

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MARCH 11, 2010**

(APPROVED: 3/25/2010)

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, 1:34 p.m., Thursday, March 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: This meeting of the Board of Variances and Appeals will now come to order. It is 1:34 p.m. on Thursday, March 11. Let the record reflect that we have a quorum present of seven Members. At this point, if there's no objections from the Members, we will take Item C-1 out of order, and table Item B-1 because we're waiting for some staff to show up. So we're going to take Item C-1 first, if there's no objection. Seeing none, would the Planning Department call that item?

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. **Proposed Findings of Fact, Conclusions of Law, and Decision and Order.**
 - b. **Appellee County of Maui's Motion for Clarification of Hearing Officer's Order**

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

Chairman Endo: Will the parties please introduce themselves?

Mr. James Geiger: Good afternoon, Mr. Chair, Board Members. My name is James Geiger. I'm here on behalf of the appellant, Uwe Schulz, who's also present.

Chairman Endo: Good afternoon.

Mr. Robert Thomas: And, Mr. Chair and Members, thank you. My name is Robert Thomas, and I'm here on behalf of the intervenors, some of whom are present here today.

Chairman Endo: Good afternoon.

Mr. Thomas: Thank you.

Ms. Mary Blaine Johnston: Good afternoon. Deputy Corporation Counsel, Mary Blaine Johnston, on behalf of the Department of Fire and Public Safety, and the Department of Public Works.

Chairman Endo: Good afternoon. So I take it we're here to adjudicate this motion for clarification of the Hearing Officer's report and proposed order. You folks have a proposed procedure, or should I let just let each of you speak for up to five minutes? Is that enough?

Mr. Geiger: That would be fine from the appellant's standpoint.

Mr. Thomas: Yes, that's fine.

Chairman Endo: Is that good?

Ms. Johnston: That's fine.

Chairman Endo: Okay, let's do five minutes.

Ms. Johnston: Shall I proceed?

Chairman Endo: Sure.

Ms. Johnston: Okay. I filed this motion for clarification of the Hearing Officer's order. One part of the findings of fact, conclusions of law, decision and order that the Board has previously voted to approve was handed over. At the much castigation by the appellants in this case that it was improper, I should've raised exceptions and so forth and so forth, they, too, are seeking clarification. They have proposed alternate language as I have for that portion of the order which should be clarified at this point rather than waiting until somebody goes in, their permit is processed, the Department says you don't have a smoke detector, you've gotta get one before we give you a permit, and then we're going to have appeals coming back here. So this is sort of like a motion to get the air very clear before you finalize your report so that the time that you have to put into this matter, the time that the parties have to put into this matter will be vastly reduced.

The issue on the Hearings Officer report that after 30 years of practicing law, I just had this sort of tummy feeling that this is something that would be an issue, and that is, the page 2 of my motion memorandum. The part of the order that I think that needs to be real clear what this Board intends to be the case, the Hearing Officer recommended that the Directors be directed to rescind their disapproval of the after-the-fact building permit applications, further be directed to process the after-the-fact applications, and issue such after-the-fact building permits. Now, what I have on behalf of my clients asked make it clear that once the decision not to process at all is rescinded, which the County will do, is the normal course of evaluation of the building permit application. It's not automatic. You don't rescind. You get your permit because we don't know what the conditions are in anybody except Petitioner Schulz's unit that was testified to in great detail, and it was concluded that the only thing that was holding him up was the lack of a fire sprinkler system. We don't know about the other people. There's not one breath in the record of what their lanai enclosures were like. There was no stipulation that they did their lanai enclosure exactly like Mr. Schulz. Mr. Schulz is a respected architect, and he knows what the rules of the roads and what the codes are. The other – the intervenors, we don't know. Maybe Uncle Joe grabbed some wood and enclosed their

lanai, or maybe bricked their lanai. We don't know. So they're still gonna have to have their applications looked at, and perhaps inspections done to be sure that they comply with other parts of the codes that were not part of this proceeding.

The only code issues that were part of the proceeding were two that were identified in the appeal application, and I'll pass this out to you in a minute, were identified by Mr. Schulz, were the two code provisions: one having to do with whether it was an addition; and the second having to do with whether it had to be in compliance with the fire sprinkler. No other issues were before the Hearing Officer on this deal.

As I say, the findings of fact and conclusions of law that had been prepared for your signature, I don't know if you have those in front of you, there are findings of fact made about the petitioner. That's Mr. Schulz. That's not the intervenors. And that's not all the other people that were not part of this proceeding who also have enclosed lanais. If you look at page 5 of your proposed findings of fact: paragraph oo, petitioner enclosed his lanai; pp, "The project consisted of removing the sliding glass door, trimming out the door jab," etc.; qq, "Petitioner paid \$800 for materials in work." So we have findings about what Mr. Schulz did. If you go on to page 11, we have a finding, a conclusion says, 20, "The work done to enclose petitioner's lanai conforms to existing building codes." 21, "The enclosure of petitioner's lanai did not create an unsafe condition." 22, "The enclosure of petitioner's lanai did not result in the existing building being more hazardous." So clearly, these findings have been made about Mr. Schulz. They haven't been made about anybody else.

Now, what the intervenors argues is that, hey, you stipulated whatever happened in this would apply to us, and we did, and it does. And what that thing that was decided in here was that requiring a sprinkler system was not a reason not to process the building permits. So what happens, and this is what I want the court – the Board to make very, very clear so we don't argue about this is go back, the two Departments are going to rescind their notices of that they couldn't process. And in going back and looking at their statements, both the Fire Department and the Department of Public Works said, "We are unable to approve the subject building permit application at this time." At this time. Okay. It doesn't mean it's always and forever. And they took two bases. Now, Mr. Geiger has argued that there's some – somehow there's some requirement that you've got to look at every permit and list every single thing that's wrong with it at the get-go, but that would be a complete waste of time when the Departments believe that because of the configuration of the building, lack of fire sprinkler system, lack of adequate fire truck access, no permits could be given. Okay, you've decided different. So now those reasons won't be used to reject the permit, but if somebody comes in, they don't have a smoke detector which is required, they don't have an opening that's big enough to have access to get out off if they have – maybe they've put electricity in there and wired it wrong, we don't know, each application will have to be looked at separately. And that's what I want to make very clear. But, yes, it's sort of like an analogy I would use, you go to a bank to apply for a loan. They give you an application. And you fill it and you turn it back. And they say, no, we cannot at this time, process your application because we need five years of your tax return. You provide them five years of tax returns, but it doesn't mean you get the loan. It just means then they can process the application to see if you meet the other qualifications. That's what we have in this particular case. Is my time up?

Chairman Endo: Yeah, you're at six and a half minutes, so if you could wrap it up? I mean, we don't

have to be totally strict on the minutes, but–

Ms. Johnston: Let me call your attention for one thing that you have in front of you. In the – the intervenors put in a – in their motion in opposition to the motion for clarification, Exhibit 5. It's a letter from Director of Public Works, Milton Arakawa, to Mr. Luna. And it sets out, he says we won't issue notices of violation to start the fine running. We're gonna hold off doing anything until this proceeding is decided. And then he says, but "Please keep in mind that if the BVA decides in the appellant's favor, building permits would still be required for the enclosed lanais, but said enclosures would not trigger the need for fire sprinklers." And you can read the rest of the paragraph. So the anticipation is, you all would get over the major question, put that – have that dealt with whatever way it's dealt with, and then you guys can proceed. And that's exactly what Judge McConnell's order says: process, rescind, not approving, process the permit application, then issue the permits. But issue the permits is not you don't pay attention to anything else. You've got to pay attention to– The Planning Department has to sign off on these permits. Then neither the intervenor nor the petitioner addresses this in their memos. The Building Department can't issue permits without that signature. And so our position is just clarify it. Yes, they've covered – they've gone over the main hurdle, but each enclosure is gonna have to be looked at separately. Thank you.

Chairman Endo: Okay, for the record, you were about eight minutes. Okay.

Mr. Geiger: Would you like me to do it here or at the podium? I don't care. Which would be the preference?

Chairman Endo: It doesn't matter as long as you speak into a mic.

Mr. Geiger: Okay, then I'll do it this way. It may be easier. Good afternoon, again. We're in spring training. I don't know if any of you are baseball fans, but coming here today, I was reminded of Yogi Berra. It seems like deja vu all over again. I've been here three times on this very same thing. And this is not a complex matter. This is a simple matter. But for whatever reason, it is trying to be made very complex.

We submitted an opposition. I don't know if you had an opportunity to read it. I'm not gonna go through the reasons. There were three reasons why the motion should be denied.

Number one, because your rules provide that if they're gonna make an objection or raise some problem with the Hearing Officer's recommendations, they have to let you know before you act on them so you can take them up in the proper fashion so that we can all discuss them. Your rules say if you don't do it, it's waived. We're done. We're on. We're not gonna waste our time.

The second reason was that as they've admitted, the requested changes that they want you to make don't even apply to Mr. Schulz, yet they want you to adopt an order that's gonna apply to Mr. Schulz. They can't have it both ways. It either has to apply to Mr. Schulz or it doesn't. And they're asking that you change everything. Make it apply to Mr. Schulz.

The final reason is that they're really asking you to make law here instead of acting as a quasi judicial body. They're telling you, we want you to make a new rule that the Planning – or excuse

me, that the Public Works Department in reviewing building permit applications doesn't have to tell somebody who applies, here's all the reasons why we're denying it. They can say here's a reason why we're denying it. And when you go through, they can come back and say, oh, no, there's another reason why we're denying it, and they continue on. That's not what government should do. But I'm not gonna go through that. That was in our brief.

What I wanna talk to you about is something that's a simpler issue. The objective language here is that the Director is being asked or told by you folks and the Hearing Officer, process the appeals, go ahead and issue the after-the-fact building permit. That's what he's being told. Very simple. Process the appeals and issue the permits, or excuse me, process the application and issue the permits.

There's a fellow named Albert Einstein. He's a pretty bright guy. And he had a comment I think applies here. He said, keep it simple, but not too simple. What was it that Hearing Officer McConnell suggested to you? What was it that you've decided to adopt? You're keeping it simple. You're telling the Director, process the applications, issue the permits. That's it. We're not asking and we haven't asked that you change any of that language. Leave the language as it is. It is very clear. It is simple. Go ahead and proceed. That's what we're asking for.

You understand what it means. I understand what it means. The County understands what it means. Why do we have to change it? We don't. If you make changes to it, it makes it more complex. It gets rid of the simplicity.

Finally, I am kind of disappointed, I guess, with the County in this particular case. We've been here a lot on something that should be a simple matter that was an \$800-dollar project that as you guys can really understand has cost a lot in attorney fees on something that shouldn't cost this much.

Milton Freedman, the economist, once said government seems to be the only group that can take a perfectly good piece of paper, apply a perfectly good ink to that piece of paper, and the result is worthless. And that's what we have here. We've had a lot of paper and a lot of good ink, but they're asking you to take all that good stuff and make it worthless by changing it. Don't do that. Go ahead, continue on with what you've done, keep it simple, and issue the permits. Issue the decision and order as you have adopted it. Thank you.

Chairman Endo: Thank you. Mr. Thomas?

Mr. Thomas: Chair and Members, Robert Thomas for the intervenors. It's hard to follow an act that quotes Einstein and Yogi Berra. And I'll keep it really simple to three points. Three points to make here. First of all, the same issue of waiver. The rules say you gotta bring these things up when – in the course of things so parties have a chance to respond to them. After the Board or after Judge McConnell makes his recommendations, everybody has a chance to chime in and say – you know, shoot arrows at it and say, wait a minute, that's not what you decided in the hearing. That's not what the evidence was. That's not what the law is. We all filed those. No mention of this issue. Then when the parties come along with Judge McConnell to the Board and say these are the proposed finding, this is the – the Judge comes and says this is the recommendations I have for you guys, and these were the objections made, and here's what my recommendation is, you take that into consideration, you make that decision, and you have decided unanimously to approve

Judge McConnell's order, even then, we heard nothing about this issue. It's only after it's all done, and then we end up getting last Friday I think in the mail this Board's proposed findings of fact and conclusions of law and order when all this has gone on. And we're not quite sure – I haven't heard any explanation from the County of why this issue wasn't raised earlier so we would all have a chance instead of scrambling around in the last week to come and make some reasoned arguments. But I still haven't quite heard that. I've heard that the County say that it's – the interesting point that they're concerned with wasting the Board's time, but those rules of procedure were adopted by this Board precisely to avoid us having to keep coming back and back and back on an issue we thought all was settled. So that's the first issue–waiver. You can dispose of this very simply by saying it wasn't raised in the exceptions. It's too late to raise it now.

Second, and this is probably a more troubling aspect of it is the notion that the County promised this thing. That the promise was not only made to the parties in the stipulation, but essentially to the Board, to Judge McConnell. And it's interesting that the County now says, wait a minute, there's no evidence in the record about intervenors' units when before we started this process, in order to save time, we decided among the parties and endorsed by Judge McConnell that intervenors – oh, I'm sorry, Mr. Schulz's unit would be – was typical of all the other units. So instead of putting on seven different cases involving essentially the same evidence, we would use his, and whatever the results, we'd all live by it. And so the County agreed that the intervenors intervened as parties. So we're not outsiders. We're actually parties to the appeal. And then specifically that the parties agreed that the determinations made as a result of the appeal will apply to everyone's unit, and at that time, none of us knew what the result was going to be. We knew what we thought the result would be, and we were validated by the Judge and by the Board, but we were willing to live with it. Either way, we rolled the dice on one party rather than having seven different appeals going on. And so, given the County's promise on that, it was a little bit troubling that they've now sort of backed off of it after they've lost. Not only that, so that's the first issue on the promise. They promised the Board. They promised the Judge. They promised us that first of all, the results would apply to all.

