BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
FEBRUARY 11, 2010

(APPROVED: 2/25/2010)

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, 1:42 p.m., Thursday, February 11, 2010, 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: Okay, good afternoon. The meeting of the Board of Variances and Appeals will now come to order. Let the record reflect it's 1:42 p.m. on February 11, 2010, and that there is a quorum of six Members currently present for the Board.

B. RESOLUTION ACKNOWLEDGING THE RESIGNATION OF BOARD MEMBER SANDRA DUVAUCHELLE

Chairman Endo: At this time, I'd like to take up a quick first item, Item B on the agenda, a resolution acknowledging the resignation of Board Member Sandra Duvauchelle. Is Sandra here? No? But I'll read the resolution into the record:

> Resolution of the Maui Board of Variances and Appeals
>
> Whereas, The Maui County Board of Variances and Appeals was established in 1983; and
>
> Whereas, Sandra Duvauchelle has served the County of Maui since April 2008 as a member of the Maui County Board of Variances and Appeals; and
>
> Whereas, Ms. Duvauchelle has served with dedication, performed her duties in the highest professional manner, and provided valuable guidance in serving the needs of the people of Maui County; and
>
> Whereas, Ms. Duvauchelle resigned from office on January 4, 2010; now, therefore,
>
> Be it resolved, by the Maui County Board of Variances and Appeals that it does hereby express its deepest gratitude and appreciation to Ms. Duvauchelle for her service during the past two years; and does hereby extend its best wishes in her future endeavors; and
>
> Be it further resolved that copies of this resolution be transmitted to the Honorable Charmaine Tavares, Mayor of the County of Maui, and the Honorable Danny A. Mateo, Chairman of the Maui County Council.

Signed by the Board of Variances' Members. Okay, so moving on.

C. APPEALS

1. **JAMES W. GEIGER, ESQ., of MANCINI, WELCH & GEIGER representing UWE H. H. SCHULZ appealing the Department of Fire and Public Safety's decision to require an automatic sprinkler system for an existing lanai enclosure (Building permit application no. B T20080351) at the Kaanapali Royal Condominium located at 2560 Kekaa Drive, Kaanapali, Lahaina, Maui, Hawaii; TMK: (2) 4-4-008:023-0059 (BVAA 20080009)**

   a. **Hearing Officer's Report**
   b. **Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Order in Consolidated Appeals**
   c. **Appellee County of Maui's Exceptions to and Memorandum in Support of Exceptions to the Hearing Officer's Report; Exhibits A-G**
   d. **Appellee County of Maui's Exceptions to Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Order; Exhibits 1 & 2**
   e. **Appellant Uwe H. H. Schulz's Brief In Support of Hearing Officer's Report and Recommended Findings of Fact, Conclusions of Law and Order in Consolidated Appeals**
   f. **Appellee County of Maui's Motion Requesting the Board to Reopen Case to Take Further Evidence and to Hear Oral Argument by the Parties; Exhibit A. *(Deferred from the January 29, 2010 meeting.)***
   g. **Appellant Uwe H. H. Schulz's Memorandum in Opposition to Appellee County of Maui's Motion Requesting Board to Reopen Case, to Take Further Evidence and to Hear Oral Argument by the Parties. *(Deferred from the January 29, 2010 meeting.)***
   h. **Intervenors' Memorandum in Opposition to Appellee County of Maui's Motion Requesting Board to Reopen Case to Take Further Evidence and to Hear Oral Arguments by the Parties. *(Deferred from the January 29, 2010 meeting.)***

Ms. Trisha Kapua`ala read Item C-1 into the record.

Ms. Kapua`ala: We have here, Board, your appointed Hearing Officer Judge McConnell is here. Representing the appellant is Mr. James Geiger, and here representing the County is Mary Blaine Johnston.

Chairman Endo: Good afternoon, everyone. At this point, I'd like to outline a procedure, and if the parties can say whether or not they're agreeable or object to any part of it. I'd like to begin with hearing from the Hearing Officer, if he would like to make any initial remarks with regard to his report and proposed findings. After that, we'll jump into oral argument on the appeal itself allowing Mr. Geiger to go first as the appellant followed by the County. And then the appellant can also reserve some time from his allotment to finish up for rebuttal. We're thinking about 20 minutes. Is that sufficient? Okay. Okay. And then, I think in this informal matter, we'd like to let you try and give most of your presentation as best you can, and then after that, we'll throw it open to the Board

to ask questions. Is that okay? Or would the Board rather interrupt them during their speeches?

Mr. Joe Huster: . . . (inaudible) . . .

Chairman Endo: Oh, sorry, I forgot the intervenor. Are you essentially then–? You folks are all aligned, so I believe you folks would have to share your time. We're checking on the rules right now.

Mr. James Geiger: If it makes it any easier, I have no problem sharing the time. Again, we'll try to beat 20 minutes. If we're a little bit longer, I apologize, but I think we'll try to keep it short.

Chairman Endo: Okay.

Ms. Mary Blaine Johnston: Mr. Chair?

Chairman Endo: Yes?

Ms. Johnston: With the motion that was made as to the Board . . . (inaudible) . . . taking further evidence and allow further testimony, it would seem that what's happening here is gonna be further testimony. And then I think that the oral argument should be limited to the attorneys, and then the Board can decide if they want to take further testimony.

Mr. Geiger: I don't believe anyone other than the attorneys are going to argue. Mr. Huster is an attorney representing the intervenor.

Chairman Endo: Yeah, I thought what we would do would be to, sort of informal, but just allow you to argue your motion at the same time. It's all wrapped up in your oral argument discussion.

Ms. Johnston: And at that time, after that, you'll determine whether the Board wants to take further testimony or ask questions of any of the witnesses?

Chairman Endo: Right. If any of the Board Members wants to reopen, then I'll ask them to make a motion, and then we'll decide right then and there. If nobody jumps up to make a motion to reopen the evidence, then we'll just proceed to make a dispositive motion on the whole case.

Ms. Johnston: And just I'd like to note for the record that present at the hearing today are the Supervising Plans Supervisor, Department of Public Works, Jarvis Chun; and Scott English, Fire Plans Examiner from the Department of Fire and Public Safety who are representing those two Departments who are the appellees. And they both did testify at the time so if the Board desires further testimony or has questions they wish
to ask, then they'll be able to do that.

Chairman Endo: Okay, I think just as a procedural matter, the Chair's understanding is that if a motion is made, and is passed by the Board to reopen, to take further evidence, we would have to do it at another meeting and not do it today. Let me ask Corporation Counsel.

