

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
OCTOBER 28, 2010**

**(Approved: December 9, 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, 1:36 p.m., Thursday, October 28, 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: Good afternoon. This meeting of the Board of Variances and Appeals will now come to order. It's 1:36 p.m. on October 28, 2010, and we have a quorum present of six Board Members. At this time, if there's no objection from the Members, the Chair would like to call a few items out of order, which can be dispensed with quickly so that we can then let some people leave without having to wait too long. In particular, I wanna take Item C-1, C-2, and the Nishida Appeal. Is there any objection to that? Hearing no objections, we'll start with Item C-1 of Unfinished Business.

**C. UNFINISHED BUSINESS**

1. **WILBUR AND SOCORRO WONG requesting a variance from Maui County Code, §19.30A.030 to allow the consolidation of three (3) parcels and resubdivision into two (2) parcels of 2.302 and 0.923 acres, whereby the minimum lot area for agricultural lots is two (2) acres, for property located at 360 and 370 Hahana Road, Kaupakalua, Makawao, Maui, Hawaii; TMK: (2) 2-7-0013: 072, 076, 077. (BVAV 20100011)**

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

Ms. Kapua`ala: Mr. Wong is here in the audience. If you'd like to appear before the Board, please? Thank you.

Mr. Wilbur Wong: Good afternoon, Board Members. My name is Wilbur Wong. And I was here during the last meeting in July and I was told to update the Board on our present situation. And I would like to advise the Board that the pending lawsuit has been dismissed by the court on October 19, this past October 19, 2010, and the lawsuit has been dismissed. I will be receiving the legal paperwork in about another week or so. And at this time, I would like to ask the Board to reschedule my item for a hearing, which I am prepared to proceed with.

Chairman Endo: Does the Planning Department have any suggested dates?

Mr. Aaron Shinmoto: January 27 is the next available date.

Chairman Endo: Okay?

Mr. Wong: That's fine with me.

Chairman Endo: Alright. Any comments or questions from the Board? Seeing none, thank you.

Mr. Wong: Thank you very much.

Chairman Endo: And also, is there anyone in the public who wishes to testify on this agenda item? Seeing none, we'll close public testimony as to Item C-1. Moving on to Item C-2.

**2. VICTOR V. CAMPOS AND MYRNA J. CAMPOS appealing the Planning Director's Notice of Violation (NOV 20090014) for the un-permitted storage of damaged vehicles on property located at 1215 Lower Main Street, Wailuku, Maui, Hawaii; TMK: (2) 3-4-039:076 (BVAA 20100001).**

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

Ms. Kapua`ala: And representing the Department of Planning is Ms. Mary Blaine Johnston from the Department of Corporation Counsel.

Ms. Mary Blaine Johnston: Good afternoon. Deputy Corporation Counsel Mary Blaine Johnston. In July 8<sup>th</sup>, we represented to the Board that we had reached a settlement and we have. Shortly after this meeting, I prepared a draft settlement agreement and submitted it to Mr. Rapaz who's the attorney for Mr. Campos. I was waiting for a response from him. It didn't come immediately, so this kind of got lost. And he actually did send a response a few weeks commenting on the settlement agreement, and it sort of lay there. And it's probably mostly my fault. We have since then completed – I completed the settlement agreement. I conveyed it to him at the beginning of this week for his client to review. And I think we're really close now that we're getting it back on track. And it's good that this showed up on the calendar because I kinda lost track of it. So our goal is to probably have it done within two weeks, have it finished, and signed off and conveyed to the Mayor's Office for her signature. So I don't know if you want to call this back up a little bit later so we can report on it. Probably a good idea.

Ms. Kapua`ala: Mr. Shinmoto, is there a sooner deadline that you'd like to see this come up before the Board again?

Mr. Shinmoto: It's at the Board's pleasure, but– It's up to you people. I'd like to have it sooner than later.

Ms. Johnston: I would say that one of the terms is Mr. Campos is supposed to have the vehicles removed from the property by the – December 31<sup>st</sup>. And if he doesn't, there's a penalty provision. So maybe we could have it come before December 31<sup>st</sup>–this is an extra incentive–that would be good.

Chairman Endo: How about we ask you to submit something in writing to us before the end of the year confirming that it's been settled? And if it hasn't, then we'll take it up in January?

Ms. Johnston: Okay, that's fine.

Chairman Endo: How does that sound? Is that okay?

Ms. Kapua`ala: Thank you.

Chairman Endo: Okay.