And then secondly, this goes to the substance of what they're raising here is that they said nothing except the sprinklers was going to be an issue. And they said, well, you know, there may be other issues that we want to bring up. Well, take a look. They've testified twice under oath when asked, is that the only issue in the case? And Mr. Chun testified yes. And it's cited on page 6 of our brief here. "Did you identify–?" He was asked by my partner, Mr. Murakami, "Did you identify any other issues with compliance with the building code other than what we've talked about today?" And his answer was no. And this was very consistent with the County's position in the appeal. And then as well in the correspondence it had before the appeal launched about what was the only thing holding up building permits here. It was the sprinkler issue, not these other issues.

And then finally, you know, the legal principle here, I guess, is, you know, after all this is done, this new issue is raised. We didn't really have a chance to come at – to raise our arguments at the time when they should've been raised. And it seemed sort of funny that the County says there's no evidence in the record when the reason – I point this out again, the reason there's no evidence in the record was because the County – we all agreed that there wouldn't be evidence in the record of the intervenors' units. So it's not – it shouldn't be surprising because we all agreed to use Mr. Schulz's unit as the example that would apply to everybody regardless of what the outcome was. So on that basis, we ask that the Board do what it unanimously voted to do last time and just

approve the order – the decision and order as it's written now. Thank you. Any– And of course, I don't know if I have any time left, but if you have any questions, I'd be happy to answer them.

Chairman Endo: Yeah, I think what we'll do now is open it up for questions to any of the attorneys.

Mr. Thomas: Do you want me to start, or should we start with the County, or–?

Chairman Endo: No, you can just sit down and I'll just – based on the question, we'll just have somebody come up. So, Members, questions for any of the parties? Hari?

Mr. Harjinder Ajmani: Yes. I forgot your name.

Mr. Thomas: Oh, which–? Me? Oh, Robert Thomas.

Mr. Ajmani: Mr. Thomas?

Mr. Thomas: Yes?

Mr. Ajmani: When Mr. Chun was in question about if there are any other issues and he said, no, there are none.

Mr. Thomas: That's correct.

Mr. Ajmani: But he was only looking at Mr. Schulz's unit's drawings. He did not have drawings for any place, did he?

Mr. Thomas: I believe that's correct, yes.

Mr. Ajmani: So his statement could never be construed as applying to all of the units, would it?

Mr. Thomas: No, his statement, no, except for the fact I think that the stipulation, and I'm – forgive me on the timing on this, I believe the stipulation was entered into – his testimony was on June the 23rd of 2009 in his deposition. And let me get the date for you here. I wanna make sure I'm correct on the dates. The date of the stipulation in which the County agreed to this was August 14th '08. So it was beforehand. The County had already agreed that whatever the result was with respect to Mr. Schulz's unit that it would apply to all. So already we were in the process of saving time in the pre-hearing testimony that were gathering. It saved us from having to do that same process and ask that same question six other times not only in the hearing, but also in the pre-hearing process where we're taking testimony from the witnesses in order to go to the hearing. So because the stipulation was more than a few months ahead of time–

Mr. Geiger: If I may? I apologize for interrupting, but attached to our memo in opposition was a – a series of stipulated facts that were entered into by the parties in connection with the contested case hearing and with regard to each of the intervenors. The County and we all stipulated that the other people's building permits were denied for the very same reason as Mr. Schulz. No additional reasons. No other things. Same reason . . . (inaudible) . . . So it was all one issue that was before the Hearing Officer for . . . (inaudible) . . .

Mr. Thomas: But that's – I mean, so I hope I've made that clear that we've entered into this agreement with the County ahead of undertaking, you know, the very expensive process of deciding who was going to be the appellant, and whether – instead of taking six other depositions and Mr. Chun's deposition six other times, we decided ahead of time with the County that it was going to be narrowed down to one guy, one unit. That would serve as the example for the rest of everybody else and would apply to everybody else.

Mr. Ajmani: You know, I think I understand what you're saying, but I think – so the sprinkler requirement part of the objection the County had raised should not apply to any of the units according to this. But I think the enclosure has to meet the – you know, like a combustible requirement. You can make it out like plastic and so on in a building like that. Or it has enough opening for egress and ventilation and so on. So in other words there are other issues involved in approving of a – an enclosure like that. So I think the understanding here was that the County was not even looking at the other things because they were insisting on doing the sprinkler system for the entire building. So that requirement should no longer be applicable in any units. But I think that if other units are constructed exactly like Mr. Schulz has submitted to the County, then it should be – then they are both – everything is identical. But if they are not identical according to the drawings that Mr. Schulz has prepared for his unit, then I don't think you can expect the County to just give you a blanket building permit. You know what I'm saying?

Mr. Thomas: Yeah, I understand that, and I'm hoping to give you something that will alleviate those concerns that you have. That these are, in fact, the same construction, the same units. I mean, they were found by the Board in its findings of fact and conclusions of law adopted by the – this Board for the Hearing Officer. Going through, and we cite them, and we quote them at page 3 and 4 of our brief there about how these are all essentially the same. And it goes down to the–

Mr. Ajmani: "Essentially" is not – means they are exactly the same, is it?

Mr. Thomas: No, of course, not. Every – I mean, we all know that every piece of property, even the next door neighbor's can be similarly situated yet different in some ways, but I think it is key for the legal point here that they are essentially the same. That they were treated the same by the County. They've been treated the same by the Hearing Officer. The stipulation, the agreement, that we made with the County was that they would all be treated the same.

And Mr. Geiger points out a good here in the stipulated facts. And these are the documents filed on July the 30th of '09 in the Planning Department. And a stipulated statement of facts is again, a timesaving device where the parties agree ahead of time that certain facts aren't in dispute, and that we don't have to put on evidence of those facts. And if you look on page 3, paragraph 14, and this is the key, why did the County refuse to grant the after-the-fact building permits to the Arbuckles who are intervenors in this case? And the stipulated facts say that for the same reason it denied the petitioner's application. And I believe every single – if you read the further paragraph, they repeat themselves. So paragraph 14, paragraph 20, 26, 33, let me keep going here, 39, and let me finish up with the last one, okay, I don't know on that one, but the County denied them for the same reason. So the County is denying it for the same reasons as – the same reason it denied petitioner, Mr. Schulz's application. So that means that, yes, the sprinklers were an issue, and in his case, now we know that that was the only issue. Nothing else was raised. And the County denied every other one of the intervenors for the same reason it denied the petitioner's application.

And again, the question goes back – I guess, it's almost a preliminary question to this is, why – I mean, that's a very – I think it's a very good question: why wasn't this question raised in the exceptions to the Hearing Officer when it was Judge McConnell who heard the testimony, and he could say, yes, oh, I remember, we agreed beforehand, or I remember the stipulated statement of facts that said, yeah, the County denied these permits for the intervenors for the same reasons that it denied the petitioner? So it really does go back to that fact: why is this question being raised now and we're spending all this time in front of the Board when really these type - this is the whole reason you delegated the issue to Judge McConnell to hear and gather the evidence?

Mr. Ajmani: Okay, but have all the intervenors applied for after-the-fact building permits?

Mr. Thomas: Yes.

Mr. Ajmani: They have. And all their applications are pending based upon this?

Mr. Thomas: Pending this, the outcome of this proceeding, yes.

Mr. Ajmani: So I think it's reasonable to assume that the County was looking at the lack of a fire sprinkler as the main issue for not granting a permit. And they have not looked at other applications for other details that are needed, for example, ventilation requirement and combustibility and construction requirements. The County requires a fire smoke detector, so that has to be put in. But I think the fire sprinkler part has been the only – really, the issue that was settled here. That should not be an issue for not granting a deferment.

Mr. Thomas: Yes, and we absolutely agree and we thank the Board for that decision.

Mr. Ajmani: Yeah, so I think that – unless I'm reading something wrong here, if you took it as a totally blanket permit for every other unit, then I don't think that was really the – I didn't take it like that at that time. And I don't think that even Judge McConnell really gave that blanket permit application acceptance. So I think the County has to look at the other code requirements that this addition has to be met with except for the sprinkler thing. That has been decided, at least as far as I'm concerned. Am I making sense or–?

Mr. Thomas: You're making sense. I understand the position that you're taking, but if – please don't take offense that I respectfully, very respectfully disagree that the County – I guess the whole purpose of this process is to piecemeal up the building permit application, and every time they do something that a property owner doesn't think is right that they have to appeal. That the property owner then has to come before the Board and then appeal that one issue. And then if that – if the County turns out to be wrong on that issue, then it gets sent back down to the Planning – or the Public Works Department to restart up the process until the next issue comes along, and then they say, you know what? You guys got the sprinklers okay, but let me point out here – what else does it say? Light and ventilation, structurally safe, meets requirements for egress, and then finally, etc., whatever that might be. I mean, that, to me, is kind of telling that the County is signaling there that, well, we haven't quite decided what else we might wanna hold these people up on, but it could be just about anything. And it doesn't seem to make sense for the process to be broken up into pieces like that. And Judge McConnell is not cheap. Your time is worth something. Our time of course is also worth something, but that every time that – there's so many issues that can come up in the

course of the building permit application that every time one of those – a property owner or a home owner thinks oh, wait, that's not being done right, I've gotta appeal that, get it resolved, come back down, restart the process, go, go until the next issue that the County raises, then we gotta appeal that, come back down. The purpose of this Board is – I mean, you serve as sort of the overview of what's going on with the Planning – oh, no, the Public Works Department with respect to building permits. And so when they tell us that's the only issue that we have and that we litigate that issue before Judge McConnell, before the Board, we file briefs, we bring witnesses, we do all that, we're supposed to rely on what they tell us. That's the issue.

Mr. Ajmani: But do you have any reason to believe that there are intervenors' applications which are substantially different from Mr. Schulz's application that they will be denied? Or are you just sort of now trying to preempt any possible action that the County might take?

Mr. Thomas: No, I mean, in the best of all worlds, and in the best – actually, in the best of all worlds, we wouldn't be here because the position that we took throughout the course of this whole affair has not wavered a bit. As Mr. Geiger said, you know, we're here about \$800-dollar lanai enclosures, which unfortunately has cost – has turned into very expensive lanai enclosures because neither Mr. Geiger and I work cheap, unfortunately. But it's that issue I think that raises or addresses that question you had: is this something that we wanna break up into little pieces? And because – and if these other things were at issue, they could have raised them. The County could've said, well, we're denying your after-the-fact building permits because you don't have sprinklers, because you don't have XYZ. And then we would have based on that said, well, let's put on evidence, either Mr. Schulz's evidence, or if they don't wanna agree that Mr. Schulz's unit is the same as ours with respect to those issues, we'll put on evidence about our units on those particular issues, but they told us that's the only issue. So based on that, we went forward with that issue.

Mr. Ajmani: Then I think if the other intervenors' construction is identical to Mr. Schulz's construction, there will be no issue. But you cannot guarantee that either, can you?

Mr. Thomas: Well, I mean, again, I mean, I think I go back to something that we all know is that every piece of property–

Mr. Ajmani: It's not a piece of property. We're talking about just the addition, or moving of this partition from inside to the outside edge.

Mr. Thomas: You know in every relevant respect, they were exactly the same. In all respects for purposes of this Board, yes, they were exactly the same. Were they exactly the same if we go out and look at them on the ground, well, of course, not, because, you know, my windows in my house, they're all the same legally, but one window is going to be different than the other.

Mr. Ajmani: In that case, then the County will have no basis for rejecting them, would it?

Mr. Thomas: Again, I would hope that. And again, in a perfect world, the County would see, hear, listen to what this Board is telling them, listen to what Judge McConnell told them, get the clue, get the hint. Don't interfere. Don't raise unreasonable objections to processing the permit. And if this were a perfect world, I would think I would be content with that, but this experience, particularly the

fact that we're all here right now leads me to think otherwise that maybe the County did not get the message clearly enough from this Board or from Judge McConnell to treat these people fairly under the law. So I understand your position that – and I certainly wish that were – that I could rely on the County not then – trying to think of other ways to delay processing of this etc. And that – I mean, it's a minor point on our part, but it gave me great pause because I thought what could that encompass? Is it a throw away line? Is it the County telling me something that there's something else out there they have in their hip pocket that they wanna use to try to deny the permits or slow down processing? I don't know. And so I can't really say that that's true. I can't represent to you or to the other Members that that's true that based upon if you hold that, yes, the sprinkler issue has been taken care of that the County will now go forward in good faith and treat – start treating these people I think in a fair manner when my – our experience so far has been a little different.

Mr. Ajmani: Okay, I think even the last meetings and all I had said that this County was really overreaching when they were requiring the sprinkler system with this minor change on the building on the units, so think – I mean, their part, I feel bad that all the tax money and my own money has been spent on an issue where it shouldn't have been spent. But on the other hand, I don't – but I think there are other issues, like I said, ventilation, egress, construction quality, and where there's combustible construction or non-combustible construction. Those other issues have to be resolved by the County in the building permit process. And just by denying that need for a sprinkler system should not be taken as a blanker thing that now anybody can enclose the unit whichever way they like.