Mr. James Giroux: That's accurate.

Chairman Endo: Okay. I think that's a notice issue.

Mr. Giroux: Yeah. That would be a Chapter 91 notice issue.

Chairman Endo: Okay. Okay. So we will ask Trisha to keep time, and you can ask her where you are, in general.

Mr. Geiger: Okay. I think the Hearing Officer goes first.

Judge John McConnell: Mr. Chairman, I'd be glad to let them go forward. I don't really have anything beyond what was in my report at this time although I'm gonna listen to this argument carefully. And it would be more helpful if I could respond after they're over and if the Board has questions.

Chairman Endo: Yeah, I assume at least when we deliberate, you'll still be here and we can ask you questions.

Judge McConnell: Yes, certainly.

Chairman Endo: Thank you.

Mr. Geiger: Mr. Chair, Members of the Commission, good afternoon. My name is Jim Geiger. I was introduced earlier, but I am representing Uwe Schulz. Uwe is the appellant here and I think some of you know him because he sat on the Board before, but Uwe is sitting at the table to my left, your right.

I've prepared a presentation here, and I'm gonna try to do it at the board probably as opposed to here, so if you can't hear me, please raise your hand. But I thought it might be helpful if we kind of went through what has gone on, why we're here, and what the issue really is. And they're probably going to yell me. Can you hear me? Can you hear me? Okay.

We're here because there was a denial of an after-the-fact building permit that Mr. Schulz had for the enclosure of a lanai at his condominium unit at the Kaanapali Royal. Uwe bought his unit back in the late summer of 2005. Shortly after he bought the unit, he enclosed the rear lanai. In January 2008, there was an inspection by the County and he received a letter which said that he needed to get an after-the-fact building permit or to remove the enclosure. So Uwe, who is an architect, prepared an after-the-fact building permit application, submitted it to the County in February 2008 to cover this particular work. In April of 2008, the Fire Prevention Bureau denied the application on two grounds: one, because the buildings did not have a fire sprinkler; and two, because there needed to be a fire access road. Both of these requirements were triggered because the Building Department believed that this was an alteration or addition, and therefore, triggered other requirements in the Building Code, which required a full retro fit of this particular structure which had been built in 1980. In April of 2008, a couple of weeks later, the Department of Public Works also denied the application for the reason that there wasn't a fire sprinkler system and because it was an alteration or addition of the building.

We filed the appeal in April of 2008 shortly after this. A contested case hearing was held in July

of 2009. There were – just so you know how we got there, there were approximately, 29 pleadings. And just so you have an idea of what's all in this record that's been created for you, 29 different pleadings have been filed in this case. There were over 60 exhibits proceeded – presented in this case and received into evidence. There was testimony over two days, seven witnesses, over 320 pages of testimony in this case. There were arguments, pre-hearing briefs, post hearing briefs. The parties were given an argument to present arguments to the Hearings Officer after the post hearing briefs were in, but none of the parties wanted to present an argument. We asked the Hearings Officer of the County, and we asked the Hearings Officer to rule, and he did rule. And ultimately, we're here today because we have a proposed finding of fact. We have a proposed conclusions of law. We have a proposed or recommended decision and order all of which was in favor of Mr. Schulz, which said that the determinations that were made by the Fire Prevention Bureau and by the Department of Public Works were erroneous. And you'll recall when we were here two weeks ago on the motion to reopen testimony that Judge McConnell told you he doesn't take what the Fire Department tells him lightly. He listens to it, but in this case, they were wrong. He ruled against them.

What's the Kaanapali Royal? Well, as I mentioned, it was built back in 1980. It has 15 different buildings. They're three-story buildings. The first two stories are the same. They consist of two units, mirror image. And the third story consists of three units, again, mirror image. In this particular case, each of the units has three lanais: a front lanai, a rear lanai, and an entry lanai. We're talking about the rear lanai which is 6'x6'.

What's the construction? This happens to be a photograph, which is in evidence, in the record, of Mr. Schulz's unit. This is the ground floor. This is Mr. Schulz's unit. This is on the second floor. This is the third floor unit. Have the same rear lanai: first, second, third. You'll note this particular condition, it shows the Mr. Schulz's enclosure. This one, the unit was not enclosed. The lanai was not enclosed. There are – and this is just a diagram, a rough sketch taken out, if you will, the vegetation, tile roof, concrete stucco, concrete block walls, concrete floors, concrete ceilings. There are ledges on the exterior, and there are guardrails on each of the lanais.

The particular unit in question, just so you have some idea, is the rear lanai. And this is again from the photograph, just a sketch. It shows the original condition, which would be a sliding glass door at the back, the ledge, and the two guardrails. This particular window in front or opening in front because it's all concrete is 5-foot wide, 6-foot tall. This particular window is 4-foot wide, 6-foot tall. This is from the inside if you were in the bedroom looking out: the sliding glass door; the 4-foot wide, 6-foot tall window; the 5-foot wide, 6-foot tall window.

What did Uwe do that got us here? He had a simple project. Cost him less than $800. He took the sliding glass door that was at the rear. He removed it. Took it out. And this would be the condition when it was out. Two openings that are in concrete. He framed in where he took out the sliding glass door. Popped in two sliding glass windows. This is a photograph again in evidence. That's the framing that he did. This is the corner. This is the 5-foot wide window. This is the 4-foot wide window. This is a picture of the top. Again, he went from the ledge which is two-foot off of the floor all the way to the ceiling, 6-foot. This happens to be the valance on the outside. And this is a picture or sketch of what it was afterwards. Took out the sliding glass door, popped in two windows. That's the project.

So what happens? As I said, we got a letter or Uwe got a letter January 7th that said, "Mr. Schulz, we've done an inspection. The enclosure of the lanai was done before you got a building permit. You either have to obtain an after-the-fact building permit or remove the enclosure." So Uwe submitted his application. He got two letters back as I mentioned. One letter was from DSA, Building Department – Public Works, rather. It said, "Mr. Schulz, we're denying your application for two reasons: one, the '97 UBC, Section 3403; and two, the Uniformed Building Code 904.2.9." In the letter they said, "You made an alteration or addition when the existing building or structure was not in full compliance." This was an assumption that if you make any addition or any alteration to a structure at any time, you have to bring the entire structure up to code. And as we'll see in a minute, that's not what 3403 says. And the Hearings Officer, in his report and in his findings let you know that the County can't do what they're arguing and they want to do in this case.

