

Mr. Tanaka: Trish, did – was anything submitted to the Planning Department?

Ms. Kapua`ala: We're not aware of any letter from OIP.

Ms. Woods: It was sent to the Board of Variances and Appeals. It wasn't sent to the Planning Department. A copy I received of the letter was addressed to the Board of Variances Commission.

Ms. Kapua`ala: The address for the Board of Variances and Appeals is the Department of Planning. So any BVA correspondence will be forwarded directly to the Zoning Administration and Enforcement Division, so Francis, Aaron, or myself.

Mr. Horikawa: I know I said you closed public testimony, but everybody's coming up. So just one comment on the action that the Board took today. You know, the petition to intervene was untimely filed. I think that's even admitted in the pleading that was filed with – by WMPA last week. And as you all know, the Sunshine Law requires that you give six days advance notice of any hearing. Well, WMPA, consistent with this position earlier, they failed to file, to timely file, the petition to intervene. It's not on your agenda. If you were to take action on that hearing as well as the opposition that I filed, it would be in a situation where you're violating the Sunshine Law again. And I think – I just wanted to put that as part of the record in the event that there is an appeal. I think the Board's decision today is fully supported and I think you made the right decision. I mean, my client believes you took that position. Thank you very much.

Mr. Giroux: I believe we need to proceed before we start infringing on the rights of the applicant at this point. So if we can dispose of the issue of the motion to reconsider by either motion or consensus of the Board, and then we can get back to discussion and voting on the merits of the case.

Mr. Tanaka: Okay, to the Board, this is where we're at, what we need to do, because the item was

presented, we went through the process, and we opened and closed public testimony, we got to the point of a vote. So this Board needs to get back to that point where we left off which was the vote, a discussion, and the vote itself, but what's standing in our way is this motion for reconsideration. So we would, as a Board, need to act and for the record, this motion, and then we can get back to where we left off which was discussion and a vote.

Mr. William Kamai: I'd like to make a motion to deny the motion for reconsideration.

Mr. Shefte: Second.

Mr. Tanaka: Okay, it's been so moved and seconded. So I'll call for a vote to dismiss this.

Mr. Ajmani: Can I have some questions? The person who says that there was a letter written to the Board of Variances and Appeals, do they have a copy of that letter, or the date of the letter when it was sent? I just want to make sure that we make a – vote on – based on the information, the correct information.

Mr. Tanaka: Well, but–

Mr. Ajmani: Is it relevant?

Mr. Tanaka: Because of the fact that whether or not it was in a timely fashion, whether it was received today, tomorrow, or a week ago, it is not before us, so we do not have that as information for this Board. That is just what was said to the Board. And because the Planning Department had not received it as of today, that's something that we wouldn't even consider at this time.

Mr. Francis Cerizo: Mr. Chair, we're not saying we haven't received it. We have – it may be – we have a lot of mail coming in and it may not have been processed. So it could be in the–

Mr. Tanaka: Yeah, true. Yeah, true. I mean, it could've been, yeah. Whether it was received today, yesterday or – as of right now, it has not been processed by the Planning Department. So that is something that this Board does not know exists. Hari, does that–?

Mr. Ajmani: No, I know technically, you are correct, but I'm just – my concern is that we might come to a wrong decision not knowing all the facts going farther. That's my main concern.

Mr. Tanaka: Well, that would be – as far as the agenda item itself, it is no new information regarding the agenda item. It has to do with our procedures that we have gone through and are attempting to finish off. I would foresee that there will be actions at a later date as far as procedurally, but not directly to the agenda item itself. Does that–?

Mr. Ajmani: Yeah, I know what you are saying, but I'm not comfortable with that. Again, it may be stemming from the fact that you heard the testimony last time that I was not part of. So I think I don't know how it affects the merits of the case or anything, but I just want to make sure that we do not do something that will cast a shadow on our decision.

Mr. Tanaka: I understand what you are saying. Although it's not any facts pertinent to the case

itself, it is facts relating to the procedure that we have gone through. And I would foresee that no matter what course of action we take or no matter which direction we move forward with, there will be repercussions. So with that, with a motion and second, I'll ask for a vote regarding the – that it has been moved and seconded that we dismiss the – deny the motion for reconsideration. With that, I'll ask for a vote from the Board Members. All in favor, please say aye. Any opposed?

Mr. Ajmani: I am abstained because I don't think I have the right – all the information.

Mr. Giroux: Hari, since you're not abstaining based on any apparent conflict, the rules will show your abstention as an affirmative vote.

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

VOTED: To deny the motion for reconsideration.