Mr. Thomas: And with respect, I don't think it will be.

Mr. Ajmani: That's all. That's all I have to say.

Mr. Thomas: Chair, Mr. Chair, are there other questions that I—?

Chairman Endo: Yeah, I have some questions, but I'll let the Members ask more questions first. No? Okay, I hate to add in another issue, but since we're looking at the order now, I figure we might as well toss something out. And I'm gonna ask the question of Corporation Counsel, but before we have him—

Mr. Thomas: Surely. I'll yield the mic.

Chairman Endo: I'm sorry, I'm gonna ask of our Corporation Counsel. I believe it's a question of the power of this Board that's why, but I wanna let the – give you attorneys an opportunity also to provide your input.

Mr. Thomas: Thank you.

Chairman Endo: My question is that under the Section 12-801-81, Standards of Appeal, it talks about what we can do. Specifically it says the Board may reverse a decision of the Director, and then it sets forth the standards on when we can reverse it. So the question for me is, it appears that we're limited actually, if we're just saying this error – this decision of the Director of Public Works was wrong and so it's rescinded. And I'm not so sure that we have the power to give affirmative orders to say do this, or do that, or do anything else, you know, whereas an appellate court might

have more powers. I think we might be a little more constrained in what we can do. So that's the question I'm going to pose to Mr. Giroux, but you folks want to—? In other words I'm saying I'm not even sure we can – we have the power to order a Department to issue a permit. I'm thinking all we can actually do is say what they did, that was wrong, and they have to rescind it because it was a violation of the law.

Mr. Thomas: You want us to respond first or Mr. Giroux?

Chairman Endo: Yeah, you can respond first.

Mr. Thomas: Two things: first of all, let's go back to the – hate to get all technical on here, but we're talking – I'm sorry, was Section 81, Subsection 81?

Chairman Endo: Yeah.

Mr. Thomas: Of the Board's powers? You can affirm the decision or order, of course, of the Hearing Officer. And in this case, Judge McConnell I think rightly decided that the Board or assumed that the Board had the power to issue – to order that the Departments issue or that the Departments not only rescind their objections, but then order the Department of Public Works to actually issue the permits for a couple of reasons.

First of all, again I go back to the issue this in essence, because of the timesaving – or I should say actually it's the fear of breaking up building permit applications into turning them – turning this Board essentially into every – reviewer of every single issue piecemeal. So when an issue comes up and it doesn't get checked off on the building permit application, then the property owner objects, comes to the Board and says, is the County right or wrong? Oh, they're wrong. Okay, you go back and then we keep going down the list until the next objection. The purpose of the Board, and I think – I mean, you, as I understand it, you guys are volunteers. You're doing this as a public service, not because there's some great financial reward in sitting here in this room. You're not in the business of hearing these appeals over and over and over. You're telling the Building Department, make your objections. The proper owner– You either grant, or deny, or can't process. The property owner then says – here – comes to the Board. You assign a Hearing Officer. And he says, here's the problem with the County's objections. The Board decides those are either valid objections or they're not, and then what's left in the process but to issue the permit or not. Or do we simply go back down, start the process up again until we the County finds another reason to deny the checkoff? Okay, here we come back again.

So the Hearing Officer, Judge McConnell, clearly thought, I think, because of his order that he had the power to do that – or I'm sorry, the Board has the power to order as the supervisory citizens' committee overseeing or overseeing and supervising the Department that you do have the power because you look at the way the Charter is organized, and you're under the Department of Planning, if I remember right in – from recalling what the Charter says. If you look up in the Charter provisions, it says the Department of Planning shall consist of the Planning Director, the BVA, and I think the Planning Commission, if I remember correctly. And it gives you certain powers. And essentially, you're there to determine whether not so much on the mackerel level or the micro level and micro manage what the Department of Public Works is doing, but to say are they right or wrong when it comes to issuance of building permits. I'm sorry. I wish I had the portion. I could cite to

you the portion of the Charter, but again, that's just from my recollection.

So Judge McConnell thought he had the power, thought you had the power. I think the Charter gives you that power. And the standards of appeal said that you may affirm the decision or order of the Hearing Officer. You can adopt it, change it, do whatever you want with it. And in this case, the Hearing Officer said I think quite rightly and quite reasonably that there's no sense in us going back down and starting this process all over again to give the County a chance to shoot more arrows at these guys, but just issue the permits already because they said. They testified. No other issues remain. There's nothing standing in the way of issuing these permits. Let's just issue them already. And – I mean, it's a very practical decision on Judge McConnell's part. And I think it would represent a legal, defensible, and practical decision on the Board's part. Thanks.

Ms. Johnston: Great of time. If I may respond? First of all, I'd like to hand out– You talk about stipulation. I want you guys to take a look at the stipulation that was entered into. He inferred that – he's trying to interpret now as meaning that no matter what the intervenors' units are like–

Mr. Geiger: First of all, I assume we're only answering the question of the Chair right now as opposed to getting into another argument. Am I correct?

Chairman Endo: Yeah, it would be good if we stick to that question first.

Ms. Johnston: Okay. The issue of the power?

Chairman Endo: Yeah, whether or not we even have the power to direct the Department to issue a building permit.

Ms. Johnston: I don't believe you do. I believe you have the power to determine this particular issue. You were asked on the appeal by Mr. Schulz to determine whether as a matter of law his enclosure constituted an addition which would trigger the fire sprinkler requirement, or whether – what he did to his apartment whether as an addition or alteration made the – his apartment less safe. Okay? You appointed Judge McConnell. He took the hearing in. He heard all about Mr. Schulz's apartment and determined that, no, in fact, it was an addition. It didn't make it more hazardous–Mr. Schulz's apartment, not the intervenors'. The stipulation that I passed you kind of goes to that issue is that they would be bound by the determination by the Hearings Officer and the Board on those two issues: was there an addition, and did the enclosure make the structure less safe. Well, whether or not Mr. Schulz's enclosure made the unit less safe could be determined because there was evidence presented. The intervenors', we don't have any idea. So what is being done here is, Departments, you erred as a matter of law. You shouldn't have said we're not gonna process your permits because you gotta have a sprinkler system. They appealed that. There'd be no sense in going and looking at every single application if the position was that nobody could be approved because of that issue. That issue is out of the way now. And what happens, you go back, and you say, okay, now we're gonna process. And this is the language Judge McConnell used. And quite frankly, I can live with the language of the Board. It doesn't have to be changed. Rescind, process, issue permits. It's just what they're trying to do is eliminate the middle one, the process. And that would put the Board, in the position – the position of the Fire Department, and the Department of Public Works in approving a building permit. And I don't think you have the power to do that. It's gotta go back, and they've got to do it through the normal course of the things. And if there's things that need to be corrected, then they have to be corrected before

a permit can be issued. If things are fine, then they get the permit. So the big hurdle was this legal issue. And that, if you look at the language of the stipulation, they've cited to you paragraph 2 on page 2, "The parties agree that the determinations made as a result of this appeal will apply to intervenors' units, as well as the appellant's unit." You've got to read paragraph 3:

The only issue of the intervenors vis-a-vis the Kaanapali Royal Condominium to be submitted to and determined by this appeal is the issue of the lanai enclosure, the same issue that forms the basis of Appellant Uwe Schulz's appeal from the determination by the Fire Chief dated April 9, 2008 that an after-the-fact building permit cannot be issued unless certain requirements of the Uniform Fire Code are met.

And that requirement was the sprinkler system. That's it. That's it. And so, no, that is the only issue. I think that's the only thing you can decide is say you've decided that the Department decided wrong. You can't use that as a reason not to process them. Now, you've gotta go process. But it doesn't say you don't go through every single, you know, evaluation of whether the individual's enclosure otherwise meets fire standards. Some people bought their units without the – enclosures already in. They don't have a clue. They don't have a clue. Or somebody may have gotten a handyman, an unlicensed handyman to do it. Did they use the right materials? Do they have smoke detectors? The Department, not you guys. You can't say you don't have to comply with that. The Department has to process the application, look at whatever drawings are submitted, do an inspection onsite, if needed, before they can make a determination whether that particular enclosure meets other fire standards. And they're trying to argue that, no, this is a – everybody's home free on this one no matter what you did.

Mr. Geiger: If I may, Chair, Members? We are in extreme danger of losing sight of the forest through the trees. We are here today on a motion to clarify a Hearing Officer's recommendation that you've already adopted by unanimous vote. We are not here today to reargue the facts of the case, and that's what we're hearing. That's why I commented earlier, this is to keep – let's keep focused on what we're here on today. We're here on their motion which they should've raised before. They should've made these arguments before. They haven't done it. It's waived.

Let me get back to the specific question that you've asked. You said, do you have the power to do it? And I'd say the answer is clear, yes, you do. The statute or the regulation, rather, that you're relying upon says, unless otherwise mentioned, the Board shall review the decision or order under appeal and may reverse or modify if the substantial rights of the petitioner have been prejudiced. You have adopted, and no one is disputing, and I believe the Board Members agree that Mr. Schulz's rights have been prejudiced. The Hearing Officer found it. You guys found it. We're here on an \$800-dollar lanai enclosure, and there was no basis for us to be here, but we're here. His rights have been prejudiced. You are certainly entitled under your rules because of those findings to direct the Public Works Department, the Director, to process the application, the after-the-fact building permit, and to issue the permit. It can't be clearer. It can't be simpler.

And I would point out just one final thing. This was not a situation where the Public Works Director said, oh, we have to stop processing your application. They said, we are denying your application for these reasons. That's what they said. That's what's in your record before you. The stipulation that all of the parties entered into is that everybody else was denied for the same reason, not for

other reasons, not that they were in process, and the process stopped. They were denied. So you have the power to do this. You have the power to direct these permits to be issued. That's all we're asking for. Let us proceed. Thank you.

Chairman Endo: Thank you. So you were, for the record, pointing out Section 18.36.020? That's under the County Code? And I was quoting the rules of the Board, I think.

Mr. Geiger: No, I was quoting 12-801-81, I believe.

Chairman Endo: Oh, that's probably a similar--

Mr. Geiger: Yes, yes, same provision.

Chairman Endo: Okay. Thank you. Members?

Mr. Ajmani: On this order that was -- that they had issued for your signature, Randy, 1 and 2 on the last page, just above your signature line, and I'm not a lawyer, but to me it's very clear, it says that we are directing the Department of Public Works and Fire and Public Safety that they should rescind their disapproval of the after-the-fact building permit. You're not saying that they should be granted permit.

Chairman Endo: Are you looking at--?

Mr. Ajmani: Yeah, 1 and 2. One says rescind their disapproval, and the second says that they should process the after-the-fact building permits.

Chairman Endo: Yeah, it says process and issue. You read it at the very end.

Mr. Ajmani: And issue, but only after they find everything -- I mean, the implication being that if everything else is okay in the permit application, they should issue the permit. Otherwise, we'll just say just issue the permit. Why process the building permit application if it's given that they should issue the permit? Am I making sense?

Chairman Endo: That's certainly one way of reading it.

Mr. Ajmani: I mean, that's like saying we'll hang him after the trial.

Chairman Endo: Mr. Giroux?

Mr. James Giroux: Yeah, Hari, I think you're bringing a lot of clarity, sharpness, and very good intuition to this issue because really, if you want to break it down and you want to make it simple, the only phrase that is causing any confusion is in that second paragraph after the "and," the word "issue such after-the-fact building permits." That phrase is the phrase that is causing the lawyers to get excited. That's where we're getting excited. Everybody's getting excited. So we're gonna bring it down and we're gonna look at that. Is that within our power to do to say that that has to be done? And I think, you know, we talked a lot about what's the perfect world? In a perfect world, there's only one issue and there's only one thing that would stop a permit from getting granted. And

I think in this whole process, what's really been brought to light is how complicated the building permit process is. When I saw that order, you know, that was something that raised an eyebrow in my mind. At the time of the hearing, I don't think I could clearly say, wait a second, that's clearly outside of our powers. But the issue is, how complicated is this building review? And I – when this issue was brought up formally, I did a lot of research and looking into if the Board has the power to issue – tell a Department that they have to issue a permit, does the Board have the power to usurp any other rules or laws that are also determinative of whether or not that permit can be issued. And I struggled with that. And my conclusion was no, no. And the reason no is because I'm fully aware that there's an SMA process. I'm fully aware that there's a Building Code process. I'm fully aware that there's an Electrical Code process. I'm fully aware that if all of these things are not crossed and all the I's and the dots and everything aren't crossed that just because we determined that the Department of Public Works was wrong, in its analysis of whether or not this building needed a sprinkler because of an addition, or alteration, or because it was created to be unsafe doesn't mean that we then are automatically given the power to grant that permit absent knowledge of what the full process is. And I think that's where the Board got a little bit sideswiped. I don't think Judge McConnell is fully aware of what the process is. I don't think the lawyers are fully aware of what the process is. I don't think I am fully aware of what the process is. We are completely relying on the Department to process these applications in an orderly fashion. And when they're wrong, we – it is brought to our attention, and we rule on that issue. Not a perfect process. Not the most expedient, but my reading of what your powers are, and my reading of the law, that is the clearest that we can come up with for this Board of nine people who are required to make these types of decisions with the amount of information that they have. I think that if this issue was brought up earlier at the time of the adoption of the order, this discussion could've happened, and the wording could've been clarified at that time. Again, it's an issue of since we're dealing with one person who all of the facts were litigated, and 23 other people who's in the similar situation, not the same situation, but similar that this issue has been put to rest. The Department cannot deny a building permit because it's an alteration or addition which is unsafe. That decision has been made. It's solidified. It's in the record. The Director cannot go contrary to that. But if we don't understand what the process is after that, we can't order the Director to do a process we don't understand. But if we tell him that he must process it, then that is going to be expected to happen. And that's where I think the tension is, what is that process? What are we – what's the next step? What are we waiting for? And I've seen this time and time again in the County. I don't disagree that it's a frustrating process, but with this Board's power, I think you have to understand that you're given an issue to decide, and the power to decide that is within your purview to tell the Director that he made an error, and that he needs to change that, and then the system needs to go on.