The Fire Department said, "Oh, you need a fire sprinkler system. You need a fire access road." But the Fire Department also testified – Mr. English testified in this case, and this is part of the record, "Bottom line, if there was a change of use or an addition, then your requirements would trigger." No change of use. No addition. Building Code doesn't trigger. Your Fire Code doesn't trigger. Yes, that's correct.

So the focus here is, is the Building Code triggered? Why is this important? Well, as you know, we have a lot of people sitting out here in the audience. There's 105 units at the Kaanapali Royal. Seventy-one of the units have had their lanais enclosed over time. There are mauka lanais and there are rear – there are makai lanais, the front lanais; and the rear lanais, the mauka lanais. In evidence, there is a list of each of the units that have had the changes made to them: 21 on the first floor, 15 on the second, 31 on the third. The very first enclosure was done about two years after the complex was completed, 1982, almost 20, 30 years ago, 29 years ago, 28 years ago. My math is not that good.

Ms. Kapua`ala: Ten minutes.

Mr. Geiger: Thank you. The last enclosure was done in 2005. That was Mr. Schulz's. Well, he was one of the last. And this again in evidence shows spread throughout the complex, the units that have had the work done. Now, some of the people pulled the windows out after the County submitted a letter. And we have some intervenors who are here who have intervened in this case. But the point is, we have a lot of people who have an interest in this.

I mentioned earlier, the County has already spoken. This is important. This was the section that they said we violated, that Mr. Schulz violated–3403. It says, and this is important, "Additions, alterations, or repairs may be made to any building or structure without requiring the existing building or structure to comply with the requirements of the code so long as the addition, alteration, or repair conforms." You can make an addition. You can make a repair. And you don't have to bring the building up to code. All you have to do is make sure that alteration, or addition, or repair meets code. Makes perfect sense.

There are two exceptions. Exception no. 1, which is in this paragraph is whether it creates an unsafe condition. An unsafe condition has six different parameters which were defined. People were asked questions about it, and there's no dispute. There was no unsafe condition.

The second one, and that's where the real dispute came down dealt with whether or not the building was more hazardous after the work than it was before the work. And you're gonna hear and see in the testimony that the County admitted that this building was no more hazardous because of the work. The County thinks it's hazardous because it doesn't have the fire sprinkler system, but that doesn't – that made no difference. Mr. Schulz's work didn't have anything to do with whether or not the building has a fire sprinkler system.

That's where we just talked about here–the six different items on unsafe conditions: structurally unsafe, overloaded, etc. That again is in the record.

So the three questions: did the work comply with the existing code? What you're gonna find out? That's undisputed. The only witness who testified, who looked at this, and he did look at this, was Tom Dusza. Tom is the – was the only fire safety engineer who testified in this case. He's with Schirmer Engineering. Schirmer is one of the three nationally-recognized fire protection firms. They write the code. They do things with the code. He's testified as an expert witness before. His testimony was the work that Mr. Schulz did comply with the code. There is no dispute about that.

Second question: did the work create an unsafe condition? Uwe, been an architect for over 30 years, knows the code because that's his business. In his opinion, did it create an unsafe condition? No, it didn't create an unsafe condition. Mr. Chun, who is the County's witness on the Building Code, and Mr. English admitted and testified he deferred to Mr. Chun on the Building Code, Mr. Chun went through it, and he said under 3403, "The only portion I have a problem with is whether or not it was a hazardous condition." He didn't say "unsafe." He said the "hazardous condition." He specifically said, "The last paragraph."

So if there's no dispute that there's no unsafe condition, did the work make it more hazardous? Again, ask Mr. Schulz. "Did the removal of the sliding make the building more hazardous?" "No." "Did the addition of the sliding glass window make it more hazardous?" "No." "Did the addition of the windows make it more hazardous?" "No." Asked Mr. Chun the very same questions. "How does the removal of the sliding glass door make it more hazardous?" "In itself, it won't." "How does putting in the two windows make it more hazardous?" "In itself, it won't." "So put them together. How did both of those things make it more hazardous?" "It won't." That's the County witness on the Building Code.

So why is there a dispute? Well, we're here, and as you saw in the exceptions and the memorandum, we're here because the Fire Department claims that rescue will be more difficult by taking out the sliding glass door, putting in the two windows. And you were cited with those four separate reasons from Mr. English. And you've seen it in multiple pleadings that were submitted to you. But what you didn't get was the testimony that he gave when he gave those four reasons, the very paragraph before that, because what he said was when he was asked, "Why is there a need for sprinklers in this building?" He said, "Because in the Fire Code, there's a section that requires emergency egress from all sleeping rooms." That's what he said. And then he gave these–

Ms. Kapua`ala: Five more minutes.

Mr. Geiger: I'll move as fast as I can. I apologize. But he gave these four reasons. So later on,

again this was testimony to his counsel, direct examination, later on he says, "It's in the Fire Code. If the Fire Code/Building Code– It's in Article 12 of the Fire Code." So I asked him,"You're saying Article 12 was a problem. What's the problem?" "Because you need emergency egress windows required from sleeping rooms." So we went through emergency egress windows. "That's merely a size issue with regard to the Building Code, isn't it?" And correct, correct, correct? That's what it is? It's strictly a size issue. And I got down. "Did you check the size of the windows? Do they comply with the code?" And the answer is, "Yes, they comply with the code." The code doesn't require you to have larger windows. The code doesn't require you to make – have bigger windows to make it easier to rescue somebody. The code merely requires that you have windows of a certain size, a certain dimension, a certain height.

What are those requirements? They're right here. They're in the Uniformed Building Code. They're not in the Fire Code. They're in the Building Code. They have to have 5.7 square feet. That's exactly 24 inches tall, 20 inches wide. Mr. Schulz's windows were 6-foot tall: 5-foot wide one; 4-foot wide, the other–well in excess of this as the County admitted in the testimony. And they can't be more than 44 inches above the floor, and these are two-foot above the floor.

So what's the bottom line? The bottom line is, is that the Hearing Officer found that the work was not an addition. The County says no, it's really an addition, and they rely upon the Housing Code, not the Building Code, the Housing Code. It really doesn't matter for our purposes and discussion here today whether you find it's an addition or an alteration. The Hearing Officer was correct because an addition means you have to increase the height or you have to increase – extend the floor area, extend out beyond the exterior walls. You saw Mr. Schulz didn't do either of those things. He's on the second floor. He didn't increase the height of the building. He didn't push out any wall. All he did was pop in two sliding glass windows in existing holes. So there wasn't an addition.