Ms. Johnston: You're gonna give us a date, then, in January?

Ms. Kapua`ala: After you submit or the parties submit some type of written confirmation of the progress, then we may be scheduling something in January. If not, it'll be settled.

Chairman Endo: Right. If you send a confirmation that you settled, then we won't schedule anything.

Ms. Johnston: Okay, so you want me to just come back and report on the settlement?

Chairman Endo: Only if you don't settle by the end of the year.

Ms. Johnston: Okay, that's fine.

Mr. Shinmoto: But we do have January 27<sup>th</sup> also available.

Ms. Johnston: Okay. I'm pretty sure we'll – now that we're back on track, we'll have it settled.

Chairman Endo: Okay, any questions or comments from the Board? Hearing none, thank you.

Ms. Johnston: Thank you.

Chairman Endo: Okay, we're gonna now move to Item B under Unfinished Business. I think it should be 4, actually. It's the Nishida Appeal.

2. **PAUL K. NISHIDA of the NISHIDA FAMILY TRUST appealing the Planning Director's Notice of Violation for maintaining a construction equipment storage and baseyard within the agricultural district for property located at 756 Pulehu Road, Kula, Maui, Hawaii; TMK: (2) 2-3-060:006 (BVAA 20100005)**
  - a. **Paul K. Nishida's proposed findings of fact, conclusions of law; certificate of service.**
  - b. **Appellee Director, Department of Planning, County of Maui's proposed findings of fact, conclusions of law; decision and order; certificate of service.**

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

Ms. Johnston: Good afternoon. Deputy Corporation Counsel Mary Blaine Johnston appearing on behalf of the Director of the Department of Planning.

Mr. James Takeyesu: James Takeyesu appearing on behalf of the appellant.

Chairman Endo: Good afternoon. I hear you have a stipulation to continue?

Ms. Johnston: Yes, we have discussed this. When we looked at the agenda, it seemed like it was very crowded and there probably would be not time for us to – at the end of it to give oral arguments, and allow the Board time to engage in deliberations. So I contacted Tremaine, and she said that the next meeting on November 10<sup>th</sup>, the one item that was on the calendar is off. And so we would like to go – be the only item on that calendar. Give us time to argue, and then to have – give the Board a chance to deliberate at the same time so you don't have to keep delaying it. And we're in agreement on that.

Mr. Takeyesu: That is correct. My understanding was that November 10<sup>th</sup> would be available.

Chairman Endo: And November 10's a Wednesday because Thursday's a holiday?

Ms. Johnston: Correct.

Chairman Endo: For some people. So is there any objection from the Members due to this continuance? No? Okay. Hearing no objection.

Ms. Johnston: Okay, and I'd like to ask the Chair what the time limitation on the closing arguments will be so we can kinda gear ourselves to finish in the time limit.

Chairman Endo: How about 20 minutes per with–? And you can split your 20 minutes, if you want to reserve for rebuttal or– Who's gonna go first? So we'll let Mr. Takeyesu go first?

Ms. Johnston: Correct.

Chairman Endo: You can do some or all of your 20 minutes, and then you can reserve some for rebuttal. And then the County can just use all 20.

Ms. Johnston: So we can practice to be sure we can–

Chairman Endo: Yeah. And we do allow power points as long as it's not new evidence.

Ms. Johnston: Okay.

Chairman Endo: Just showing what's already in evidence.

Mr. Takeyesu: If any of the Board Members is gonna have – if they have questions . . . (inaudible)  
. . .

Chairman Endo: Yeah, we'll allow for questions and answers, but we usually will let you finish your presentation first.

Ms. Johnston: Okay. That'll be great. So we'll see you in two weeks.

Chairman Endo: Okay.

Mr. Kevin Tanaka: Only closing arguments only?

Chairman Endo: Closing arguments, and then we'll review their proposed findings, and decide. Okay. So now we will move back to our Public Hearing Item B-1. Oh, you want to do C-3 first?

Ms. Kapua`ala: Mr. Arakaki's here to ask for insurance – just an insurance request.

Chairman Endo: Sometimes it can take a while, though. Yeah, okay, we'll do it then. Okay, is there any objection to doing Item C-3? It's the request to reduce insurance. We'll try and take care of that quickly, and then move on to the actual variance for today.

Ms. Kapua`ala: Thank you.