Mr. Thomas: Excuse me, Mr. Chair, may I respond to . . . (inaudible) . . . ?

Chairman Endo: Sure, if you can brief.

Mr. Thomas: I will be as brief as a lawyer can be . . . (inaudible) . . . But, yes, I'll promise to try to keep it as short as possible. First of all, I mean, it's interesting that Corporation Counsel raises this now that he'd been thinking about it. I mean, this is the purpose of raising it in the exceptions two meetings – two hearings ago so we don't get sandbagged, and we don't try to figure it out on our feet, what does the Charter say you guys can do, what does the rules say you can do. We feel like we haven't had a chance quite to respond to this. And that was the whole purpose. And again, I still haven't heard the answer to the question: why is this being raised now other than someone

didn't think of it earlier? And the whole point of this process is to make us all think of it when we're supposed to think of it, raise them so we can all argue about it, come to the conclusion, and then we all move on. It's not to draw this thing out endlessly. And unfortunately, that's what I'm hearing from Corporation Counsel is that this process is going to be drawn out, that you decide, oh, sprinklers, no problem. Go back. Something else is a problem. We come back here again. We do this whole again for six months. The Building Department – or I'm sorry, the Department of Public Works has the power to issue building permits. It denied the permits in this case for one reason only. What you do is when you reverse the Building Department or the Department of Public Works and tell them the reason you denied it was wrong, the one reason you denied it was wrong, it's semantics to say, oh, reverse the denial, but no grant of the permit. I mean, what does that leave us to do other than to trust them in good faith that they're going to go forward? And I hate to say this, but if we don't, we're gonna be back here. And I hate to say that, but it isn't a perfect world and we're going to come back, unfortunately, unless the Board issues the order. And again, I'll leave you with this point. I still haven't heard why we're talking about this now instead of when it was supposed to be raised? You guys have rules for a reason. We followed them. Why now? Thank you.

Chairman Endo: Okay. Hari, if you don't mind, I think what I'll do is I'll let each attorney just make their final remarks, and we're taking kind of too long almost, and then we'll just make a motion already, and just be done with it. Is that okay?

Mr. Ajmani: That's okay.

Chairman Endo: Okay. Mr. Geiger?

Mr. Geiger: Just real briefly. The record that you have before you is clear that there is no problem with Mr. Schulz's permit application. He has completely met all of the requirements of the Building Code. There is no evidence to the contrary. So while I appreciate what you may be saying about you have some concern about issuing the permit, certainly with regard to Mr. Schulz, that would not apply. And my concern is if you folks start piecemealing this order, because of the stipulations that have been entered into where everybody agreed that for these people before you on this appeal that there was a single issue involved, that they were all denied for that single issue, for you folks to now come in and say, oh but we can't say issue the permits, you're gonna give the County the ability to have everybody go through, and then they're gonna come and look, and okay, did they have a smoke detector out there? What are the size of the windows? Do we like the windows? Don't we like the windows? Folks, that's silly. This is an \$800-dollar lanai enclosure that should never have been denied in the first place. We shouldn't be here. Please don't make us come back. Thank you.

Ms. Johnston: The reason why I filed the motion at this point in time– You guys wanna go ahead and enter exactly what you have in the order you have, that's fine. But when it goes back to the Department, and they say, okay, we'll now process because we've been told by the Board we have to, oh, you don't have any windows that open in the unit. We can't pass it, so you're gonna take care of that. Yes, and that is the process. And the letters that went out said, we are unable to approve at this time for the following reasons: the ones that have been litigated. Those reasons no longer exist. That doesn't mean this is the only reason, and that's what they're trying to argue. So if you guys wanna go ahead and enter the order the way it is, that's fine. I agree – I happen to

agree with Mr. Geiger as far as Mr. Schulz goes. That was all covered in the hearing. And he's testified. And according to the Departments, he's met – so he'll probably get a permit very quickly. For other people, it may take more time. There are applications that maybe are not complete, but that's just the way it goes. So as I say, if we just waited, just said nothing, and then when they go through the process, and if people start screaming about it, then we're gonna have what? Seven appeals from the intervenors and 23 more appeals? And the bottom line on this is all of these people had the option of undoing their enclosure. They didn't want to spend the time and effort to simply unenclosed it and be done with it, but they've chosen because they want their enclosure to come before the Board to appeal. And once they do that, that's the process they've committed themselves to. I would just urge the Board that if you feel like clarifying the order that is out there, do so. If you don't feel like adding anything else to it, that's fine. And then we'll just probably – we'll be back here, you know, if the process breaks down somewhere as far as the applicants are concerned.

Chairman Endo: Okay, Members. Hari?

Mr. Ajmani: I want to draw your attention to one other item on this conclusion of law. It's Item 20. It says, "The work done to enclose petitioner's lanai conforms to the existing Building Code requirements." It does not say that work done to enclose petitioner's and intervenors' lanais conform to the existing Building Code requirements. So I think as far as my understanding is that the petitioner's lanai conforms to everything except for the sprinkler requirement and that we have now said should not be called for. So there shouldn't be any issue of it—the petitioner's permit. But this doesn't – this should not be taken as a granting of permits to all the intervenors' applications.

Chairman Endo: Jim?

Mr. James Shefte: Yes, Mr. Chairman, I'd like to move that the County's petition be denied and that the process – that we accept our original findings in the previous meeting. I think we have no business trying to second guess what everybody's been doing, and to try to direct infinitesimally the Building Department on how they should conduct their business, which I think is what we're sort of trying to do here, if we accept their – the County.

Chairman Endo: Is there a second?

Ms. Rachel Ball Phillips: Second.

Chairman Endo: Okay, it's been moved and seconded to deny the County's motion to clarify the findings of fact, conclusions of law, and decision and order. Further discussion? Bill?

Mr. William Kamai: I don't know who can answer this, but hypothetical situation, say we grant or we deny the County's motion, and the intervenors are granted their building permits along with Mr. Schulz, any homeowner in the future that chooses to enclose his lanai, are they granted an automatic building permit?

Chairman Endo: No. The stipulation says that they – the decision we're making now applies to all the intervenors who are now parties to the case.

Mr. Kamai: Only?

Chairman Endo: So only to the intervenors. Is that correct, Mr. Giroux?

Mr. Giroux: Yeah, that's accurate. Yeah, if anybody in the future decides to enclose their lanai, they're gonna have to get a building permit. It's gonna be reviewed by the Department to meet all codes and standards. And that's how we're gonna have to see the process work out.

Chairman Endo: If I might make one comment? It seems to me that we're damned if we do and damned if we don't. Either way, there could be problems with the application and enforcement of the order based on interpretation by either party and their attorney. So since there's going to be a lot of issues anyway, and exceptions are somewhat late based on our rules, I intend to vote for – I'm intending to vote for the motion to deny the changing of the order at this point.

Mr. Kevin Tanaka: I just wanted to say that as part of this – I mean, it's here in print, "Shall rescind their disapproval," one. And two, "Shall process the after-the-fact building permit and issue such permit." It's – we're saying that it has to be processed, and that's what, Ms. Johnston, that's what you're saying.

Ms. Johnston: That's correct.

Mr. Tanaka: So we're not rubber-stamping anything, and that's the way I read it. So – and as far as that goes, it's – I don't think we're overstepping our bounds or making a–

Chairman Endo: Well, it depends how you read it, yeah, if you don't mind my interjecting. I mean, if their commitment is only to process, then you wouldn't need to have the further sentence that says, "and issue." It would just say, "process."

Mr. Tanaka: But I think by having it – by saying "shall process and issue." If it just said, "issue," yeah, or if it just said, "process," but by having them both in there, issuing the building permit to the – what is it? Seven? That's a decision. If for any future or other units that are there, the intent I believe that this Board – the point that this Board is trying to make is that, okay, that the issue that was fire safety has been resolved, so you shall process this. Now, if there's something else, if there's – I mean, one of the other building permits came in and there's asbestos, or lead walls, or something outrageous, but it still shall be processed. So I would also tend to agree with the motion.

Chairman Endo: Okay. Further discussion?

Mr. Ajmani: Yeah, actually, I'm trying to understand what will happen if we vote with the motion, or without the – or against the motion, what are the implications of that?

Mr. Tanaka: Then we'll come back in two weeks.

Mr. Ajmani: In the real world. I think, in the lawyers world, I can see it. But what are the issues in the real world?

Chairman Endo: Well, to a certain extent, we're arguing about potential hypotheticals that might

never ever occur because – and so I don't want to waste too much more of our time because of that. In the best case, you know, all of these enclosures are fairly similar in all central respects to Uwe's. And the only reason they were denied was the fire issue. The fire issue was resolved. We said it was erroneous. So they should just do the administrative act of processing the permit, do all the other paperwork, documents that they've got to do, and then issue it. That would be the perfect world. But if I hear the County correctly, I'm hearing that they might say, well, they don't interpret the order that way, so they might do it differently, you know, so that's why I said either way, there might be issues after this is resolved.

Mr. Ajmani: Okay.

Chairman Endo: That's just my – that's my opinion.

Mr. Ajmani: Actually, what I was trying to imply was that will the voting for the motion will mean that now permits will be issued automatically, and not voting for the motion will mean that they'll go through the process, or the process will take place no matter what? The building permit application process will take place no matter what?

Mr. Tanaka: Yeah, that's my understanding. Our order, the Board's order says that the process shall continue. Specifically to Uwe, it shall be . . . (inaudible) . . .

Mr. Ajmani: Okay.

Chairman Endo: I don't know. I think that the parties are interpreting it – the intervenors and the appellant to mean that the paperwork has to be processed and that the permit will be issued. That's how they're interpreting it. Because they would say otherwise, you don't need the last sentence, "and issue." You should just say, "process." But when we're saying "process and issue" means do the paperwork, all the regular acts you'd normally do, and then issue it. So it's a directive that they get their building permits because there was only one issue: the fire safety issue. That was resolved by this appeal, so issue them their building permits. That is the, I believe, the legal position that they will be taking. Maybe they can speak to that?

Mr. Thomas: Just again without trying to open up and take more of the Board's time, they were denied for one reason: fire issue. There's no more– They've been processed. Denied. They weren't stopped. You know how sometimes they get held up in – in process, say we can't process it further because you're missing pieces. Go get the pieces and come back. No, they said the application's complete. Process. Denied. Fire sprinklers. Fire sprinklers came to you. No issue. Reversed. Go. That's all we're asking the Board to do.

Ms. Johnston: I'd just like to comment that part of the process in this – in the Planning, the SMA exemption, . . . (inaudible) . . . the Departments have to go over. And if there is a flagrant . . . (inaudible) . . . , they can notify the owners. Say, hey, you've got to cover up your wiring, or you've gotta make a bigger hole, and that's part of the process. But once you look at those things, you know that the building permit . . . (inaudible) . . . as long as they've complied with the . . . (inaudible) . . . This doesn't say the only reason– The testimony was the only reason Mr. Schulz was denied was because of the fire sprinkler issue. No such testimony about the other . . . (inaudible) . . . So I think just leave the order the way it is, and whatever happens, there may no problem with any of

the intervenors' units . . . (inaudible) . . .

Mr. Thomas: Excuse me. I'm sorry. I don't mean to interrupt, but if the County's agreeing–

Ms. Tremaine Balberdi: I'm sorry, but if you could all use the mic.

Chairman Endo: Okay. Sorry, yeah.

Mr. Thomas: I apologize. I'm sorry. Getting all excited. But if I'm hearing Corporation Counsel right that they say that the order just should be signed, maybe they can withdraw their motion, and you guys don't have to – and just do what you did last time and sign it, if that's the case, if I'm hearing correctly. Maybe the County can withdraw their motion to clarify. Again, just a suggestion.

Chairman Endo: I don't think that the County's withdrawing their motion.

Ms. Johnston: No, I'm not going to withdraw . . . (inaudible) . . .

Mr. Thomas: Okay. Oh, sorry about that.

Chairman Endo: Wishful thinking. Okay, Jim?

Mr. Shefte: I was just saying – gonna say that we can talk – beat this thing to death because like you say, there's two different opinions. And no matter what, whichever way we vote on this, it's going to follow its own course. So therefore, I'd just like to ask the Chairman if he could please call for the question.

Chairman Endo: Okay. Oh, you're just asking for a request, though. That's actually a motion. I can actually vote on a call of the question.

Mr. Shefte: Yeah, that's what I was asking for. I was asking for the motion to be voted on.