The next thing: was the work an alteration? They didn't make any objection to that. You can find that.

The work met the Uniformed Building Code. And again, the only person who testified about this was Tom Dusza. They say, well, it's not the code in their objections because of Mr. English and his testimony on the Fire Code, but again, we're not looking at the Fire Code here. The question is, does it meet the Building Code? And the answer is yes.

We really get down to unsafe conditions: 67 to 74. And again, the County says no, you know, they're unsafe conditions. Some of them are unsafe because Mr. English testified, but again, his testimony was not about the Building Code. His testimony wasn't about was an emergency exit or rescue exit blocked. His testimony was, hey, I don't like where the windows are, where the rescue is now. I want something different. You can't deny a Building Code application, a building permit application just because you want it a little bit easier for you. You have to follow the law. The law says if the windows are of a certain size, certain dimension, certain height, you have to approve it. And Mr. English did admit that.

Finally, work didn't create – work didn't make the building more hazardous. Mr. Chun admitted it didn't make it more hazardous. All that the County wants to do here is they want to say, hey, we don't like how we're gonna have to rescue people. Well, if they don't like that, they need to go back

and change the code, but they can't ingraft that where there is no code basis for it, and that's the real problem.

I've kind of run through this very quickly. I do have some comments that I'd like to reserve a little bit of time. Hopefully, you'll give me a little bit of time to make a response to the County, and also, I'd like a few comments concerning the motion to reopen, if necessary.

Chairman Endo: I think since – how much time did he use?

Ms. Kapua`ala: Ten more seconds.

Chairman Endo: Yeah, we'll just give you more time. And then what we'll do is we'll give equal time to the County.

Mr. Huster: Mr. Chairman, Board Members, my name is Joe Huster. I represent the intervenors. There's six couples. We have intervened by stipulation, the County. And we are in the same position as Mr. Schulz. I just have a few remarks I want to make to add to Mr. Geiger's presentation.

I would emphasize that there has already been a full and fair evidentiary hearing on this matter. There was two days of testimony from seven witnesses. There was, as Mr. Geiger pointed out, 69 exhibits, I believe. And the County was given many opportunities, given several opportunities, one at the hearing, and an additional opportunity, if it wanted to avail itself, to make further oral arguments in this matter, and they declined to do so.

Judge McConnell is a very experienced jurist. Looked very carefully at their evidence. If you read his opinion, you'll see that he did not disregard the Fire Marshall's – excuse me, Fire Inspector's testimony. He gave it very careful consideration. He went through it point by point and found it unpersuasive. You know, the report, in my opinion, anyway, for what that's worth, is obviously correct. The report – the case comes down to whether or not the building was made more hazardous. And all of the evidence that you saw is – indicated that it didn't. That was his conclusion. None of the exceptions to 3402 are triggered by this alteration. And so that's the only conclusion we can come to is that the Building Code allows for additions and alterations as long as they don't make the building any less safe, and that's what happened.

The County raised one concern in its brief: its concern about legal liability both for it and for Lt. English were he to sign off on these permits, and there was an accident at Kaanapali Royal, and somebody got hurt. That argument is without merit. Hawaii law, and we cited the case, it's Cootey v. Sun Investment, basically immunizes the County and Lt. English for signing off on permits as long as he does so within the law, and that's what the case is here.

Mr. Geiger, in his brief, pointed out that the law actually disfavors opening up an evidentiary hearing after one has already been closed. There are only a few exceptions to that. One, if the law changed, or if there's some additional new evidence, and none of that's the case. The County merely wants to hear – wants you to hear from the Fire Marshall, but you heard from the Fire Marshall in the form of Judge McConnell. That's what you hired him to do, to take testimony. He carefully considered that testimony. And to reopen the case after having such a voluminous record

and a carefully considered opinion would be a waste of resources, the County's resources.

On my reading of the County's brief, the only reason that they give for asking you to reopen this case is that the Hearing Officer was wrong. They don't agree with it, but that's an illegally insufficient reason to open the case. And finally, I would just add that reopening this case continues to impose litigation expenses on our clients which are considerable. After having already gone through the litigation process, it's unfair and a violation of their due process rights for the County to simply reopen the case and particularly when the County had many opportunities to hear evidence. With that, I'll – my remarks are complete.

Chairman Endo: Thank you. Ms. Johnston?

Ms. Johnston: I had a nice argument written out, but Mr. Geiger covered some of the things I was going to go into, so I'll address what I feel are the critical issues in response to them and also some of the other observations I wanted to make.

First of all, we're not here because the County has requested to reopen the case. We're here because we filed exceptions to both the findings of fact, conclusions of law submitted by the Hearing Officer, as well as the Hearing Officer's report. Those are – that is specifically provided for in your rules, which anticipate that there are situations where it's appropriate for the parties to be able to come in and voice their objections to what has gone on in the hearing before the duly appointed Hearing Officer. I have great respect for Judge McConnell. I have appeared in front of him for many, many years. I believe in this case, the testimony as it was presented was misleading. And what I want to do is to demonstrate for the Board where I think that perhaps the perception was led in the direction it shouldn't have been.

The comment has been made here that the test is whether or not the building became more hazardous. We've had an apples and oranges argument here. They're talking apples. Our exceptions talk about oranges. Let me explain what I mean by that. The focus – I'm gonna focus primarily on the Hearing Officer's report which discusses – essentially focuses in on the issue of whether there was a hazardous condition or dangerous condition arising from the enclosure of the lanai by Mr. Schulz. Section, UBC, Uniformed Building Code, 3403.2, provides a pertinent part that "Additions or alterations shall not be made and shall not cause the existing building or structure to become unsafe." So one issue is whether the building became unsafe. This is all they're focusing on: did the building become unsafe? But this code provision has a different provision and the one that we're arguing that was overlooked and ignored in the findings of fact, conclusions of law, and order that was recommended to you by Judge McConnell. And I'm gonna state this part of it, "An unsafe condition shall be deemed to have been created if an addition or alteration will cause a building to become structurally unsafe or overloaded." That's one thing. That's one thing. Two, "Will not provide adequate egress in compliance with the provisions of this code, or will obstruct existing exits." Next, "Will create a fire hazard, will reduce required fire resistance." Now, those are five different things you can look at. The sixth one is what I would like the Board to focus on, "Or will otherwise create conditions dangerous to human life." And this is where we feel that the Hearing Officer went astray in his determination. This code section goes on to provide the "Additions or alterations shall not be made when such addition will result in the existing building, a structure being no more hazardous based on life safety, fire safety and sanitation than before such additions." We're focused on life safety conditions dangerous to human health or changes

that are hazardous to life safety, life of a human being.