3. **WAYNE ARAKAKI of ARAKAKI ENGINEER, LLC, representing DAVID EASTON & CYNTHIA WRIGHT requesting a variance from Maui County Code, §18.16.230 to allow a two (2) lot subdivision of a 4.265 acre lot with recorded road and utility easements totaling 0.962 acres whereby the required subtraction of said easements would result in two (2) substandard agricultural lots, both of which would be less than the required two (2) acres for the proposed Easton Subdivision located off of Hana Highway at 61-63 Kakio Road, Kakio, Hana, Maui; TMK: (2) 1-4-011:027 (BVAV 20090005).**
  - a. **Wayne Arakaki, on behalf of David Easton and Cynthia Wright, requesting to amend Condition No. 2, liability insurance requirement, of the variance granted on August 27, 2009.**

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

Chairman Endo: Before we begin, let the record reflect that Member Santiago has joined us, and we now have seven Members present.

(Mr. Bart Santiago entered the meeting at approximately, 1:47 p.m.)

Chairman Endo: Also, is there anyone from the public who wishes to testify on this agenda Item C-3? Seeing none, we'll close public testimony. And, Mr. Arakaki, you can present your item.

Mr. Wayne Arakaki: Wayne Arakaki, Engineer, representing the owners. And I have a map here that I wanted to make my presentation, and whether it would be yes or no on this to delete the insurance requirement. I just wanted to show I guess for kinda liability exposure that the County may have, which actually is minimal, but it's up to your decision.

This subdivision is located along Hana Highway and Kakio Road. It's just past Hamoa Beach and it's kinda like in the rural area. There's residential homes located in the area. The green represents the perimeter of the subdivision, and the green also shows the net area.

What we did was we took out the Kakio Road road-widening dedication and also along Hana Highway. Hana Highway, in this area, belongs to the County. So we did do a roadway dedication. And it kinda mirrors with this subdivision across the street. So normally on the ag subdivision, we have 40 feet right-of-way, but now we have – we're gonna give a road-widening, and ultimately, it's gonna be 44 feet wide.

The orange or the red, that's the edge-of-pavement. And then it's a gravel road and graveled from Kakio. It meets a paved road along Hana Highway. And that goes to show you the road alignment is not really correct in this area. And that's one of the subdivision requirements that we'll be working on where we have to realign the gravel road or paved road.

The one in blue is the access easements. Both of these lots are 2.039 acres. They actually is over two acres, but because of this – we had to subtract from the access easement which is in blue. It's all in the two acres. It comes up to about 1.75 acres. The blue easement is in favor of Hana Ranch, and it's an access utility easement, which as I said before that they probably won't be able – they won't use it because Kakio Road is actually on this area here. So we tried – again, we tried to go to Hana Ranch, and tried to have that easement removed. And I guess their thinking was there's no incentive for them to remove it because it's – you know, if anything, I guess we almost have to pay money to have it removed, but actually, it's not being used. In fact, all along this roadside here, there's a wall, a short wall, about two to three feet high that the owners over the years have placed. So actually, nobody's using this area. It's just a grassy area. And then there's a small, little building, a shed, that's encroaching on top this easement. But again, it's not being used. The rural road is actually along this green alignment. And where the red is, is where the gravel road is located.

So with all this information, the owners have asked me to request if we could delete the insurance requirement. Any questions for this?

Chairman Endo: When did we grant you the variance? Just approximately.

Mr. Arakaki: November 17, 2009. And August 27, 2009, was the meeting that was granted.

Chairman Endo: Has the owner attempted to get insurance?

Mr. Arakaki: Yes, they tried. For whatever reason – I mean, like when I get this kinda variance, for whatever reason, some of them do get it, and some of them, they say it's very difficult to get. So it's a problem.

Chairman Endo: Did we meet on this before?

Mr. Santiago: Yeah, we did. We had requested some language to be provided to them that they would go back to the insurance agent with–what was required.

Chairman Endo: Right. So what happened after that?

Mr. Arakaki: They have their attorney, so I gave it to their attorney, but for some reason, he didn't get back to me. And I'm not presenting that angle where the wording – I'm just trying to go on the

merits of the liability and this project, because I feel it's really minimal. That's my explanation for this hearing.

Chairman Endo: How much insurance did we impose, previously?

Mr. Arakaki: A hundred thousand dollars. You folks did reduce the amount, which I felt was fair, but apparently, they have difficulties even getting that. It's not so much the premium, I guess. It's just getting the type of insurance, I guess.

Chairman Endo: Did they get final subdivision approval?