Chairman Endo: Yeah, yeah, I know that. But I mean, the call for the question is where you can by motion cut off further discussion by two-thirds vote of the Board, but we don't have to go there. We'll just say everybody had enough talking already? Yeah? Okay, good. So hearing no further discussion, all those in favor of the motion to deny the County's motion to clarify the order, please say aye and raise your hand. Okay, opposed, please say no and raise your hand.

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

VOTED: To deny the County's motion to clarify the order.

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

(Excused: S. Castro)

Chairman Endo: **Okay, motion passes, and the County's motion is denied.** Thank you.

Mr. Thomas: Thank you, Chair and Members.

Chairman Endo: Thank you.

Mr. Geiger: Excuse me. I think the second— Excuse me. I think the second item on that was actually to adopt the decision and order, and I'd ask that the Board please do that.

Chairman Endo: Oh, it was?

Mr. Geiger: Yeah, I think it was actually the first item under the agenda, Item A.

Mr. Tanaka: I mean, wasn't the—?

Mr. Geiger: I think it's an administrative action that you sign, and I'm just asking that it be done, please.

Chairman Endo: Is there a question whether or not we need to vote on that?

Mr. Geiger: No, no, I don't believe you need a vote. I just want to make sure you sign it.

Chairman Endo: Oh, okay. I'll sign it, if you give me a pen.

Mr. Geiger: I'll be happy to.

Chairman Endo: Okay. Okay. There, it's signed. Okay. Trisha, can we go back to the item – first item?

- 1. MICHAEL T. MUNEKIYO of MUNEKIYO & HIRAGA, INC. representing KEN NEWKUMET requesting a variance from Maui County Code, §18.20.040 to delete the road widening and paving requirement for the Honokala Farm Subdivision (Subdivision File No. 2.3018) located off of South Honokala Road, Honokala, Haiku, Maui, Hawaii; TMK: (2) 2-9-004:085 (BVAV 20100003).**

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

Ms. Kapua`ala: I have just a map available to the Board. We can keep this available. This is Hana Highway and the ocean would be this way. And according to this map, the TMK map, the real property tax map, Honokala Road, South Honokala Road, is here. The subject property is there in yellow. And I also have available to you the project scope. So any time you can ask me, and I can bring this to you, show this to you, to help in your deliberations. Other than that, I'll let the applicant do their presentation.

Chairman Endo: Okay, before the applicant comes forward and gives their presentation, I just want to let everyone know that we took quite a while on the other item. So it's almost three o'clock, and I might have to leave a little before 4:00. Does anybody else have to leave early today? I just want to check our timing. Okay, so I might have to step out and you folks can continue with six Members if we don't finish up. Okay.

Ms. Kapua`ala: I'll go ahead and let the applicant take the stand.

Chairman Endo: Okay.

Ms. Kimberly Skog: Good afternoon, Chair and Board Members. I'm Kimberly Skog with Munekiyo and Hiraga. And we're here before you this afternoon for an application for a variance from Title 18 relating to subdivisions for the proposed Honokala Farm Subdivision, which like Trisha said is located out past Haiku towards Huelo, East Maui. The owner and applicant is Mr. Ken Newkumet who is here with us today. And we are the planning consultants from Munekiyo and Hiraga. Mike Munekiyo is also here, and he will be doing part of the presentation to you as well. The civil engineer we worked with was Stacy Otomo from Otomo Engineering, and the geo-technical engineer who did soil sampling for the roadways was Mr. Charles . . . (inaudible) . . .

To give you some background of what the project is and what the subdivision is, this is a four-lot subdivision of an 11.96-acre parcel. Each of the four subdivided lots will measure between two and three acres. Preliminary subdivision approval was granted in June of 2007. And two conditions on that preliminary approval pertains specifically to Section 18.20.040 of the County Code, Existing Streets. And in particular, these two conditions speak to improvements on the subdivision frontage road and the subdivision access road. And it is to these two conditions that we're seeking a variance.

To give you an idea of where exactly Honokala Road is located, I don't know if you can see it well, but this yellow here is Hana Highway. This is Kaupakalua Road which comes down from Makawao and connects to Hana Highway at this point. Ulumalu Road is in this area. Twin Falls, if you're familiar with Twin Falls is just around here. Honopou is just around here. The Door of Faith Road in Huelo is a little bit past the project area. This is pretty far out in Huelo.

This is a TMK map. The gray shaded area is the subject parcel, like Trisha said. This is Hana Highway right here. South Honokala Road. South Honokala Road is a private road and it's a dead-end road that serves about ten lots. And just to give some background, Honokala Road was once one continuous stretch. And when the State made the Hana Highway, they essentially bisected Honokala Road in two. And although this looks like an access point, there's actually a pretty significant grade change between Honokala Road and Hana Highway such that this is no longer an access. And so this portion of Honokala Road really only serves as a driveway. It's a neighbor's lot. But a paper access road was made by the State right here, but this actually ends in kind of like a gully. So that's actually not a real access. So the alternate access to Honokala Road was cut into kind of the side of a – kind of a steep bank right here, and actually bisects the property of another neighbor, Mr. Gary Hipp.

This is the site plan for the subdivision. Hana Highway is right here. This here is South Honokala Road. Again, this is a gravel road. And actually, the residents who live in this neighborhood pitch in to maintain the road on their own. Again, this is the property of Mr. Gary Hipp, and this is the subject parcel. This is the neighbor, Mr. Gaffey's property. And this is the subdivision frontage road right here. And actually, this portion of the subdivision frontage actually – yeah, is essentially the driveway to Mr. Gaffey's property.

Here's a closer up view of the roadways we're talking about. Again, this is the subdivision frontage

road. This is the subdivision access road. And these are all gravel roadways right now. This is Mr. Gaffey's property and his driveway comes off of that access road this way. This is just a picture to show you where the Honokala Road comes out kind of up here, just to give you an idea. The entrance – the alternate access is kind of behind where Trisha is standing, just to give you some reference.

So Condition no. 13 of the preliminary subdivision approval said that in accordance with Section 18.20.040, improve the adjoining half of Honokala Road and the adjacent road-widening lot to the provisions of the subdivision ordinance for roadways within the agricultural district. So the specific section of the code says that "Where existing streets are adjacent to the subdivision, i.e.," – well, "the subdivision frontage, improvements as may be required by the Director shall be constructed on one-half of those portions of the streets adjacent to the subdivision provided that the portions of the streets shall have a minimum of 20 feet of pavement." So in this case, this is speaking to this road here, the subdivision frontage that's highlighted in yellow. And basically, the code requirements are that this roadway be widened to 20 feet and paved all the way across.

This is the existing condition of the road. Like I said, this is a gravel road that the residents all chip in to maintain on their own. Where I'm standing, the subject parcel is located kind of behind us to our right. This is looking mauka up the roadway. This picture is taken from the same point looking towards the ocean. The subject parcel is located here on our left. At this point, I'll have Mike take over.

Mr. Mike Munekiyo: Good afternoon, Board Members. My name is Mike Munekiyo. I just wanted to quickly talk a little bit about the circumstances and justification for the variances that we are requesting today before the Board.

The first one we are talking about is the frontage road as Kim mentioned. And this is the frontage area. Mr. Newkumet is seeking a couple of variances. Number one, rather than having the roadway paved namely with A.C. pavement, he is asking that the roadway materials that could be allowed would be compacted gravel, which would have an equivalent of all weather surface capacity to support fire equipment. So the soils engineer has indeed come up with a design to allow that. So that would be one variance, and that is again, to allow compacted gravel in lieu of pavement.

The second request that he is asking the Board to consider is whereas the code requires the entire frontage be paved, Mr. Newkumet is asking that this portion which fronts Lot 2-A be required subject to that condition. And basically, this portion of the frontage would be limited in terms of its future service capability. Mr. Gaffey would use – currently uses it as his driveway, but in terms of functional value of paving this entire area, there wouldn't be any, again, future service ability for this portion. Again, there is no connection to Hana Highway as was shown in the figure. This would, again, result in this type of configuration where the pavement area would be from fronting 2-A. And again, the pavement material that Mr. Newkumet is asking is that of compacted gravel in lieu of A.C. pavement.

So just to summarize, the code requires that the street – improvements to the street adjacent to the front – the subdivision, and that is frontage road, that be improved. Mr. Newkumet is asking that the northern portion which leads to Mr. Gaffey's property, that that section be waived, and so that the improvements would be only in the western section.

Secondly, again, that the paved surface, rather than a truly A.C. paved surface, Mr. Newkumet is asking that a compacted gravel surface, which would have the equivalent function of an all weather surface for fire vehicles, that be substituted in lieu of regular pavement. And again, this is just a map showing where it is we are asking for the frontage road improvements.

In terms of justifications, real briefly, the Board needs to consider five criteria. Number one, that there is a special geographical or physical set of circumstances affecting the variance. And again, the conditions at South Honokala Road are indeed unique. As Kim mentioned, it is a dead-end road. It serves a limited amount of lots. Ultimately, roughly, 11 or so lots. Of course, that limitation – there's a limitation in terms of access. There wouldn't be vehicles flowing in and out, number one, because it is a limited – it is a terminal – terminus type of road, Honokala is. Secondly, the Paia-Haiku Community Plan has a somewhat extensive language in terms of discouraging excessive roadway standards. And in this case, Mr. Newkumet is seeking to maintain the rural character of his neighborhood as you probably could gather from the photographs that Kim showed. And just as background, Honokala Road has been of gravel construction for many, many years. So it's a unique neighborhood. Unique in terms of its ambience, unique in terms of its access characteristics, traffic flow, number of lots, so forth.

The second criteria that the Board needs to consider is that there would be a preservation and enjoyment of property rights. The northern section of the frontage road, which we are seeking a variance for improvements will not serve the subdivision, of course, but it would – it currently serves as the driveway for Mr. Gaffey, and again, the paving of this section would not really create any value in terms of access or circulation value. So again, this is the reason we are asking for that section to be deleted from the improvements – improvement requirements. And secondly, this is a very unique neighborhood in terms of its rural agricultural quality. And it is something that is very important for Mr. Newkumet to preserve. And I think there are other neighbors as well who share similar views.

Number three, circumstances are not the result of the previous subdivision – of a previous subdivision action. Again, the conditions and character of South Honokala Road has been in existence for a few decades. There were certain situations such as the construction of Hana Highway which contributes to its ambience. The subdivision action, therefore, does not alter the conditions of the – was not created by a previous action of the subdivision.

Number four, there would be no detriment to the public health, safety, or other property. What Mr. Newkumet is proposing is an all weather surface. He has been working with the Fire Department. And there is a Fire Department comment letter in the staff report, but he has been working with the Fire Department trying to resolve – at least assure the Department that he will comply with the all weather surface requirement, and if needed, provide a fire truck turnaround. So he's willing to do that. And finally, there is appropriate zoning. This is an all agricultural area. So that's with respect to the frontage road.

The other point, Board Members, is that Mr. Newkumet is asking for a variance to the access road. There are two provisions of the code: one relates to the frontage, one relates to the access. So this access road, again, was utilized because this connection was cut off, and this was not constructed basically because there was a gully condition out here. So the code requirement that we are seeking a variance from is for this section at least. The requirement is to allow – require a 20-foot

wide paving section. And this is the variance we are requesting is to allow, again, compacted gravel. This is the frontage road. And to allow the existing width to suffice, and we'll see why it is that that's important.

So the condition of the subdivision, again, comply with or show compliance with Section 18.20.040, which requires a pavement of existing streets to provide an access to the subdivision to be a minimum width of 20 feet in areas zoned residential, rural, or agriculture. So again, the two key terms are pavement and 20 feet wide.

Again, here it is that we're looking at this road itself is the subject of this variance. I'm sorry. This is— Just to look at a couple photos: this is that section of the access road, again, as with the Honokala frontage road, it is an existing compacted gravel road. Existing width is about 12 feet wide. In some areas, it may get up to 14, but generally, overall, it's about 12 feet, plus or minus. This is a picture looking south. And really in both photos, what we have here is really a very steep cross slope. This road was cut across a very steep cross slope seen here. And I think this photo kind of shows it a little bit better, but this is the same road looking up as you head into the subdivision, but these slopes are fairly sharp. This is at the — near Hana Highway. But as you get further in, again, what you're looking at is a fairly steep cut section, so the 20-foot requirement would require some, I think, probably extraordinary engineering design principles be applied in terms of retaining walls, so forth. So that is why we are asking for that he be allowed to maintain the 12 feet width or existing width.

Again, the variance, the requirement to provide a minimal of 20 feet. And Mr. Newkumet is asking that existing width be permitted. Second would be to have that section paved. And again, Mr. Newkumet would ask that the Board allow the use of compacted gravel design to provide all weather surface capabilities.

Just going on real briefly the criteria for your consideration, again, special geographical and physical circumstances, the roadway is really hampered or limited in terms of its constructibility by the steep topography of the area. And again, as with the frontage road, there are extensive discussions with respect to excessive roadway standards in this region of the island. With respect to preservation and enjoyment of property rights, again, the rural character and ambience of this neighborhood was — is all part of the result of what occurred historically when Hana Highway was constructed and that direct access was discontinued. The applicant, again, seeks to maintain the roadway and neighborhood character that is — has been really in place for decades.