(Assenting: W. Kamai, J. Shefte, H. Ajmani, R. Phillips, K. Tanaka)

(Excused: S. Duvauchelle, R. Shimabuku, S. Castro.)

(Recused: R. Endo)

Mr. Tanaka: Okay, so we're back to where we're at, at the last meeting. Any further discussion? Hari, you weren't here so you're at a disadvantage. If there's anything–

Mr. Giroux: Hari, did you review the transcripts of last week's hearing?

Mr. Ajmani: Yes, I did.

Mr. Giroux: Okay, yeah, we can proceed then.

Mr. Tanaka: I'd like to ask the applicant if you can come forward and give us – give the Board an overview of the application.

Ms. Yarrow Flower: Good afternoon. My name is Yarrow Flower with Maui Land and Pineapple Company. If it pleases the Board, I could do an abbreviated presentation with a power point. Or if that's inappropriate, I can just give you a verbal recap of our request.

Mr. Tanaka: Well, for myself, I think a verbal as I see that we still have some of the exhibits that you had.

Ms. Flower: Okay. So the project is a subdivision of a 2.46-acre parcel. The parcel is located on the shoreline directly next to Kapalua Bay. It includes public parking, access to Kapalua Bay, showers and bathrooms, as well as a restaurant. All of those were constructed in the 1970s. With this subdivision, no additional construction or improvements are planned. The purpose of this subdivision is to separate the portions of the parcel that are used for public use from the commercial portion which contains the restaurant. There is also an agreement and declaration in place that preserves the parking, and amenities, and public access to Kapalua Bay.

And Maui Land and Pineapple Company is requesting a variance from MCC Chapter 18.040.030 specifically in regard to an inconsistency between the community plan and Maui County zoning. It's clear that providing access to Kapalua Bay has been the common goal of Maui Land and Pineapple and the County since 1974 and probably before that. The existing improvements, as I said, were constructed in 1976 and 1977 which is prior to the adoption of the community plan in 1983 and 1996. And while the community plan shows the intent to provide the public access to Kapalua Beach, the public/quasi-public corridor was inadvertently drawn directly through the existing restaurant, and terminates on a rocky shore instead of following the access that was existing and is still existing today. And because of that, Maui Land and Pine is unable to subdivide this land. That's it in a nutshell. Do you have any questions?

Mr. Tanaka: Yeah, thanks. Do you have any questions for the applicant? Hari, do you have any?

Mr. Ajmani: Where is the restaurant in this drawing?

Mr. Tanaka: Yeah, that shaded square.

Mr. Ajmani: This is the restaurant?

Mr. Shefte: Yeah.

Mr. Ajmani: And the beach house and the public access is—? Is this the bathroom area? I cannot tell.

Ms. Flower: I can pull the subdivision map up on the computer.

Mr. Tanaka: Yeah.

Ms. Flower: Thank you. Okay, so this is our proposed subdivision. This is the entire parcel. As I stated, it is approximately, 2.46 acres. Anyway, the lot on the right which is Lot A-1-A-2, is the lot that contains all of the public access. There's approximately, 30 parking stalls. The restroom is located here. That's the restaurant. This is the parking area. Restrooms, my apologies, that's the restrooms, and this is a concrete path to Kapalua Bay. As I said, there is an agreement that preserves this public access. The remaining parcel is this one. And this outline is the existing location of the restaurant.

Mr. Ajmani: Is that a landlocked parcel now or will become a landlocked parcel?

Ms. Flower: No, it's not landlocked. It has access off of Lower Honoapiilani Road which is right here.

Mr. Ajmani: Where is the road?

Ms. Flower: This is the Lower Road here and then this is the ocean.

Mr. Ajmani: And it will have access to the public—?

Ms. Flower: Absolutely.

Mr. Ajmani: Public – well, not – to the parking lot. It doesn't have street access, direct street access.

Ms. Flower: The parking lot is located directly off of the road.

Ms. Woods: But there's a second parking lot, which is the restaurant parking lot.

Mr. Ajmani: Okay, so – but the access to the restaurant will be to the public parking area?

Ms. Flower: No, the access to the restaurant is through this driveway right here. The restaurant access is separate.

Unidentified Member of the Audience: And there's a tunnel that runs . . . (inaudible) . . .

Mr. Ajmani: There is a tunnel? It doesn't cross the parcel then? Does it cross this parcel?

Ms. Flower: The access to the restaurant follows right through here. This is an underpass so that pedestrians walk underneath the overpass where the cars can drive to the restaurant.

Mr. Ajmani: Oh, I see. Okay. Thank you.