Mr. Arakaki: No, we're working on getting this thing approved. The reason why we didn't apply for subdivision yet is because where the alignment. What's on the deed and what's out there is totally different. So what we did was on Kakio Road, what we did was we kinda like reflected the property on the other side of the road, and that's how we created this 44-foot right-of-way.

Mr. Santiago: I just have a question. The language, was it provided to you, and was it provided to the insurance agent?

Mr. Arakaki: Just from what the variance – yeah, the variance.

Mr. Santiago: From the last meeting?

Mr. Arakaki: Yeah.

Mr. Santiago: Was there language provided to you by someone that you provided to the agent?

Mr. Arakaki: What I did was whatever you gave me, I just gave that to the owners for the attorney to look at. But again–

Mr. Santiago: That was never forwarded on to an insurance agent? You're not aware of?

Mr. Arakaki: No.

Chairman Endo: Sorry, I kind of – for myself, I kinda forgot a little bit of the details on this matter, but I thought last time when this matter came up, we kinda wanted to see – might've been a different case, so I can't say exactly it was this one, but I know for one of them I had asked to see if the insurance company or somebody could at least kind of describe what the issue is, why they can't cover it, so we get a little more detail. Was it this one?

Mr. Santiago: Yeah, I think we wanted a hold harmless along with – where possibly, the insurance coverage, but wanted to convey to the insurance agent what was required. That it was a liability coverage for if anything happened on the variance that we granted on their behalf, right?

Chairman Endo: Right.

Mr. Santiago: It doesn't appear like we've gotten any movement on that request. Will the hold

harmless suffice as opposed to—?

Chairman Endo: They aren't asking for a release from the hold harmless portion. So they would still do the hold harmless.

Mr. Arakaki: Yes, they will, yeah.

Chairman Endo: So that would indemnify the County for any liability arising out of our granting of the variance. Members, any comments or questions?

Mr. Tanaka: My personal feeling regarding— I tend to agree that the possibility is — the risk is low. And having the hold harmless agreement in place would suffice as protection for the County. That's just my personal feeling.

Mr. Santiago: Is that a question for the risk management department of the County? There's traffic there, a potential access there.

Mr. Tanaka: Well, the access to the two lots are off of the gravel road, Kakio Road, correct?

Mr. Arakaki: That's right. It's not along Hana Highway. And again, Kakio Road will be improved to subdivision standards. Even though it's approved, our subdivision, it's gonna be realigned.

Chairman Endo: Would the owners be willing to record the indemnification so that it runs with the land and applies to any subsequent owners?

Mr. Arakaki: Yes.

Chairman Endo: Current owners and future owners?

Mr. Arakaki: They would.

Chairman Endo: Because I think that's something that's not done, presently, but if it were to be done, it would be a pretty good way to have added protection, yeah. But then some people don't like to have more paperwork, and then of course, it would show up on a title report and everything.

Mr. Arakaki: Yeah, that's fine. Yeah, that would be acceptable to the owners.

Mr. Tanaka: Isn't that the case anyway that a variance—?

Chairman Endo: Is it already—? That's not the standard, though. They don't record the—

Ms. Kapua`ala: It is.

Chairman Endo: The indemnification, hold harmless—

Ms. Kapua`ala: The hold harmless agreement is recorded. And attached as exhibits are the Board's final decision and order or approval letter, and a liability insurance certificate.



Chairman Endo: But does it say that it would run with the land so that future buyers of the property would be bound also?

Ms. Kapua`ala: It says "all owners and assigns," yes. It's recorded.

Chairman Endo: So that's actually pretty good protection. That's good to know. Okay, anybody else have any questions, suggestions? Any suggestions from the Planning Department or Public Works? Mr. Nakamura, no comment?

Mr. Lance Nakamura: No.

Chairman Endo: Okay, the Chair would suggest that somebody make a motion to do something.

Mr. Tanaka: I would so move to approve this request as part of the variance previously granted to eliminate the insurance requirement.

Chairman Endo: Okay, is there a second?

Ms. Rachel Ball Phillips: Second.

Chairman Endo: Okay, it's been moved and seconded to delete the insurance condition. Keep in mind that the hold harmless and indemnification provision would still be required.

Mr. Arakaki: Yes.

Chairman Endo: Okay. Discussion? No discussion? All those in favor of the motion, please say aye. Okay. Motion— Opposed, say no.

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

**VOTED: To delete the insurance condition.**

**(Assenting: K. Tanaka, R. Phillips, B. Santiago, B. Vadla, W. Kamai,  
R. Shimabuku.)**

**(Excused: S. Castro, R. Tanner.)**

Chairman Endo: **Okay, the motion passes and your request is granted, so the insurance provision is now deleted.**

Mr. Arakaki: Thank you very much for your help.