The circumstances is not a result of previous subdivision action. Again, what really led to the construction of this access road as an alternate access was the construction of Hana Highway and not really attributable to Mr. Newkumet.

Number four, there was no detriment to public health, safety, or other property. Again, Mr. Newkumet will be providing compacted gravel designed to support the emergency vehicles. And I think there has been concerns that any paving type of requirement may encourage fire vehicles speed through the neighborhood. Again, this gets back to the ambience of the neighborhood.

And finally, appropriate zoning designation as with the frontage road, we are in the agricultural district at the State, community plan, and County levels.

So these are two requests, Board Members, one relating to the frontage road to allow compacted gravel, and to allow just this portion to be improved waiving this portion, and the second relating to the access road to allow Mr. Newkumet to utilize the existing width with compacted gravel. So those are the two variances – two sets of variances before the Board. And we'd be happy to answer any questions the Board Members might have.

Chairman Endo: Thank you, Mr. Munekiyo. Do you waive reading of the staff report?

Mr. Munekiyo: We do.

Chairman Endo: Thank you. At this point, I'd like to open it up to – actually, you know, I'm going to take a five-minute – very, very brief five-minute break. In fact, we'll make it three minutes, and then – for anyone who needs to use the restroom, and then we'll come back and have public testimony. So we're in recess.

(A recess was then taken at 3:15 p.m., and the meeting reconvened at 3:20 p.m.)

Chairman Endo: This meeting is now back in session, and we will proceed with public testimony. I have four people signed up from the public testimony sign-up sheet. I'd like to ask them to come up as I call them. If you could please speak into the microphone, and you'll be limited to three minutes of testimony. So I guess I'll do the – either I'll do the timing or someone from the Planning Department will do it. The first person we have is Irwin Giroux.

Mr. Irwin Giroux: I'm a resident of the area. I've lived on this property for about 31 years. We've maintained it by hand with a pick and shovel, and carrying gravel. And it's really– The first trip up the road was horrendous. We weren't sure we could even get to our property because this road turns into a river during heavy rain. And it has been impassable at times, but through a tremendous amount of work, tremendous amount of cooperation and the people who live on the road, we – and the help of one resident who has the beautiful tractor, we've been able to maintain that road, and – as you saw it in the picture.

It is a one-lane road. In the case of anybody coming down that section, that section coming down from the hill down to the Hana Highway, it is almost impossible to pass. There's only one spot where if the people are aware of it, they can pull into there and we can pass. Otherwise, you have a long way to back down that road, which is almost impossible. And if you have a trailer or heavy equipment, why, forget it. It's going to be difficult. So what I think is, be reasonable. We need to have portions, at least, of that road widened. And I agree with the gravel. I agree with it. It's fine. But the road does need to have more ability for people to pass. Otherwise, it is dangerous. It is impossible if we get stuck. And if you have a heavy load and you're going up the hill, you will spin out. You will lose traction on that road especially during heavy rain and washout. It's a difficult thing.

And we have a question about widening the roads, spoiling the country atmosphere and ambience. That, all you have to do is look across the street to the Honokala – on the other side of the Highway, and you'll see it hasn't spoiled anything. It's a very nice job they did on the other side of the street, and it's all paved.

Creating a tremendous difficulty for widening that road at places is – all you have to do is look at Hana Highway and the cutout that was shown on the film, and you'll see that they shaped the hillside, and it did not need any kind of retaining wall for that. And it's a tremendous height.

So there's one other issue–

Chairman Endo: Mr. Giroux, could you try and–?

Mr. Giroux: Okay. I have one more issue is if this problem is not solved and these lots are sold to other parties, they will have to face other requirements like the building permit and Fire Department. They will have to approve of this road also. I don't know if that's your authority to have that blanketing all the way through, or whether people, once they develop a property are able to sell it, and then leave the problem for the new owner. I'm just asking that as a question because development without the infrastructure is I don't believe very reasonable. Okay, thank you.

Chairman Endo: Thank you. Any questions for Mr. Giroux?

Mr. Kamai: Yeah, I have a couple of questions for you, Mr. Giroux. Could you show us on that map where you live?

Mr. Giroux: I don't see it. How do you want me to do that? That map, I can hardly see.

Mr. Kamai: I'm sure staff will accommodate you.

Mr. Giroux: Our property is this right here. So we are using – we are driving all the way from our . . . (inaudible) . . . all the way down to the highway.

Chairman Endo: Could you use the microphone, please?

Mr. Giroux: I don't know exactly what distance is, but all of the problems I mentioned to you are on the access road. That's the problem–the access road. And by the way, there's a cut by who? When the State did that cutoff to realign the Hana Highway, where did they get the permission to put a road like that and that addition? And why did they do it there and not where they have it actually drawn? I mean, we had some problem here with creating ownership problems and etc.

Chairman Endo: Okay, any further questions for Mr. Giroux?

Mr. Ray Shimabuku: I have a question. You had mentioned about at times there's only one car that can pass at a time. Can you show us on the map exactly where that would occur?

Mr. Giroux: That's on this entire road. There is one spot right here. It's 14 feet wide right now. But if someone is coming down the road right here, and they get too far down, and the person coming up doesn't – they're not akamai, right, and they keep driving, and here you are head-to-head with a car, then somebody's gotta back up, or somebody's got back all the way down that road in order to pass. And it's really unreasonable. And if we're gonna add a lot more traffic–

Chairman Endo: Mr. Giroux. Any more questions for Mr. Giroux?

Mr. Shimabuku: So the place that you're concerned is from the highway up to the frontage of the proposed property?

Mr. Giroux: Yes.

Mr. Shimabuku: Okay, thank you.

Chairman Endo: Any further questions?

Mr. Kamai: So, Mr. Giroux, so you would agree with the applicant's statement that that road would serve 11 people? Eleven households?

Mr. Giroux: It has been getting worse. We started off with just maybe three different properties that were occupied, and now you see there's 11. So it's been increasing in difficulty especially people who don't know how to drive country roads. You know, they just don't realize that you can't get by. And we've had people get into arguments, fights, banging into cars, you know. And it really does need to have more – maybe you can't do a 20-foot wide, I don't know, but there's gotta be more – I really feel you need to get a little more width on that road where it's possible.

Mr. Kamai: Yeah, we wouldn't want any more fights.

Mr. Giroux: No.

Mr. Kamai: But so in your comments you made was that that access road was the one you said was like a river.

Mr. Giroux: Definitely, yeah. There's nowhere for the water to go. As a matter of fact, we did have water running off into Gary Hipp's property and he stopped us, which I understand, you know. So all the water has to go down the road right now. There's no other place for it to go.

Mr. Kamai: So my next question is, I don't know if you would know this, but so if they were widen the road for the required 20 feet, would they have to ask Mr. Hipp to—?

Mr. Giroux: I don't know. I'm not aware of that.

Unidentified Speaker: . . . (inaudible) . . .

Mr. Giroux: Okay.

Mr. Kamai: So, Mr. Giroux, you're saying that you'd agree to pockets on that road for traffic to pass, and that it be – the gravel was okay?

Mr. Giroux: I'm agreeable with gravel, yes. I mean, it would be nice if it was all paved, you know, because really, it appears to me that the County should've been involved in that from the very beginning, but instead it went right through some private property. And it's only been recently that they're even negotiating about, you know, the ownership, which is not clear yet. Gary Hipp can probably explain that.

Mr. Kamai: Okay, thank you. No more questions, Mr. Chair.

Chairman Endo: Thank you, Mr. Giroux. Next up we have Gary Hipp. Mr. Hipp, if you could please speak into the mic., and you'll have three minutes.

Mr. Gary Hipp: Greetings. My time's gonna be cut short because I really need to visual that map. And so I am a person who is questionably owns the access road which is here. And this is – I live right here and I have property up here. And so when this property – or when that Honokala Road was cut off, now I don't have anything, and this was cut off here, there's a 30-foot bank going right down there to the road. The people who lived up here just cut that through there because there wasn't anybody there at that time. But since then, this is developed, and that road then cut through the center of my property. So I negotiated for the past 14 years with the State to try to dedicate this road so that everybody would have access to their own property up here. And how some of the other properties got developed without access, I don't know. But in any event, the last time I looked on the tax map key and on the site, I am still part owner with the State of Hawaii on that piece of property—the road. So how the County can require the road to be widened without the permission of the property owners, I really don't know. So that would be my first question.

And to make comment along there is I've also got two small children, and a 20-foot wide paved road causes some difficulty for me in their safety. Right now, it's just a natural speed barrier the way the road sits right now. Also, by widening that road, we have – you know, it's beautiful there. It's absolutely a gorgeous piece of Hawaii. You've got big trees on both sides on that road overarching that road going right on through. And contrary to what Mr. Giroux said, the road on the other side, doesn't look nearly as nice. And to widen that road, all the trees usually on the right-hand side on that road going up will probably have to be taken out. So when Mike talked about the ambience, and the nature, and how the property looks, it looks great now. So I can see that maybe that there'd maybe some pockets put in so people could pass, but the idea of putting a paved road in here would just take away what most of us moved to the country for to get away from that kind of a thing. So I'll keep my time short. Anyway, I've got my letter that I've written. You probably got it in front of you there, so that would be it. Any questions?

Chairman Endo: Any questions for Mr. Hipp?

Mr. Kamai: Yeah, Mr. Hipp, so if – so you're against the widening of the road?

Mr. Hipp: Yes.

Mr. Kamai: But if we were to deny the variance, would you be compensated for the width of the road being bigger than what it is now?

Mr. Hipp: No, I don't think so because of the part that the State owns in it. So I don't think there's any compensation involved at all.

Mr. Kamai: But Mr. – the applicant would be responsible for paving it.

Mr. Hipp: Yeah, he's– To me, that's extortion. You know, how can you force a man like that to pay for a road that's not even his?

Mr. Kamai: Yes, so I'm trying to figure out who's— There's gotta be some kind of— You don't just tell somebody I'm going pave one 20-foot road and not be compensated.

Mr. Hipp: That's what the State's telling him.

Mr. Tanaka: Well, apparently, the TMK shows a roadway parcel that follows that outline cutting diagonally through your property. Is that correct?

Mr. Hipp: That's correct.

Mr. Tanaka: So, I mean, the TMK has that. It's a roadway lot.

Mr. Kamai: Okay, so the frontage variance in front of Lot No. 2-B, isn't that upon it being widened going into your property as well?

Mr. Hipp: No, it's above my property. I'm talking about the access road, which is the second part of the presentation.

Mr. Kamai: So in your estimation, how long is that access road?

Mr. Hipp: Two hundred yards. Two football fields. It isn't the greatest — you know, it is a steep road, but it can be built so the water runs down the side. And it's not necessary to have a paved road there.

Mr. Kamai: No more questions.

Chairman Endo: Any further questions? Hearing none, thank you, Mr. Hipp. Next we have Ken Gaffey, Sr.

Mr. Ken Gaffey, Sr.: Yes, I agree with Gary almost totally. I think the proposed area where they wanna make it 20 feet wide, the wider you make that road, the more water is gonna come down on the lower part of the road that's partially owned by the State, which would probably wash that out periodically when we have some bad weather. The way it is now and the way Polo has been maintaining it is we haven't had any real problems with it washing out. I mean, we all try to pitch in, and pitch in for gravel. And as far as I know, we've never had any kind of compensation from the State or County to help us maintain that portions of the road. Where I'm situated in that little triangle there right at — my property goes right to Hana Highway, I'm totally satisfied with the way the road is. And I have a large truck and I can back up and down the road. Some people just don't know how drive properly going up and down the road anyway or used to wide roads. But that's just a portion of if you're gonna live up there, that's what you have to put up with. That's all I really have to say.

Chairman Endo: Thank you. Any questions for Mr. Gaffey?

Mr. Kamai: Mr. Gaffey, so you wouldn't want to see the road paved either?

Mr. Gaffey: Oh, no, not at all. If you paved that portion, you would just create a big bunch of water

coming down and whenever it rains hard. I mean, up where the proposed 20 feet wide area is, is fairly flat. I mean, it does go uphill real gradually, but below that is where it's really steep. So the more that you would make that nicer up above there, that would just cause us bigger problems down below. The way it is now, we have water coming right down through the property itself from other areas. It comes through there. We have a – when it rains real hard like it did Kona storm, we have up to a six to seven-foot wide stream coming right down through the property. It's cut off from other areas up above. There's little ditches that come in off of here and here that come in and then just go on right down through the property, go right down through here. And right in here is where we have sometimes up to a seven-foot wide stream. It goes off like a waterfall right onto Hana Highway as it is. So if you was to pave this area up in here, it would just create a whole bunch of water going down right down the roadway. And there's no way – I don't think you can improve it unless you put in giant culverts or some type of other.

Mr. Shimabuku: Mr. Chair? So, Mr. Gaffey, with your big truck, you have no problem coming up through the road making that corner to get back to your property?

Mr. Gaffey: Not at all, no. We've had – I've had big cement trucks, big 15-yard cement trucks come right into our driveway. They have no trouble coming up that road either.

Mr. Shimabuku: Okay, thank you.

Chairman Endo: Any further questions? Thank you, Mr. Gaffey. Finally we have Paul Batakis.

Mr. Paul Batakis: Yes, thank you. My nickname is Polo. They refer to me as Polo. And again my legal name is Paul Batakis. I'm a property owner at the very end of South Honokala Road at the very top of the end at the end. I own six acres. I did just get a subdivision approved a couple years ago myself.