You have a number of exhibits, but I'd like to provide you with a copy. I don't think you'll have any objections. These are the two of the photographs that Mr. Geiger showed. They were a little hard to – the glare on the screen was a little hard for you to see, but I wanna refer to those. And I want to go – to focus on the testimony that was given primarily by Mr. Schulz as to what was done. I have a – like Mr. Geiger included additional documents to illustrate his oral argument, I wanna do something that's a little more . . . (inaudible) . . .

Mr. Geiger: For the record here, everything that was in the power point presentation was evidence that is in the record. There was no additional demonstrative item that they're now trying to put together here. So I would object to this.

Chairman Endo: Okay. Objection is so noted.

Mr. Geiger: I think I need a ruling.

Chairman Endo: Okay, well–

Ms. Johnston: May I respond?

Chairman Endo: Sure.

Ms. Johnston: This is oral argument. Everything that I'm gonna talk about is evidence in the record: all the measurements, configurations. This is a problem. We have testimony actually made by Mr. Geiger saying, oh, somebody could just walk over and then – they could simply walk over this and walk out. It's no problem. I'm gonna demonstrate that when you look at it physically, not on paper, not on a slide, what the actual physical condition is arising from the lanai enclosure. I think it'll be very helpful to the Board.

Chairman Endo: Okay, well, I'm gonna– Go ahead, Mr. Geiger.

Mr. Geiger: First of all–

Chairman Endo: Under the objection, right?

Mr. Geiger: Yeah. I do have an objection. I also object to this because I don't believe . . . (inaudible) . . . vis-a-vis how this particular example is set up. I will tell you that it is not set up, and you can look at the photographs, and see that it does not match the actual physical condition. So I do have an objection if they're trying to state that this is the physical condition out there.

Ms. Johnston: I'm sorry, but I've just handed you photographs that show – their photographs that show exactly what the building is. And I will relate in my oral argument how this demonstration relates to those pictures.

Mr. Geiger: In fact, the railing is set out. There is approximately, eight inches on the inside, eight to 12 inches on the inside. The way this is set up, it would appear that there's nothing on the

inside.

Ms. Johnston: Well, I'm gonna get to that.

Mr. Geiger: My point is that this is not an accurate depiction of the condition.

Chairman Endo: Okay.

Mr. Geiger: And I would object.

Chairman Endo: Okay. I guess– Let's see. The Chair would deny the motion, but anybody on the Board can appeal my ruling, and then the whole Board can vote on it. So initially, I'll – the Chair would allow the demonstration, and allow Mr. Geiger to, you know, speak to it, and criticize it as much as he wants. The Chair would prefer to allow the demonstration, the demonstrativeness of it, but you can appeal, and then we can vote on it. So I'm not trying to– I'm just making an initial ruling. So if you wanna go against it, that's–

Mr. William Kamai: No objection.

Mr. Harjinder Ajmani: No . . . (inaudible) . . .

Chairman Endo: Okay, proceed.

Ms. Johnston: May I proceed? Okay, thank you. You have plans that are attached. I think it's Exhibit B to the County's memo taking exception to the Hearing Officer's report. And these again are the – Mr. Schulz's exhibit. They are the plans for – that were submitted in conjunction with his submittal of the building permit application which show exactly what it is he's planning to do. This had to be reviewed by the Department as part of the permit application process.

You will see that the corner where he shows – where the new window is going to be that there's a note that says "42-inch railing to remain." "Railing" would seem to imply that it's that metal bar that's in the photograph that I've given you. However, it's very confusing because in looking at the pictures and measuring, the railing is – the 42 inches is actually – the 42 inches is not just this rail, not the metal part, but is the bottom concrete part. And if you look at the exhibit, the photographs I just handed you, S-8, it's confusing because it looks like at the bottom, you're looking at the floor, and then the railing's on top of that, but actually the part at the bottom is the concrete part. The floor is not on that page. It goes beyond it. So when you're talking about– First, let me do my demonstration. And I will admit that the railing is not placed – it would be further out, and it would be spaced. The testimony, and I can go through this that Mr. Schulz gave that on the five-foot long window facing the parking lot, the ledge is about nine – is about 12 inches, and the railing is placed somewhere in there. We don't have a picture of exactly where that placement is. On the window on the end, it's on the – we call the – it's a copout. And not all of the units not – especially, the intervenors, some of their units don't even have that particular window, the ledge is wider. It's 20 inches wide. What they're claiming is that this–

Let me start over. This is about six feet back. These are the lanai doors before they're removed. Okay? At the time, if a fire happens, if there's smoke in the unit while the lanai was intact before

the enclosure, the person would simply slide open the lanai door, walk out, slide it close, stand about 36 square feet, six feet between this rail and the ground, this is the second story for Mr. Schulz and these lanai doors. Okay. Once the lanai doors were removed, you no longer have that. You now have cement, glass going up six feet, and right outside of the glass, and that shows up in the picture, the S-8, you have the window. So what happens, no longer can a person open the door, walk through, close the door, get a little bit away from the fire and stand there. A person– Smoke is coming. Fire is coming. You gotta go and stand – get over it. There's furniture – if there's furniture under this window– Mr. Schulz testified he had office, special office equipment. I don't know if it was under this window or the other. Suppose you have a sofa or something, you've gotta get over your furniture, clear off your computer or whatever you have, get up on top of something that's 30 inches high because you gotta get out. You gotta open your windows, which go this way. The picture showed it opens this way. And you still – then you have to step over this rail onto the ledge. Okay. So it's 42 inches you've gotta get up and over. This is not walking out of the building. This is actually having to climb over.

Now, Mr. Schulz testified and I pointed that out in my memos that he has a vision problem. He suffers from macular degeneration. Has impaired vision. So he's gotta be doing this with difficulty seeing. People that are in wheelchairs that have enclosures or need walkers to walk are gonna have a very difficult time in the event of fire, smoke, getting out.

Now, then you get out on a ledge. Okay. You have a ledge that's on this side. Maybe you've got nine inches to stand in because some of the cement's behind you. Maybe on this ledge, you have more. Now, this is the hard part I think that's very hard to visualize that occurred after we started rereading the transcript. You get on the ledge. You don't have a rail to hold on to because the rail is now down here. You are standing. So if you're gonna hold on to something, it's not something that's up here. It's down here. So you're nine inches this way. And you hold the rail this way. You hold the rail. How do you hold the rail? Teetering there. The other side, admittedly, you would have a little bit more space to sit or hold on to, but again, if you have a disability, it's going to be very hard. If you have a guest in your house with a disability, it's gonna be very hard for you to stand on that ledge waiting for somebody to come rescue you. So this is something I think you can't get from the pictures. This is why I wanted a demonstration.