Mr. Tanaka: Any other questions by the Board? Hari, did that answer your questions?

Mr. Ajmani: Yeah, I mean, now I understand how it can be broken up.

Mr. Tanaka: Okay. Just as discussion anyway, it is my understanding, and please correct me if I'm wrong on any part of this is that the proposed – subdividing the parcel into two lots separating the public parking and access to the beach and the restaurant, the site of the restaurant. Now, it has been recorded that that parking lot and beach access shall remain – was it forever? Well–

Ms. Yarrow: Forever is a very long time. The declaration that protects the public access is in perpetuity. It goes with the land regardless of who owns it. The only way to alter or remove that declaration is by action by the County Council.

Mr. Tanaka: And being that the restaurant site – the restaurant building itself is actually – has three separate land designations according to the map anyway, now with the granting of this variance, that restaurant cannot expand, cannot turn into a single family residence, it cannot do anything other than remain the same. So the variance is just separating the restaurant lot and public access.

Ms. Yarrow: Correct. We're requesting a variance only to complete the subdivision. There's no other construction or development plans associated with it.

Mr. Tanaka: And if you can remind this Board, what was–? The other issue was maintenance of the lot. That was going to be turned over?

Ms. Yarrow: The public parking and general public access is currently maintained by the resort association and would continue to be maintained by the resort association.

Mr. Tanaka: Okay. Continuing my – just discussion-wise that the lot shall remain, parking shall remain, maintenance shall remain, and there are no other uses that the restaurant – the restaurant cannot change into anything else. That is why in my opinion and what I had voted for in the past meeting was that I would see no problem with the granting of this variance. Any questions or discussion from the Board?

Mr. Shefte: I have one question. At the last meeting, I was the lone censor. And I keep – I mulled this over in my mind from time to time over the last month or so, and I keep coming back to the same question, which I cannot satisfy or justify in my mind: why bother? For what reason? As our Chairman just stated, there's no use other than the current use for the parking lot, for the restaurant, so why go through all this? What for? What's the reason for trying – what's the motivation to clear this up? Why not just leave it alone because you're not going to do anything with it anyway? So what's the difference?

Ms. Flower: Well, as we discussed, it's very common for subdivisions to be done to separate land uses. In this situation, we have a very public land use which is beach access, and then we have a private commercial use which is a restaurant that we currently lease out to Merriman's. So I don't think that it is extraordinary as a landowner to want to separate those uses. We did discuss at the last meeting that it is Maui Land and Pine's intention to transfer the public access officially by deed to the Kapalua Resort Association. That is our intention. However, I did want to state that the land is owned by Maui Land and Pine, and future transfers of the deed are not relevant to this variance request or the zoning because the zoning goes with the land, but I'm perfectly happy to share our intentions with you, regardless.

Mr. Tanaka: Again, discussion, even if – well, the way I see it is even if the day after this lot were to be subdivided into two, and if Maui Land and Pine sold it the next day, the use could not change. There is nothing – The new owner would have to go through the full process as well. So even if Maui Land and Pine sold that other parcel tomorrow, the beach access would remain and that restaurant can only be a restaurant. It can never be expanded or its use can never be changed because of this overlapping land designation.

Ms. Flower: I believe that any re-purposing or redevelopment of that lot would require a change in zoning.

Mr. Tanaka: So that was discussion, my opinion, anyway. So that's the reason why I'm not worried about if Maui Land and Pine sells it tomorrow, what can happen, how it will affect any others because even if they did sell it tomorrow, the new owner couldn't do anything with it without going through the full process, anyway. My main concern was that the public parking and beach access shall remain. Any other questions or discussion by the Board?

Mr. Ajmani: I have three questions. One is that – and this came up in the last meeting also that on this subdivided public parcel will be devoted to Kapalua Association . . . (inaudible) . . . and so on, and . . . (inaudible) . . . maintaining of this?

Ms. Flower: It's currently maintained by the Kapalua Resort Association.

Mr. Ajmani: Why are they doing it when it doesn't belong to them?

Ms. Flower: Well, although it does not belong to them by title, it has been annexed into their CC&Rs as a land that is a common area for the resort for Kapalua.

Mr. Ajmani: Are they obligated to maintain it or—?

Ms. Flower: They are obligated to maintain it.

Mr. Ajmani: So you have some kind of an agreement with them?

Ms. Flower: We do.

Mr. Ajmani: That agreement will stay enforced? Do you know what the agreement is? Was there any discussion on that?