I'm totally fine with the road the way it is. I do most of the maintenance on the road with my backhoe. I have experience as a road developer. I've built two projects: one in New Hampshire and one in Massachusetts, 65 units and 50 units. And I've installed the roads myself, so I'm pretty experienced with road construction. I agree pretty much with what Ken Gaffey and Mr. Gary Hipp have said. And being a developer, the economy's pretty bad. I don't want to create a financial burden for Ken Newkumet. I think what might be reasonable is if he did contribute some money to some improvements on the road.

One problem we've had all along – well, since I've brought property there, is there's really not a very well organized road committee. And I don't know if the Board has the authority to leave a decision up to a maybe a road committee that might be formed. They could vote on how to allocate some funds to be set aside for road improvements so that it benefits the neighborhood the way they would see the best benefit, you know, something to the idea that maybe Ken contributes three thousand dollars out of the sale of each site when he sells it so that as to not create a financial burden. And we have had like one meeting in the ten years I've owned the property trying to get a road committee together without too much success. So I would think it would be great if Ken could, you know, spearhead forming organizing a road committee. And we have talked previously in one meeting we had about installing drainage culverts and widening the road a little bit like, you know, so that it makes it passable. There has been a little bit of a problem where two cars are

coming head on to each other. Of course, they go slow, you know, it's like ten miles an hour, but still, sometimes it is difficult to pass. So if there are other areas where it could be widened to two lanes to make it easier to pass, it would be a good benefit. I think a gravel – you know, a totally gravel road is fine. There's no need to asphalt it. And I would actually not like to see asphalt. I like the natural look of it.

Chairman Endo: Three minutes. Could you finish up?

Mr. Batakis: Yeah. So I think – you know, I'm pretty much in favor of what Ken Newkumet proposes. And I could do a lot of it myself widening the road at a pretty good cost to him since I am experienced in that area. But again, the road is even fine the way it is. I have had to have road requirements met by the gas company that comes up. They need like a 13-foot height. And they're pretty particular on what roads they'll deliver gas on, and they have no problem. I have gotten large Matson containers up the road. No problem. And it's very easily accessible for fire trucks. So, yeah, I think that's about it. Thank you.

Chairman Endo: Any questions?

Mr. Ajmani: Yeah, I have one question. You said you had a subdivision done on your property, when was that?

Mr. Batakis: A two-lot subdivision about three years ago, three or four years ago.

Mr. Ajmani: Okay, and at about that time, you were not asked to do anything to the road?

Mr. Batakis: No, I was not asked to, correct.

Mr. Ajmani: Thank you.

Chairman Endo: Any other questions? Hearing none—

Mr. Shimabuku: I had a question.

Chairman Endo: Oh, go ahead.

Mr. Shimabuku: He mentioned again, traffic coming head on. Is that the same place that we were talking about previously, or there's other places since that you live on the very end of the road?

Mr. Batakis: Yeah, on this road on the access part of it, especially.

Mr. Shimabuku: But not further up the road where—?

Mr. Batakis: It actually gets wider further up the road. It's not as much of a problem and there's not as much traffic either. There's more traffic on the lower access part.

Mr. Shimabuku: Okay, thank you.

Chairman Endo: Thank you. Anyone else in the public wish to provide public testimony? Hearing none and seeing no one coming up, we will close public testimony as to this agenda item. It's now a quarter to 4:00, if we could try and deliberate quickly so we can all be present for a vote, it would be preferable. Any questions for the applicant? I have a question, otherwise. Mr. Munekiyo, I noticed that your diagrams are not to scale, and there's been a lot of questions about being able to pass and everything. Would you be able to tell us the approximate width just roughly of the access road and also of the frontage road, currently?

Mr. Munekiyo: Yes, the access road I believe Mr. Newkumet and I did measure it. It's about 12 feet, and in some areas, 14 feet, but I think predominantly, about 12 feet. And then on the South Honokala frontage road, approximately, 14 to 16 feet wide. But Mr. Newkumet is, as part of the subdivision has a roadway lot dedicated of five feet, which would for the most part bring it up to 20 feet wide.

Chairman Endo: So he's going to dedicate and improve the frontage road?

Mr. Munekiyo: Right, but the question here is just whether or not it's pavement, or asphalt, or compact gravel.

Chairman Endo: Okay. Thank you. Further questions?

Mr. Tanaka: Well, I would have had a question for the civil. Mike, maybe you can answer. You know, I realize I don't live there, but I can imagine that when it does rain that the roadway does become a stream. Has Stacy looked at addressing any – you know, along with the possibility of a gravel road, a wider road, what happens to the water?

Mr. Munekiyo: He has not.

Mr. Tanaka: At this point, no?

Mr. Munekiyo: He has strictly looked at taking the soils engineer's recommendation on the roadway pavement design and see what might be needed for – to implement that design. But as far as drainage, I think the assumption was it would be something that would need to be left as is because it's a fairly significant improvement otherwise.

Mr. Tanaka: Okay, thank you.

Chairman Endo: Actually, I have another question, Mike. You said that it was between 12 to 14 feet wide in terms of the access road, but do you know the actual width of the lot? Is it much more than that—the roadway lot?

Unidentified Speaker: It is.

Chairman Endo: It is? So if we had to improve it, there's actually room within the roadway lot to do improvements?

Mr. Munekiyo: I would imagine so.

Unidentified Speaker: Not without destroying the look of what it is, though.

Chairman Endo: Mr. Munekiyo, has your client looked at the possibility of adding any turnouts along the access road for cars to pass?

Mr. Munekiyo: Not at this point, Mr. Chair. He's considering just whether or not the existing width can be – satisfy the requirement.

Chairman Endo: Okay. Hari?

Mr. Ajmani: My question is to the Planning Department. People who reviewed this, do they have any comment on whether this variance should be accepted or denied?

Ms. Kapua`ala: Answering for the Department of Public Works, we have Mr. Lance Nakamura. He is the civil engineer with the Development Services Administration, Engineering Division.

Mr. Lance Nakamura: The Department of Public Works didn't have a recommendation. We did read the responses to the criteria and we didn't have any objection or comment.

Mr. Ajmani: Okay, what is the general view of the Planning Department? I think all the subdivision applications that have come over here, they have never accepted the less than the required width by the code. So how come they are not making any comment this time?

Mr. Nakamura: Our standard requirement is to enforce the code. You know, if you want to grant the variance, that's up to you. What we're saying is we have no recommendation for or against at this time.

Mr. Ajmani: Yeah, but in all other applications, you have always insisted on – recommended that the requirement of the width of the road shall be retained as required by the code. So why are you not saying something like that this time?

Chairman Endo: Actually, Hari, in the past several years, at least, I know that the Department of Public Works has a policy of generally not issuing a recommendation. They do the report which you have before you, but they generally don't have a recommendation. That's my recollection over the last four years. Planning Department, on the other hand, when they do a staff report, they come out with a recommendation.

Mr. Ajmani: Okay, so the Planning Department has no recommendation this time?

Chairman Endo: Trisha?

Ms. Kapua`ala: No, the Planning Department does not have jurisdiction to provide a recommendation. Because this is a Public Works' code, the Public Works Director must provide analysis and recommendations to the Board, which–

Mr. Giroux: Chair, can I address this issue?

Chairman Endo: Sure.

Mr. Giroux: In the past when we've had this issue, I think there's always been this hesitancy of having a recommendation. I think what Hari's trying to point out is that there's not even an analysis. I think that's the concern that Hari's trying to bring out. I don't think we've ever had a report where every indicator says "no comment." I think that's the concern.

Mr. Hari: Yes. Thank you. That's why I was addressing it to the Planning Department because that's what I normally see.

Ms. Kapua`ala: The Planning staff does draft the final decision and order, so I would ask – the Planning staff would ask that it should – whatever your decision is today that you provide a justification of your decision so that we may draft a decision and order properly.

Mr. Kamai: I got a question, Mr. Chair.

Chairman Endo: Yes.

Mr. Kamai: Yeah, Lance, in this letter from Captain – Fire Captain Haake, he says that you folks did not receive any subdivision plans from the applicant?

Mr. Nakamura: Yes. They have not submitted construction plans for review yet.

Mr. Kamai: My concern, Mr. Chair, is that in the past when we've approved – not that we have approved, it's just that it seems that there's a trigger involved in the number of dwellings for a subdivision that requires a road-widening for fire access. I think even there's triggers regarding fire hydrants to be installed or there's gallons per minute, if you don't have a fire sprinkler system in place.

Mr. Nakamura: Chair, can I clarify that?

Chairman Endo: Sure.

Mr. Nakamura: They submitted the preliminary plat, which is routed around to the various Departments for the specific requirements, and those requirements are listed in our preliminary subdivision approval letter. Some of those requirements are construction-related. And in order to address those construction-related conditions, the civil engineer will later submit a set of construction plans for my review. The preliminary plat has been submitted, and the conditions have been made. The subdivision construction plans have not been created and submitted for our review I guess because they wanna clarify whether or not the roadways will be required before they prepare and submit the plans.

Mr. Kamai: So in essence, we're being asked to approve a variance to the width of the road prior to the actual final subdivision plans being submitted for review by all the Departments?

Mr. Nakamura: The construction plans, but the plat – the proposed subdivision has – I mean, the plat has been submitted.

Chairman Endo: Yeah, the detailed cross sections, the exact way they would do the road, and all the engineering details on that have not been submitted, but we know where the road would have to be widened. We know where the improvements would go, basically. So they're coming up— And there's no sense in them submitting plans on a full pavement road if they're gonna get a variance and not have to do a paved road. They'll just submit construction plans for a gravel road instead, if they get the variance.

Mr. Kamai: Mr. Chair, it's not so much the gravel road as opposed to the width of the road for the ladder company to have access to the subdivision. I think it's been a point of contention in the past for other variances that – I mean, this Board had a hard time approving because of the width of the road.

Mr. Ajmani: Yeah, I think the – so the 20-foot width road requirement is – generally, the Fire Department is very strict about that. They have – we have never approved a subdivision map approval with less than 20 feet road. So that's why I'm kind of surprised that this time we don't have adequate comments about it.

Chairman Endo: Well, we have granted variances for access roads less than 20 feet. We've done that up in Kula. Oftentimes there were roadway right-of-ways that were only less than 20 feet. And neighboring landowners would never even agree to sell extra land to the developer, and so they came to us and said, well, there's absolutely no way they can get 20 feet. And so – and there were other conditions. So we gave them variances so their access roads were not always 20 feet paved. So we have done that to my recollection. But you raise a good point as to whether or not there's any concern from Fire. We don't have any representatives from the Fire Department here today. Mike?

Mr. Munekiyo: Thank you, Mr. Chair. We have been working with the Fire Department. And if I might refer the Board Members to Exhibit C which is the comment letter from the Department of Fire and Public Safety? In our discussions with Captain Haake, what he has indicated, and this is reflected in his comment no. 2, he's indicated that the Fire Code that the standards would apply to the frontage road, under – at the last sentence on no. 2, he says, "The access road to service the road is a concern, but at this time our office requires improvements to roads that front the new parcels." And I understand the concern with respect to the width of the access road getting up to the property. And so if it is that that might be a concern that would influence the actions of this Board, the applicant, and I just spoke to Mr. Newkumet, and he would be willing to a condition to provide a pullout along that access road, which would help to, I guess, facilitate passing. It's just the full 20-foot width that entire stretch would be somewhat burdensome. But I think if there could be a strategic location midpoint, or wherever that – from a constructibility standpoint, and just from a traffic flow standpoint, that might be workable for everybody, then he'd be willing to do that as well.

Chairman Endo: Okay. I'm sorry. I didn't hear. Did you say your client's willing to do one turnout at some point?

Mr. Munekiyo: One or two, whatever would be workable. I think that's something that– I guess the concern is that the full 20-foot width would be real difficult, problematic. And again, just to remind the Board of the origin of this site, of this road, was when Hana Highway was constructed. And it

was indeed something that by necessity had to be created along a site that was really not suitable for a road. But again, understanding the discussion that has been going on with the Board and of course, with some of the comments from the testifiers, I think Mr. Newkumet would be willing to at least consider a condition that would help to address that concern.

Chairman Endo: Okay. Jim? Hari? You know, I might wanna clarify something. I might have misspoke when I told you about that 20-foot thing in Upcountry, just for the record. It might've been a right-of-way issue. Lance, is there a 24-foot right-of-way minimum for access roads also?

Mr. Nakamura: Yes.

Chairman Endo: Okay, so we gave a variance from a 24-foot right-of-way access requirement, but it was different from the 20-foot paved requirement. There's a 20-foot paved requirement, Lance?

Mr. Nakamura: Yes.

Chairman Endo: Okay. So I'm not positive if we ever gave a variance in the 20-foot paved.

Mr. Ajmani: Actually, obviously, I haven't been here for all the meetings in the last five years, but I have never seen a variance granted for less than 20 feet road width for more than a three-lot subdivision.

Chairman Endo: So we should ask the Department if that's their understanding. Actually, I'm not even sure I've even seen a request of this nature before.

Mr. Ajmani: I think there was one in Makawao. There was one in Kaupo. And in both cases, we denied the request.

Chairman Endo: What was that, Lance?

Mr. Nakamura: I cannot recall.