## **B. PUBLIC HEARING**

- 1. STUART BRANDEL requesting a variance from Maui County Code, §18.20.040(B)(2) to delete the requirement of improving the adjoining half of Nahiku Road for the proposed Nahiku Homesteads Subdivision (Subdivision File No. 1.297) located off of Hana Highway at its intersection of Nahiku Road,**

**Nahiku, Maui, Hawaii; TMK: (2) 1-2-003:058. (BVAV 20100015).**

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

Ms. Kapua`ala: And here representing the applicant is Mr. Glenn Tadaki of Chris Hart and Partners, and he does have a power point presentation for you.

Mr. Glenn Tadaki: Thank you, Trish. As Trish mentioned, my name is Glenn Tadaki. I'm with the landscape architecture and planning firm of Chris Hart and Partners. With me today is the applicant, Stuart Brandel and the project Civil Engineer, Stacy Otomo. We are here to request a variance from Section 18.20.040(B)(2) of the Maui County Code to delete the subdivision requirement for improving the adjoining half of Nahiku Road as it relates to the proposed subdivision.

The subject parcel is located in the Nahiku area of Hana. It's located on the northeast corner of the intersection of Hana Highway and Nahiku Road. The site encompasses an area of 63 acres, which is largely undeveloped and densely forested. The parcel is designated for agricultural use by the State Land Use Commission, the Hana Community Plan, and Maui County zoning. The site is also located within the limits of the special management area for the County of Maui.

This map shows the location of the subject parcel in relation to the Nahiku area. So Hana Highway to the south, Nahiku Road to the west. This is a TMK plat map that shows the location of the subject parcel and surrounding properties. Again, there's Hana Highway to the south, Nahiku Road to the west. There are single family residences on two parcels: Parcel 23, which is surrounded by the subject parcel on three sides; and Parcel 17, which is southeast and adjacent to the subject parcel.

This is an aerial view of the Nahiku area showing the subject parcel. Again, Hana Highway and Nahiku Road. This is a closeup view of the subject parcel. Nahiku Road is west of and adjacent to the subject parcel. Makapipi Gulch lies adjacent to Nahiku Road. Kuhiwa Gulch lies along the eastern front of the property. Lands to the north of the subject parcel are vacant and designated for agricultural use.

The proposed Nahiku Homestead Subdivision seeks to create three ag lots of approximately, 20 acres each, and one roadway lot of approximately, eight-tenths of an acre. The proposed access for the subdivision is from Hana Highway via a cul-de-sac, which is approximately, 730 feet in length situated within a right-of-way that's 40 feet wide, and will have a minimum pavement width of 20 feet. The request for subdivision was filed on September 15<sup>th</sup>, 2008, and preliminary approval was granted on November 13<sup>th</sup> that same year.

Condition no. 14 as it relates to our variance request states, "In accordance with Section 18.20.040, Maui County Code, improve the adjoining half of Nahiku Road to the provisions of the subdivision ordinance for roadways within the agricultural district."

This slide shows the preliminary subdivision map. As previously indicated, there are three lots: Lots 28-A, 28-B, 28-C, each of which is approximately, 20 acres; and then roadway Lot 28-D, which is eight-tenths of an acre. Parcel 23, which contains a single family dwelling is surrounded on three

sides by the subject parcel.

These are some photographs of the parcels' street frontage with Nahiku Road. This first photograph is looking at an eastward direction toward the intersection of Nahiku Road to the left and then Hana Highway to the right. The second photograph is a section of Nahiku Road by the beginning of a retaining wall and guardrail just below the intersection. This is a view facing south. The pavement width here is about 21'6" wide at the start of the retaining wall, and about 26' 7" wide in the foreground. The next photo shows a section of the roadway by the end of the retaining wall. Again, this is a southerly view. Pavement width here is 15'5" at the end of the retaining wall. The next photo shows a regular section by the mailboxes near the top of Nahiku Road. This is a view facing northward. The pavement width here is about 12'7" by the mailboxes.

These photos illustrate various sections of Nahiku Road. The pavement width of this section of the road is about 10'7" by the utility pole. This section shows a pavement width of about 11'8" by the speed bump, which is in the center of this photograph. This photo shows another speed bump looking in a northward direction. Pavement width in the foreground is about 11'5" inches, and about 12'4" in the background. Here's another section of Nahiku Road. Pavement width is about 12'4" wide here in the foreground.