Mr. Tanaka: Well, I think it was brought up that it is in their best interest to do the maintenance on it because it's an asset to their association, as well as—

Mr. Ajmani: All the public access that I have seen on the island, they have not been very well maintained by people who said they will maintain it. And so I have — this is a very — I have used the Kapalua Bay Beach before and so on and it's a very large area. And it's a big expense to maintain it, I'm sure. And I'm not sure that I'm going to take Maui Land Pine's word for it that it will be maintained by any association.

Mr. Tanaka: Do you have a written agreement with the—?

Ms. Flower: If I may? By deeding this land to the Kapalua Resort Association, you won't have to take Maui Land and Pine's word for it because the Kapalua Resort Association will own it and be responsible for it. They have the money to maintain all the common areas in the resort. It comes from the residents in the area, as well as the commercial operations in the area. And it is an association that's been in service for over 30 years, and will be here regardless of whether Maui Land and Pine owns that lot or not.

Mr. Ajmani: Well, I'm not quite sure about that, but anyway, that's one of my concerns. The second was that the bridge that you're showing going over this public lands to get to the restaurant—

Ms. Flower: There's an easement.

Mr. Ajmani: That's an easement. And it will be granted to the restaurant parcel or is it part of the—

Ms. Flower: The easement goes with that parcel, yes.

Mr. Ajmani: Okay, right now, they all are sort of joined parcels. There is no easement granted right now, is there?

Ms. Flower: There is an easement granted right now.

Mr. Ajmani: An easement granted now.

Ms. Flower: Yes, now. We had to do that in 2001 when we did the declaration that preserved the public access.

Mr. Ajmani: And third, what will be the new zoning of this restaurant parcel?

Ms. Flower: There will not be any change in zoning.

Mr. Ajmani: Which is what?

Ms. Flower: There is no change.

Mr. Ajmani: What is the current zoning of that parcel?

Ms. Flower: It's that what you have in front of you that lists all of the separate zonings that are on that parcel. The top one I believe is the community plan zoning.

Mr. Tanaka: The bottom one. In theory, it's actually open space and—

Mr. Ajmani: This red is open space and the green—

Mr. Tanaka: Green is open space.

Mr. Ajmani: Green is open space. And this is the— Red is what?

Mr. Tanaka: Resort.

Mr. Ajmani: Red is the resort. So the restaurant building right now straddles the two zones? Right now it straddles two zones?

(Mr. Endo then left the meeting at 2:58 p.m.)

Mr. Tanaka: Yes. And then the community plan actually straddles three zones.

Mr. Ajmani: Does anybody know how it got built like that?

Mr. Tanaka: Well, we're looking at archival maps and making broad strokes. That was probably the reason that this kind of thing happened.

Mr. Ajmani: Okay, thank you.

Mr. Tanaka: Board Members, any other questions? Any discussion? Then I guess I'd ask the Board for a motion.

Mr. Kamai: I'd like to make a motion to approve this variance request and agree with the applicant's response in the application.

Mr. Tanaka: It has been moved. Do I have a second? It has been moved and second. So with that, I'll call for a vote from the Board. All those in favor of granting the variance request, please say aye. Sorry. Trisha, go ahead.

Ms. Kapua`ala: Thank you, Mr. Chair. We'd like to bring up two points. First of all, the staff report before you prepared by the Department of Public Works provided no comments for any of the analysis that the applicant provided. James, I'd like to know if we – if the Board was to approve this variance, do we simply adopt every fact stated by the applicant as justification for the granting of the variance?

Mr. Giroux: That should probably be clarified during discussion of whether or not they agree with the facts as stated by the applicant.

Ms. Kapua`ala: Which facts justify the five criteria. And also, if the Board does approve this variance, we'd like to recommend that the Board adopt a hold harmless agreement with the insurance policy indemnifying the County. Thank you.

Mr. Tanaka: Okay, let me – let me take two steps back before the actual vote. It has been moved and seconded to approve this request for a variance. As a part of it, I guess I'll ask Bill as part of your motion, if you can clarify, and if you would like to add that—our indemnification of the County.

Mr. Kamai: Yes, Mr. Chair, I'd like to add that indemnification clause, first, and our hold harmless agreement with the County. And secondly, regarding the analysis portion of this variance that there are special geographical and physical circumstances regarding this parcel. That the . . . (inaudible) . . . of the community plan map and the general plan map, I think it's going to be a situation that comes before this Board in the future. Regarding the preservation and enjoyment of this property, along those same lines in response to what I said earlier about the special circumstances. Regarding special circumstances or conditions affecting the property are not a result of the previous action, I think after the code was approved that Corp. Counsel took a closer look and started going through the maps and the different applications regarding this particular process. In regards to granting or a variance shall not be detrimental to the public's health, I don't see it being detrimental. That there is a public right-of-way that's been in use for several years now. Regarding said property has obtained appropriate zoning, that's what this whole process is about being here today is to – for us to waive the plan and change in zoning, and allow them the best use of their property.