The code says, again, let me just reiterate that if there's a danger – much more danger to life after the alteration or addition, a greater hazard to life safety after the addition, then that triggers the requirement for fire sprinklers. And I think it's certainly clear that this is much more difficult. In fact, during the testimony, Mr. Dusza testified as much, their expert. And I want to take – I want to take a section to a comment that was made by the intervenors in their memo that Mr. Dusza was a neutral expert. Mr. Dusza was retained by Mr. Schulz and intervenors to give testimony on their behalf. So that's just a complete misstatement.

The Hearings Officer–

Ms. Kapua`ala: Five more minutes.

Ms. Johnston: The Hearings Officer, during the hearing, asked Mr. Dusza basically–this is a transcript, pages 199-200–basically, "If extending the ledge would be a little more difficult for many people than when shutting the door and standing there if the construction was as originally built."

Mr. Dusza said, "Right." He agreed that this – standing on the ledge, hanging two – or dangling your legs over or whatever would be a more difficult situation than it was before. And that's exactly what the code says you can't do without triggering the retrofit of the sprinklers. Mr. Dusza also testified when asked about the issue– We went through during the hearing, and this is a transcript, and it's attached as an exhibit to the intervenor's memo for these proceedings today, "Question: the final thing is that if it would be an unsafe condition if it created a condition dangerous to human life. Now run us through the analysis of that. Give a condition dangerous to human life created by Mr. Schulz's project." This is Mr. Dusza's answer, "No, that's kind of a hard thing to determine, a dangerous condition, but if there's – if there was, let's say, a construction – well, let's say it was in a different level and he didn't put steps in or something like that, that would be an unsafe or dangerous condition." And we argued that this is different – several different levels requiring considerable effort to get up and out especially, if you have problems, especially, if you're panicky because the fire or smoke is following you.

So we would ask the – we also believe that the ruling on whether or not the addition or alteration was incorrect by the Hearings Officer. And that's pretty much in the memo, and I won't go into that further at this point, but that is an issue we wanted to preserve for the record on this.
The codes are designed to keep people safe. People can be their own worst enemies. And while this may not seem like a big thing to Mr. Schulz or some of the other people I know that are here that also have enclosed their lanais, yet they don't take those things into consideration. That's why you have to get a building permit so that somebody that is knowledgeable about what the conditions are that keep you safe. As I pointed out in one memo, there's currently before the Council, a revision or an updating of the Uniformed Building Code that's going – a Fire Code that's going to require all buildings except single family residences one story or more. Under the existing code, it's three stories or more, but the belief is that it's so dangerous to not have a fire sprinkler system that they are going forward with that.

And just one final point I wanna make: liability. The determination of whether or not there is a requirement for fire sprinklers under this circumstance which the County says there is, I pointed out that the proposed order that the Hearings Officer recommended that the Building Department, the Fire Department, be ordered to sign off on this after-the-fact permit when they've steadfastly believed that these are dangerous conditions that exist. Okay. Somebody gets in one of these apartments that can't get out their window. They're burned. Somebody else – damage, injury, death, you can better believe that the County is going to be sued because it approved the permit to put this enclosure in. The case that they have cited, the Cootey case, doesn't support them in this. The Cootey case, and I have copies, and I'll be happy to provide the Board, concluded that a County employee in approving and reviewing a subdivision plans submitted by a developer did not have the responsibility of going back and re-engineering, and redoing, and re-computing all the figures that the developer did. That the County wasn't liable if the engineer made it – something that was – caused the problem. In that case, Hawaii County, it was a drainage issue that flooded the subdivision, flooded a neighbor's property, and the adjoining property owner sued the developer and the County. It's a very narrow ruling. We have here a building permit application. Cootey has nothing to do with building permits. It's a subdivision. So for them to present that and say it's okay, we can kind of look the other way because the County won't be liable is simply not true. There's no – Cootey v. Sun Investments doesn't stand for what this is – it stands for. I would urge–

Ms. Kapua`ala: Twenty minutes.

Ms. Johnston: This Board to think about this. This is kind of crude. I mean, maybe I'm not smart enough to use a smart board yet, but just trying to demonstrate physically so you can see that you're standing on a ledge with a rail below you and the ground, and maybe two stories, one story below you. And there you are until they come and rescue you. So I would ask that the Board reconsider. The County has submitted their proposed findings of fact, conclusions of law, which are attached as – to I think our exceptions to the proposed findings of fact and conclusions of law that have been given to you by Judge McConnell. Thank you.

Chairman Endo: Okay, so how are we doing on time?

Ms. Kapua`ala: Both parties have used 20 minutes of their time for their opening argument.

Chairman Endo: Okay, so five minutes?

Mr. Geiger: Probably not even that, I hope.

Chairman Endo: Okay.

Mr. Geiger: First of all, I didn't have an opportunity before, but I want to thank you on behalf of myself and Mr. Schulz for taking the time to pay attention to us because this is a very important issue for Mr. Schulz.

The comments that I've just heard – the bulk of the comments that I've just heard are really not appropriate for this Board, for this proceeding. Those comments that they're making should be made to the County Council saying, hey, we don't like the Building Code and what the Building Code says. We think you should change the Building Code and make the Building Code so that you can't have any rescue window that is higher than 24 inches, 48 inches, whatever you want. But the Building Code doesn't provide for that. If you look at the Building Code and its Section 310.5, I believe, this particular section, it is an exhibit, it is Exhibit S-26, and the County of Maui actually took the Uniformed Building Code and they modified it, but they didn't modify the portion about what size rescue windows and sleeping units had to be.

And the Building Code has requirements on size. We went through those. It has to be 5.7 square feet at least. Mr. English admits he did check Mr. Schulz's windows. They exceed that. They have to be at least 20 inches wide. Mr. English admits they're at least 20 inches wide. They have to be at least 24 inches tall. Mr. English admits they're at least 24 inches tall. They have to be – they have to be at least 24 inches off the floor. They're at least 24 inches off the floor. If they want to change the Building Code, go over to the other building to the County Council and make your argument to them, but you can't deny a building permit because you don't like how the Building Code reads. Mr. Schulz complied and his project, his work, complies with the Building Code. And quite frankly, if this is the best argument they have: oh, we don't like the height, and it's gonna be more difficult, go talk to somebody else. Change the law, but apply the law. That is their obligation and that's your obligation. Apply the law. Show me one thing, one provision in the rescue window that Mr. Schulz violated. I can't find it.