These are still more photos along the parcel street frontage. This photo shows a pavement width of about 11'4" in the foreground. This one shows the pavement width of 11 feet in the foreground. This photo shows a pavement width of 11'2" in the front while this photo shows a pavement width of about 14'5" in the background. This photo which is taken near the County water tank across the street from the parcel shows a section with a pavement width of 11' 9" inches in the foreground. Just below that section is another roadway section with a pavement width of 15'1" by this driveway. And this last photo shows a pavement width of 14'7" in the foreground.

This is a photo reference map which shows the location and direction from where these preceding photos were taken. This is a map showing the location of the pavement widths along the subject parcel's frontage with Nahiku Road. This is the intersection of Hana Highway and Nahiku Road. This is heading down in a northerly direction from left to right. This section below shows the portion of the roadway that connects to the above section. This is the tail end of the parcel's frontage width up Nahiku Road all the way up to its northern boundary.

In terms of justifying our request for a variance, we would like to justify the variance criteria. The first test is that there are special geographical or special circumstances or conditions that affect the subject parcel that are not common to our property in the area. We would like to note that the parcel's frontage along Nahiku Road and its street frontage which is about approximately, four-tenths of a mile. Another factor is the varying pavement widths along the parcel street frontage which vary anywhere from 10.7 feet to 26.7 feet with a median pavement width of 13 feet. For purposes of our variance request, we've used the median width because it represents the middle ground, so to speak, in terms of the various pavement widths along Nahiku Road. In other words, half the widths are greater than 13 feet and half the widths are less than 13 feet.

Another circumstance or condition is that the 300-foot segment of Nahiku Road beginning at the intersection of Hana Highway and Nahiku Road was realigned and widened and improved by the Public Works Department back in 2008. The project involved paving and realigning a 300-foot

segment of the road, as well as constructing retaining walls and installing guardrails. The reason why this portion of Nahiku Road was improved was because previous landslides had caused portions of the road to fall into Makapipi Gulch which is right next to and west of Nahiku Road. As part of that action, our client, Mr. Brandel, was required to provide additional roadway rights-of-way so that the County could approve the required section of roadway.

The other extenuating circumstance is that the project's frontage with Nahiku Road rises upward and away from the roadway surface much like an embankment while across the street is Makapipi Gulch. And the topography slopes rapidly downward and away from the roadway surface.

There are special circumstances or conditions that affect the subject parcel, which would result in extraordinary hardship to the applicant, if the applicant were to comply with the strict provisions of Section 18.20.040(B)(2). We'd like to note that Nahiku Road will not be used to provide vehicular access to the subdivision. Access will be provided by a cul-de-sac, which is 20 feet wide pavement width, which will connect to Hana Highway.

Another consideration is that the terrain along and across this subject parcel's street frontage. In other words, the embankment, Makapipi Gulch, would hinder the applicant's efforts to improve his adjoining half of Nahiku Road. Because of these physical constraints, the estimated cost to improve the parcel's entire street frontage could be as much as \$200,000. Since Nahiku Road will not be used to access the subdivision, the requirements of Section 18.20.040(B)(2) would create a hardship for the applicant.

Special circumstances or conditions that affect the subject parcel are not the result of any previous actions by the applicant, and the granting of the variance will not impact public health, safety, welfare and other property in the area. Finally, the subject parcel is zoned for agricultural use by the County of Maui.

In summary, we'd like to state that we feel the applicant's request meets the criteria for our variance. And the special geographic or physical circumstance or conditions affect the subject parcel that are not common to all property in the area. And due to these special circumstances or conditions, strict compliance with Section 18.20.040(B)(2) would result in extraordinary hardship to the applicant. The special circumstance or conditions affecting this subject parcel are not the result of any previous actions pertaining to the subdivision or the applicant. The granting of a variance will not result in any adverse impacts to public health, safety, welfare, or harm any property in the vicinity. And finally, the subject parcel has the appropriate zoning designation.

I'd like to thank you for listening to our presentation and request your thoughtful consideration of our request. I'd also like to thank Trish for all her help with the processing of the variance. We welcome any questions at this time.

Chairman Endo: Before we do that, I think we should just open up for public testimony. Is there anyone in the public who wishes to testify on this agenda item? Please come forward and sign up on the sign-up sheet. Seeing no one approaching the podium, we'll close public testimony as to this agenda item, and open it up to the Board for questions to the applicant. Mr. Tanaka?