Mr. Kamai: Question, Mr. Chair, who would be responsible for the location of the two so-called turnouts on the access road?

Chairman Endo: I believe since they're proposing it, if we were to grant this variance, the maker of the motion could impose it as a condition of the granting of the variance. And – so that would be the applicant's burden then at that point. If he wants the variance, he'd have to meet the condition which would be to add a turnout or turnouts.

Mr. Kamai: But the design and location of those turnouts is what I–

Chairman Endo: That would be up to the maker of the motion. He could say that it had to be to the satisfaction of DSA or, you know, whatever the motion he wanted it to be. Hari?

Mr. Ajmani: I think Mr. Munekiyo suggested that there are two basic variances they are seeking: one for the width of the road, and the second for paving of the road.

Chairman Endo: And also for one for just abolishing the unneeded section also.

Mr. Ajmani: The corner section. So I personally think for the abolishing of the corner section is no big deal. They can build the road which will be acceptable to the Fire Department without paving, and if the owners over there are willing to live with it, I have no objection to those kinds of things, but I think the width of the road is something I find very – I think is very important. In the future when this area is populated, the Fire Department has the proper access and the fire trucks can go through and all. So I think I am finding the less than 20 feet width very disturbing.

Chairman Endo: Okay. Anyone wants to make a motion?

Mr. Shefte: It's true, though, that there are two motions: one concerning the frontage area and the other concerns the access road.

Chairman Endo: That's actually correct. There's at least three variances, yes. There's like three different sections of road: there's the frontage road that's important; there's the frontage road that's really obsolete, not important; then there's the access road. And one is for graveling, and one is for width, yes.

Mr. Ajmani: So do we need to make three motions then, or just one motion?

Chairman Endo: It's up to the maker. You can make one omnibus motion, if you like. Just do everything.

Mr. Ajmani: Okay, I'll make a motion that we allow the granting of the variance for making the gravel road and deleting the requirement for the unimportant frontage road, but we keep the 20 feet width requirement per code.

Chairman Endo: Is there a second?

Ms. Phillips: Second.

Chairman Endo: Okay, it's been moved and seconded to grant the requested variances with regard to the two sections of the frontage road, but not as to width of the access road. Discussion?

Mr. Tanaka: Well, as part of what– I'll agree with Hari's motion. The only concern I have would be that – which I know will happen anyway, but I just wanted to state for the record is that the civil engineer addresses the issues of any time you move earth, you change drainage patterns and erosion. So my only concern is in a big storm, 20 feet across, you cut into it, and you got a 20-foot wide stream that runs down and mud flowing across Hana Highway, potentially, anyway.

Unidentified Speaker: Could I ask a question?

Chairman Endo: No, you can't ask a question, no.

Mr. Tanaka: Well, but your civil engineer will address that.

Chairman Endo: Yeah, that will part of the normal review once they are required to do–

Mr. Tanaka: And reviewed by DSA.

Chairman Endo: Discussion? Yes?

Mr. Kamai: I would support granting the motion regarding the frontage, but the portion about the access road is what I have a problem with. That the owner of the actual road says – and the people who live there have no problem with the current width, but–

Chairman Endo: Except for one.

Mr. Kamai: Yes, except for one, but again, I think the problem was to pass. And if there are two turnouts to be worked out between the people in the neighborhood as to its location along with DSA, I would support a motion like that.

Chairman Endo: Okay. From a procedural standpoint then, I would say just vote against the motion. And then if it fails, then you can propose something different.

Mr. Ajmani: I think the issue is not only just the passing with the normal traffic, but under an emergency condition, the fire truck has to go there in a hurry, and they have to reach the – for an emergency reason, somebody having a heart attack or some such thing, then – and if something were to – a bad thing were to happen, I can see some owner coming to County and say why did you not allow a 20-foot road which was required by the code and so on. So I think we should be really careful approving something which is not to code and is hampered to safety.

Mr. Shefte: Mr. Chairman, you know, the letter from the Fire Department isn't totally clear, but no. 3 says, "In regards to the variance pertaining to road improvements to the subdivision's frontage, our office requires that the entire road frontage for these new parcels to be improved because this is the fire apparatus service road to the parcels." So would that mean it's requiring 20 feet? It doesn't say that, but is that what it means?

Chairman Endo: Well, when they say "subdivision's frontage," they're talking about that section there that touches the subdivision, I believe.

Mr. Shimabuku: Mr. Chair, I have a question. You know, I would be in favor of granting this variance along with Mr. Kamai's comment on the turnoffs for the access road. My concern is that what's the Fire Department's gonna say if we do grant the variance, and then whatever permits are being submitted, then they say they cannot – you know, they gotta put their conditions in, but that we already grant the variance? How would that play out?

Chairman Endo: That's a good procedural question. Let's ask Mr. Nakamura. If we grant this variance as requested, but the comments and conditions from the Fire Department aren't super clear at this point, they could still potentially add more conditions that may not have been granted a variance, is that correct?

Mr. Nakamura: The variance request is from Title 18 requirements. The Fire Department, I guess,

they enforce their own Fire Code. I don't know that granting this variance exempts the applicant from the requirements of the Fire Code.

Mr. Shimabuku: That's what I was concerned. If we grant this, the widths and the whatever, and then the Fire Department says, oh, they gotta come in and they gotta go add fire hydrants, or make turnarounds, or whatever, they might come back again and file a variance for not putting in all those requirements. I don't know.

Chairman Endo: Mr. Munekiyo?

Mr. Munekiyo: Thank you, Mr. Chairman. We understand that there are exemptions for Title 18 of which we are seeking. And separately, we understand there are Fire Code requirements. We understand that if the Fire Code requirements conflict with our variance, then we are obligated to comply with the Fire Code requirements because we are seeking only at this point a variance from Title 18. And we're comfortable in making that distinguishing remark because we have met with Fire, and we believe we can comply with the Fire Code requirements. So again, we are only seeking Title 18 variances. And if Fire Code requirements require other improvements, we would need to comply with those. And if it conflicts and it requires them, we need a shifting in what we need to do, then we will need to do that because again, our objective right now is just the Title 18 variance.

Chairman Endo: Okay. Thank you for that clarification.

Mr. Ajmani: I have a question. So Title 18 requirement says that you should have a 20-foot road, is that right?

Mr. Munekiyo: For the frontage and access road, yes.

Mr. Ajmani: It says both?

Mr. Munekiyo: Yes.

Mr. Ajmani: Okay.

Chairman Endo: Jim?

Mr. Shefte: I was just going to say that I would agree I think with Bill and Ray that turnouts, if we could amend the motion to include turnouts rather than a 20-foot requirement on the access road, and then make it subject to – of course, to requirements of the Fire Department as one of the stipulations in the variance, then I would be comfortable voting for it.

Chairman Endo: Thank you. Any further discussion on the motion? Okay, all those in favor of the motion as stated by Member Ajmani? Oh, yes?

Mr. Aaron Shinmoto: I'd like to remind the Board that if you are going to choose to approve the variance that you consider the hold harmless and insurance requirement—the standard comments.

Chairman Endo: Okay. We'll just assume that Hari's motion included the standard one million dollars insurance and hold harmless as stated in the—

Mr. Ajmani: Yes, that will be included, yeah.

Chairman Endo: Okay, is there any objection to so construing the motion? Seeing none, we'll do so. Okay. All those in favor of the motion as stated by Hari, which grants the variance as to only the frontage road sections, but not as to the required minimum 20-foot width of the access road, please say aye and raise your right hand.

Mr. Ajmani: This is just for the frontage road?

Chairman Endo: No, no, it's the whole thing. I'm voting on your whole package. Your motion is to grant the first two requests but deny the third.

Mr. Ajmani: Yes.

Mr. Shimabuku: To widen all the way?

Chairman Endo: Yeah, his motion is for everything altogether. So we're just going to vote on it as one for now. So all those in favor of Hari's motion, please say aye. Opposed, please say no.

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

VOTED: To grant the two variances as to only the frontage road sections, but not as to the required minimum 20-foot width of the access road.

(Assenting: H. Ajmani, R. Phillips)

(Dissenting: J. Shefte, R. Shimabuku, W. Kamai, K. Tanaka)

(Excused: S. Castro)

Chairman Endo: **Okay, motion fails.** Okay. I have to leave in three minutes, so anybody want to try another motion?

Mr. Shefte: I move that we approve the variance with – as stated for the frontage road, and eliminating that little turnout to the small section, can't remember the name of it, and that we amend the – or require them to use crushed gravel paving with turnouts on the access road, and not requiring the 20-foot wide.

Chairman Endo: How many turnouts are you requiring?

Mr. Shefte: I think as determined by the Engineering Department or the engineers that– Do we have to specific about that?

Chairman Endo: It's up to you.

Mr. Shefte: I don't think we should be specific because I don't think we know.

Mr. Tanaka: You can say a minimum maybe.

Mr. Shefte: Okay, a minimum of two.

Chairman Endo: Okay, and with the standard conditions?

Mr. Shefte: Standard condition of a million dollars insurance.

Chairman Endo: And hold harmless?

Mr. Shefte: And hold harmless agreement.

Chairman Endo: Thank you. Is there a second?

Mr. Tanaka: Second.

Chairman Endo: Okay. It's been moved – I'm going to try and clarify this, it's been moved and seconded to grant all three variance requests subject to the condition that the access road portion be improved with no less than two turnouts as approved by the DSA in terms of location, and size, and everything else. And that the standard conditions of a hold harmless and million-dollar insurance requirement be imposed upon the applicant. And that the findings of fact and conclusions of law be based upon the justification as submitted by the applicant in their request.

Mr. Shefte: Eloquently stated.

Chairman Endo: Okay. Alright. Discussion?

Mr. Ajmani: Do you have any – you are not adding any condition that if the Fire Department say it's not good then, tough luck?

Chairman Endo: Okay, raise your hand before you speak. Jim?

Mr. Shefte: Yes, I would amend my motion to include subject to Fire Department approval.

Chairman Endo: You're talking about the turnouts' approval by the Fire Department?

Mr. Shefte: I'm talking about the access road, in general, you know, because the code requires a 20-foot wide access, and we're approving something less than that, or trying to approve something less than that. Therefore, I would make it subject to the Fire Department's approval of those—

Chairman Endo: At this point, we are granting a variance as to just to the subdivision requirements and the applicant has already stated they are going to deal independently with any requirements that might be imposed by the Fire Department and Fire Code. So you sure you want to add that in?

Mr. Ajmani: I think otherwise this may mean we're just kicking the can down the road. We're really not solving the problem. We're just letting it go away. Either way, it sounds like to me.

Mr. Kamai: I think, Mr. Chair, it was made clear by Mr. Nakamura regarding Title 18, and that the triggers for that would be when Fire Department would base their approval separately as far as widening of the road, as far as the frontage before the two properties. So I won't be supporting the amendment regarding fire.

Mr. Shimabuku: Mr. Chair, I believe Mr. Munekiyo had mentioned that they would be in compliance with the Fire Department's requirements.

Chairman Endo: Yes.

Mr. Shefte: Okay, I would remove the amendment.

Chairman Endo: Okay, you're withdrawing your--?

Mr. Shefte: Amendment.

Chairman Endo: Amendment? Okay. So we'll go back to the main motion. Any further discussion? All those in favor of the main motion which grants all three requested variances subject to the conditions with regard to the turnouts and everything else as stated by Member Shefte, please raise your right hand and say aye. Okay. Opposed, say no. Okay, the Chair votes aye.

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

VOTED: To grant all three requested variances subject to the conditions with regard to the turnouts and everything else as stated by Member Shefte.

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

Chairman Endo: **And the motion passes five to three, and the variances are granted subject to the conditions as stated.**

Mr. Munekiyo: Thank you, Board Members.

Chairman Endo: Okay. Thank you.

D. APPROVAL OF THE FEBRUARY 25, 2010 MEETING MINUTES

Chairman Endo: Okay. Could someone make a motion to approve the February 25, 2010 meeting minutes?

Mr. Ajmani: So moved.

Chairman Endo: Okay. Second?

Mr. Kamai: Second.

Chairman Endo: It's been moved and seconded to approve the February 25, 2010 meeting minutes. Discussion? Hearing none, all those in favor, please say aye. Opposed, please say no. It was moved by Mr. Ajmani, seconded by Mr. Kamai, then

VOTED: To approve the February 25, 2010 meeting minutes.

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

(Excused: S. Castro)

Chairman Endo: **The motion is passed and the minutes are approved.**

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Chairman Endo: Is there a status report on the BVA contested cases?

Ms. Kapua`ala: The only status to report is that the Makila Nui Ranch's Subdivision appeals – that final D&O shall be reaching our office shortly. So that will be a – something that will be coming up on your agenda very soon.

Chairman Endo: Okay. Thank you.

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

Chairman Endo: Next meeting is March 25. Is that going to be Hari and Jim's last meeting?

Mr. Ajmani: Yeah.

Chairman Endo: Okay. Okay, any further business of the Board? Hearing none, the meeting is adjourned.

There being no further business to come before the Board, the meeting adjourned at 4:20 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman

Board of Variances and Appeals
Minutes - March 11, 2010
Page 46

Kevin Tanaka, Vice-Chairman
William Kamai
James Shefte
Rachel Ball Phillips
Harjinder Ajmani
Ray Shimabuku

Members Excused:

Stephen Castro, Sr.

Others:

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