You know, this has been an interesting case in the sense that we get through this, we present the case, the County admits the building's no more hazardous. The County doesn't put on any

evidence on unsafe condition. In fact, you can look through the transcript. Their witnesses didn't use the words "unsafe condition" once, not once. They didn't say it's an unsafe condition. They didn't say it's not an unsafe condition. They didn't talk about it. Their whole point was, well, the building is hazardous because it doesn't have a fire sprinkler system. In fact, you heard the pitch here today: oh, we're gonna go change the law. Fine. Go change the law over there. Your job here today is to apply the law. The law does not require that buildings be retrofitted to have fire sprinkler systems unless in two conditions that happens, and you don't have anything in this record that allows you to find that either of those two conditions occurred.

Finally, I could get into an argument with you guys about the law on Cootey. I don't think you guys particularly would want me to hear. Suffice it to say, I disagree with the County. Obviously, the State of Hawaii has ruled that County officials are not gonna be responsible for doing their job. Doing their job. They don't their job, sure, they ought to be responsible. But if they do their job, they're not going to be subject to liability. And so that's all we're asking here: make them do their job. Thank you.

Mr. Huster: Just a couple points. The reason that these grandfather clauses, these continued use clauses, are in the Building Code is to spare owners of existing buildings, or owners of apartments within existing buildings, the economic hardship that – of having to upgrade every time you wanna do a small alteration – having the entire building. That's the whole point proposed. And so it's important to keep that in mind that these exceptions have to be taken seriously.

The second thing I would add is that what – the arguments that Ms. Johnston made to you were the same arguments and the same testimonies, but basically, the testimony of the County at the hearing. You look into the report, you'll see excerpts of the testimony, and it was the same arguments. The argument they're making is that the building is less safe. That has been litigated. That's already been determined. We've had full expert testimony, full witness testimony. And the Hearing Officer made a determination that that was not the case, that it was not unsafe. It was no– And so that provision of 3403.2 does not apply.

Finally, I'd like to just read one little section out of that Cootey opinion, I think, because it really does say – it really does get to the point. I'm not gonna go long on that, but this is in court, in Cootey, "We hold that the primary responsibility of providing an adequate and safe development rests with Sun Investment, the developer, and not the County. The task of government employees is to review the development plans submitted by the owner and to assess compliance with the law." That's their job. The building inspector and the fire inspector's job is to assess compliance with the law. Right? The last part I wanna note here, and this is the court again, "Government is not intended to be an insurer of all the dangers of modern life despite its ever-increasing effort to protect its citizens from peril." The court was saying that government officials need only to follow the law. The law is prescribed by the County, by ordinance, and the level of safety that's provided has been met. The testimony is clear. The windows meet the code. The guardrail is installed as required by the code. That's all the law requires. The County officials' job are to assess compliance with the law, not to worry extraordinarily about the extra safety that they might want to provide for these residents. They're not legislators. They're officials. And for them to impose legislatively – oh, excuse me, administratively, what has not been enacted legislatively, is improper. Thank you.

Chairman Endo: Okay. Thank you. Since I believe they went a little bit more than their time, you can have a minute.

Ms. Johnston: We just had apples and oranges again. The code says you can't do something that creates a greater danger to human life. We're not talking about the building. We're talking about human life. And clearly, we haven't even dealt with that issue. The change, the requirement of getting through the window, over the rail and hanging on does create a greater danger to human life, a greater hazard to life safety. And that is as much in the Building Code as the other provisions they're talking about.

Chairman Endo: Thank you. Okay, at this point, if someone wants to make a motion with regard to the issue of reopening the docket to take further evidence, we can rule on that. We can always keep in mind and we clarify this with our Deputy Corporation Counsel that it's always our prerogative to do that anyway. So you could rule on the motion and say deny it, but after we deliberate for the next, you know, 20 minutes, half an hour, whatever, and you suddenly realize, no, you really want more evidence, on our own, the Board can just reopen it. We don't need to have a motion before us in order to do that. So it's sort of a – you know, it gets us only so far. Yes?

Mr. James Shefte: Before we go any further, could we have some comments from Judge McConnell concerning the things we've heard here this afternoon?

Chairman Endo: Sure, he's here if you have any questions for him. Sure.
Mr. Shefte: I don't have specific questions. I'm just wondering if he would perhaps give us a synopsis of his thoughts concerning this.

Chairman Endo: Okay. Hang on. Do you want to take a recess? Okay, we'll take a two-minute recess. We'll be right back.

(A recess was then called at 2:45 p.m. and the meeting reconvened at 2:50 p.m.)

Chairman Endo: The Board of Variances and Appeals is back in session. At this time, we'd like to request Judge McConnell to approach and either make remarks, or we might toss out a few questions.

Judge McConnell: I would only say that what I found was that the County's determination was clearly erroneous. And the legal definition of that is that the fact-finder, that was me, is left with a definite and confirmed conviction a mistake was made. And I think, you know, that – I didn't have the benefit of the demonstration during the hearing, but we can all appreciate the difficulty of making these decisions.

Getting building permits I think is pretty much an administerial act. You've got to – you've got to follow the rules or the code. And I appreciate the argument that it's a little more difficult to get out, but the code sets the requirements for exit windows. And there was never any dispute that this alteration, if you want to call it that, met that requirement. So, you know, I can certainly understand the Fire Department's concern. I, of course, like everybody here relies on them for our lives and our property. and I appreciate that. And I don't argue with them lightly, but I think primarily it is a

question of law, a mixed law and fact, anyway. And under the law, the fact that they met the code requirement for exit windows was sufficient. You know, if they – if this building say, had been built the way – with these enclosures already done, it would've complied with the – with the code when built. That was way back in 1980 when sprinklers weren't required. And the Council made it pretty clear that, you know, it wasn't going to require this retrofitting of entire buildings. But having had to make a decision, I now am glad that you all have to make this decision. Okay, I'll answer any questions I can.

Chairman Endo: Okay. Hari?

Mr. Ajmani: Judge McConnell, according to your understanding, this opening, railing height is less than 44 inches, I take it.

Judge McConnell: Right. I think the point was that from my thinking about it was the opening was the opening. It wasn't changed. But, you know, I mean, what was done was put a slider in and so half of it slides over. That's still big enough for the – under the code thing.