Mr. Tanaka: The County Code requirement is improvements along Nahiku Road. That's what

you're trying to get a variance from, correct?

Mr. Tadaki: Correct. It would be to improvements to the applicant's adjoining half of Nahiku Road.

Mr. Tanaka: What I didn't see was, and I see it in there, the preliminary approval letter that there are improvements that are going to – that are required along Hana Highway.

Mr. Tadaki: That is correct. Our project Civil Engineer has been working with the State Department of Transportation, Highways Division, to address those requirements.

Mr. Tanaka: So whatever DOT says, you'll comply, correct?

Mr. Tadaki: Yes, we will.

Chairman Endo: I have a quick question. I was reading kinda quickly, so I'm probably just not quite clear on everything, but on page 4 where you talk about the formula about 200 feet where you take the lots minus one, multiply by a hundred feet and all that, does that apply to this situation or not apply?

Mr. Tadaki: In this particular case, according to the Department's staff report, this formula is not applicable.

Chairman Endo: So your obligation is all the sections of Nahiku Street that is your subdivision would have to be improved under the ordinance?

Mr. Tadaki: Yeah, according to the staff comment, the code section requires that the entire frontage of Nahiku Road be improved.

Mr. Santiago: I have a question. How long has the property been owned by Mr. Brandel?

Mr. Stuart Brandel: (Inaudible)

Mr. Santiago: So subdividing it, my assumption is that it will be sold off to different owners?

Mr. Tadaki: That is the intent would be to subdivide it into three lots for sale.

Mr. Santiago: I'm new to the island, so what's an acre cost out in Hana for a 20-acre parcel on average?

Mr. Tadaki: Well, that's a good question. Just to give you a rough idea, the parcel immediately adjacent to and east of Mr. Brandel's parcel recently sold for approximately, \$500,000 to \$600,000. However, that parcel is significantly larger in size. I think it was 121 acres. But one thing you should consider, though, is the sale price had a lot to do with the market conditions. And as you know, the economic downturn has affected a lot of landowners, and developers, as well as businesses.

Mr. Santiago: Thank you. I was trying to get a perspective on a \$200,000-dollar cost for road

improvement relative to what price you could ask for the subdivision. So that's helpful. Thank you.

Chairman Endo: Just for the record, Mr. – the owner indicated that he owned the property for eight or nine years. If we're gonna take information from the audience, please ask people to come up and speak into the mic., just for our recording purposes.

Mr. Tadaki: No problem. To reiterate what Mr. Brandel said, he has owned the property for about eight or nine years.

Chairman Endo: Thanks. Since nobody's asking a question, it looks like there'll be a lot of grading if you had to take care of that with the grade change, and the edge, and everything. It seems like there'll be actually way more than \$200,000's worth of work.

Mr. Tadaki: I'll let Mr. Otomo speak to that question. I'm sure there'll be quite a task to do that.

Mr. Santiago: It's more like building, yeah, a retaining wall.

Mr. Stacy Otomo: Good afternoon, Chair Endo and Members of the Board. My name is Stacy Otomo. The \$200,000-cost was really off the cuff, really taking how much pavement would be required, and we assumed a certain height. But I think if you look at the photos that was presented in the presentation, there's sections of a bank in the property that's fairly – almost vertical. And if we had to widen the street to County standards, it'll also involve grading ten-foot of shoulder in the right-of-way. So there would be a substantial cut in that bank, if we could physically cut it at all. So my guess is that if we actually did a design and a number, it'll be substantially greater than the \$200,000.

Chairman Endo: Thank you.

Mr. William Kamai: Mr. Otomo, so the improvements to the Hana Highway of the subject property that's fronting Hana Highway, would that be the equivalent of the kinds of improvements that the County's requiring you to do on Nahiku Road?

Mr. Otomo: The State requirement is a little more stringent. They recognize that Hana Highway has a limited right-of-way and the improvements, existing improvements, there are fairly inadequate. So they want the developer to basically, kind of standardize their road at that particular frontage. And we will be working with them. There are opportunities. If we cannot do the full improvements that they are requesting, we will be required to put in whatever is reasonable, but we're not asking for exemption from the highway improvements.

Mr. Kamai: I know, but in the Department's response, one of them was to restrict the applicant from using Nahiku Road. And being that you folks on your preliminary subdivision map, you guys have your own access road via a cul-de-sac.

Mr. Otomo: Yes, there is no intent for any of the lots to access out to Nahiku Road. Everything would come out from the cul-de-sac that's shown on the plat.