Mr. Tanaka: So if you'd like to make another motion?

Mr. Kamai: And that be included in my original motion.

Mr. Tanaka: And if I can get a—?

Ms. Phillips: Yes.

Mr. Tanaka: And seconded. Okay. With that said, now we can vote. Once again, it has been moved and seconded for the granting of the variance with the conditions as stated by Bill. So I'll ask for a vote from the Board.

There being no further discussion, the motion was put to a vote.

It was moved by Mr. Kamai, seconded by Ms. Phillips, then

VOTED: To grant the variance with the conditions as stated by Member William Kamai.

(Assenting: W. Kamai, R. Phillips, K. Tanaka)

(Dissenting: J. Shefte, H. Ajmani)

(Excused: S. Duvauchelle, R. Shimabuku, S. Castro)

(Recused: R. Endo)

Mr. Tanaka: **We have a three-to-two vote.** So no action shall be taken by the Board at this time. The item is deferred. Would there be any other motion?

Mr. Ajmani: Yeah, I would like to make a motion to deny the variance.

Mr. Tanaka: State – stating your–

Mr. Ajmani: Again, it's not clear to me why they are doing what they're doing. And I'm not totally satisfied with their explanation that the public area will be maintained properly. And that the conditions for the – the condition that we are imposing on the oceanfront lot are strong enough to retain the uses that they have or to keep it the way they have.

Mr. Shefte: I would second the motion in the interest of moving it along to whatever the next process that it has to encounter.

Mr. Tanaka: Okay. And, James, what is our next step in the process?

Mr. Giroux: Discussion on the motion.

Mr. Tanaka: Discussion by the Board on the second motion to deny. Trisha, I'm sorry.

Ms. Kapua`ala: Thank you, Mr. Chair, I'd just like to raise the issue that pursuant to your rules, the Board shall render a decision on the variance within 60 days of the close of the public hearing. And that calculates to making a decision today for us to be able to issue a final decision and order by January 11, 2010. If no decision is made by today, the variance shall otherwise be deemed granted.

Mr. Tanaka: Alrighty. Here we go. It has been moved and seconded to deny this variance by what was stated by Board Member. Any other discussion by the Board? Okay now, apparently, this is it. There is no more deferral. Well, I'm sorry. Let's take a vote on the second motion.

There being no further discussion, the motion was put to a vote.

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

VOTED: To deny the variance application.

(Assenting: H. Ajmani, J. Shefte)

(Dissenting: W. Kamai, R. Phillips)

(Excused: S. Duvauchelle, R. Shimabuku, S. Castro)

(Recused: R. Endo)

Mr. Tanaka: **Well, without the Chair's vote, it is two-to-two.** So typically, it would be a deferral, but as we've been notified by the County that this Board needs to have taken action by this date. And as there is no action by this Board, by default, the variance request is – will be granted.

Mr. Giroux: Well, I don't think you guys have to make that ruling. I think the – either action, or no action, and possibly deferral, and Corp. Counsel will have to talk to the Department to see how they want to proceed.

Mr. Tanaka: Okay, so it is now in the hand's of Corp. Counsel and Planning Department. Okay. So there is no action taken by the Board on this agenda item. We shall move forward.

(Mr. Kamai then left the meeting at 3:07 p.m.)

D. APPROVAL OF THE NOVEMBER 25, 2009 MEETING MINUTES

Mr. Tanaka: The next item on our agenda would be the approval of the meeting minutes for November 25th. Have we all reviewed the meeting minutes? We don't have a quorum anymore, but we don't need one for the rest of the– Bill had to leave. We have lost our quorum. And so the meeting officially, is adjourned.

E. ADJOURNMENT

Being that there was no quorum, the meeting adjourned at 3:07 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Board of Variances and Appeals
Minutes - December 10, 2009
Page 24

Randall Endo, Chairman (1:39 p.m. - 2:58 p.m.)
Kevin Tanaka, Vice-Chairman
William Kamai
Rachel Ball Phillips
James Shefte
Harjinder Ajmani

Members Excused:

Sandra Duvauchelle
Stephen Castro, Sr.
Ray Shimabuku

Others:

Aaron Shinmoto, Planning Program Administrator, Planning Department
Francis Cerizo, Staff Planner, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel
Lesli Otani, Civil Engineer, Department of Public Works, Development Services Administration