Mr. Ajmani: No, I think the question I was trying to get to is that the code requires that you should have an egress out of the bedroom. And does this additional, this sliding door, and the height of the railing make – the culmination of the two still complies with the code, is that right?

Judge McConnell: Yes.

Mr. Ajmani: Okay. And, you know, if this building was built with the lanai enclosed from the get-go, from the day one, this construction would have totally complied with the then code, isn't it?

Judge McConnell: Yes, sir.

Mr. Ajmani: That's what you're implying?

Judge McConnell: That's my belief, yes.

Mr. Ajmani: Thank you.

Chairman Endo: Judge McConnell, I have a question. So reading your report then, although you say you acknowledge that it does make things a little bit more difficult having to climb over the railing and everything, and not having that sliding – the pre-existing glass door, but you don't think that it will create a condition dangerous to human life?

Judge McConnell: No, because I think, you know, the law has defined that. Actually, that section, you know, what they're preceding under is the "Otherwise create conditions dangerous to human life." You know, we lawyers, we just put words on things. In my judgement, there was just not a material difference between what was there before and what was there after. I guess, you know, Lt. English and I reasonably disagree on that, but, you know, you can – you have to use an element of reasonableness in interpreting this language. And I did the best job I could with it. I thought that this was not a situation where the legislative intent would've required the retrofit.

Chairman Endo: Yes, Hari?

Mr. Ajmani: I think there is no requirement in the code that I know of that from an egress window, you have to have a ledge or a sufficient place to stay out of. I mean, in a typical house or anywhere where you have a second story window with no lanai outside, I mean, you have to either jump out or rescued by the Fire Department's railing, or their stair, or whatever. So this situation is no different than that, is it?

Judge McConnell: I would agree, yes.

Mr. Ajmani: Okay, thank you.

Chairman Endo: Any further questions for Judge McConnell? Thank you, Judge. Okay, Members, you can also ask questions of the parties' counsel, too, or if somebody's ready, you can make a motion. Yes, Hari?

Mr. Ajmani: Yeah, I'd like to make a motion that we should accept the Hearing Officer's report and accept the – I guess, deny the appeal or whatever you have to do, whatever – or accept the appeal of Mr. Schulz.

Chairman Endo: Okay, so just to clarify, your motion is to adopt the Hearing Officer's recommended findings of fact, conclusions of law and order, and adopt it as ours. Correct?

Mr. Ajmani: That's right.

Chairman Endo: Okay. Is there a second?

Mr. Shefte: Second.

Chairman Endo: Okay, it's been moved and seconded to grant the appeal and thereby adopt the Hearing Officer's recommended findings of fact, conclusions of law and order as our own for this Body. Just to clarify, our technical procedure would be, I believe, Mr. Giroux wants us to say, then essentially, then you're denying the motion also to reopen the case and take further evidence.

Mr. Ajmani: That's right, yes.

Chairman Endo: Okay. Okay, it's been moved and seconded to that effect. Discussion? Hari?

Mr. Ajmani: I just wanted to make one comment, if I may? I think I am understanding the County's position on this. And this is the kind of thing that I have encountered in my own career, and this is what I used to do years ago. And I think the – if the County is concerned about that these buildings are not safe the way they were built in '82 without the fire sprinkler then the County can, through the legislative process, require them to be fire sprinkled, which I have seen in a lot of jurisdictions where the City and County have gone back and required buildings to be fire sprinkled if they deemed them to be unsafe. So I think in that respect, that's a totally – a different thing they want to do. The changes that Mr. Schulz is making on this one really does not make it any significantly – or I should say does not make it unsafe compared to what could have been built

then. And so therefore, I think this is a little overreach to require the whole building to be fire sprinkled just because of these little changes.

Chairman Endo: Discussion? Bill?

Mr. Kamai: No, just a comment that Mr. Huster said that as the – representing the intervenors in this case that he pointed out the role of the government employees was to – that they would be – it's part of their duties just to follow the code, and that they would be absolved of any approvals like this where it would cause any harm to the public. And I wish that he'd maybe address his intervenors and let them know that they're responsible for their own enclosures should there be any fire, or help, or rescue from the Department should this thing be approved. That's all I got to say.

Chairman Endo: Okay. Further discussion? Hearing none, all those in favor of the motion to grant the appeal as were particularly stated earlier, please say aye. Oh, sorry.

Mr. Kamai: About the section about the hold harmless agreement indemnifying the County?

Chairman Endo: Those are standard conditions for granting of a variance. Yeah, we don't normally condition a ruling on an appeal. Yeah. Okay. So no conditions. We're just either granting the appeal or denying the appeal at this point. So all those in favor of the motion which is to grant the appeal, say aye. Opposed?

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

VOTED: **To grant the appeal and thereby adopt the Hearing Officer's recommended findings of fact, conclusions of law and order as the Board's own, further denying the motion to reopen the case and take further evidence.**

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

Chairman Endo: **Okay, the motion is carried, and the appeal is granted.** Thank you.

Mr. Geiger: On behalf of Mr. Schulz and the owners, we thank you.

Chairman Endo: Thank you.

D. APPROVAL OF THE JANUARY 28, 2010 MEETING MINUTES

Chairman Endo: We have the January 28, 2010 meeting minutes. Is there any motion to approve or amend?

Mr. Ajmani: So moved.

Mr. Kevin Tanaka: Second.

Chairman Endo: Okay, it's been moved and seconded to approve the minutes as currently written. Discussion? Seeing none, all those in favor, please say aye. Opposed, please say no.

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

VOTED: To approve the January 28, 2010 meeting minutes as written.

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

Chairman Endo: **The minutes are approved as written.**

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Chairman Endo: Status on BVA's contested cases?

Ms. Kapua`ala: Within the past two weeks, there have been no updates to report on, but we'll have something by next week or next meeting.

Chairman Endo: Okay, thank you, Trisha.

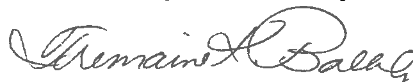
F. NEXT MEETING DATE: February 25, 2010, Thursday

Chairman Endo: Our next meeting date is February 25, 2010. Is there any further business of the Board? Okay, this meeting is adjourned.

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:06 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Kevin Tanaka, Vice-Chairman
William Kamai

James Shefte
Rachel Ball Phillips
Harjinder Ajmani

Members Excused:

Ray Shimabuku
Stephen Castro, Sr.

Others:

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