Mr. Kamai: Okay.

Chairman Endo: Members, I think at this time, it would be good to see if there's any additional comments from the Department of Public Works who has prepared a report but without recommendation, and if there's any comments.

Mr. Nakamura: Chair, Lance Nakamura from Public Works. We don't have any comments beyond what is noted in our staff report.

Chairman Endo: Okay. How about Planning? Planning, you got any comments? No?

Ms. Kapua`ala: Our only comment would be that the Board justifies what Public Works did not comment on should they want to approve the variance today.

Chairman Endo: Thank you, Trisha. Member Kamai?

Mr. Kamai: Lance, this question is for you. The Department's response to number two, the Section 18.20.040(B), so because they're not using Nahiku Road as their primary access to the property, would that suffice that no improvements on that road be made being that they're gonna create their own access road to their own property and not – there'll be open to a restricted use as your response is in number four–the Nahiku Road?

Mr. Nakamura: Regardless of where the access is from, the code does require – it talks about adjoining roadways being improved, and it doesn't necessarily say that the condition is triggered by where the access is made. So the code does require the improvement to be made. That is why we added it to the preliminary subdivision approval requirement letter.

Mr. Kamai: Regardless of access from that road?

Mr. Nakamura: Yes.

Mr. Kamai: So if there were roads on two sides of the property, his responsibility would be to widen both roads?

Mr. Nakamura: Yes.

Mr. Kamai: You gotta think about those things when you buy property, yeah? No more questions.

Chairman Endo: I have a question for Mr. Nakamura also. That's a County road, correct–Nahiku?

Mr. Nakamura: I don't know. I would have to check. The requirement isn't limited to County streets, though.

Chairman Endo: It would apply even to private roads?

Mr. Nakamura: Potentially, or, you know, like government roads.

Chairman Endo: Is there any – does anyone know whether or not the Fire Department commented on this application?

Ms. Kapua`ala: The Department of Fire and Public Safety was solicited for comments, and there was no response.

Chairman Endo: Because I would imagine – in fact, I know in similar cases, they would say they would want a minimum of 20-foot paved for their fire vehicles to have access.

Mr. Tanaka: But the access would be off of Hana Highway anyway and their private drives. So Nahiku Road wouldn't be – I mean, I would assume that.

Chairman Endo: That's true. I mean, it doesn't affect fire safety for their subdivision, but they would say it would – you know, just to improve the general area's fire safety. If you can upgrade a road, that's good for them.

Mr. Santiago: Now, there's a home along Nahiku Road, right?

Chairman Endo: Yeah, but it's not part of the subdivision, though.

Mr. Santiago: I know. It's adjoining the subdivision, the proposed subdivision, so I guess my question is how did that home get built without Nahiku Road being improved?

Chairman Endo: That lot could predate the ordinance. A lot of the lots are old. There are a lot of possible reasons. Yes?

Mr. Otomo: Chair Endo, Stacy Otomo again, regarding the Fire Department, I just want to state that we did contact them. And their comment to us was that if there's no access off of Nahiku Road, they would not require fire protection along the road. However, we would be required to do it along the cul-de-sac as being proposed, as well as they have a standard requirement where you actually come in to build a structure, there has to be fire protection within a 500-foot radius of the fire hydrant, so we needed to meet those requirements for the Fire Department.

Chairman Endo: So you'll be doing fire hydrants and everything along the cul-de-sac?

Mr. Otomo: That's correct.

Mr. Kamai: And the road width meets the fire code standards from the Department?

Mr. Otomo: Yes, the pavement in the cul-de-sac meets County standards. There's going to be a 20-foot wide pavement on that particular roadway.

Ms. Bernice Vadla: Does that leave us anywhere liable for not improving that area? I mean, do we put ourselves in a place of liability?

Chairman Endo: I guess, theoretically, it's always possible that if somebody were to get into an accident on Nahiku, and they could argue, oh, they wouldn't have gotten into that accident if the road had been widened somehow, or brought up to County standards at least for half of it that the County was liable. But it's not – hard to say, of course. We'll ask that to Corporation Counsel.



Mr. Giroux: Whenever people get injured on roadways, the standard industry of personal injury is to sue everybody. And a huge sector of personal injury lawsuits tax the government agencies that are responsible for maintenance and care of roads. So there's design issues. There's maintenance issues, design requirement issues. So everybody gets sucked into it. That's kind of the industry. They sue everybody and see who pays up. So when the government is looking at the roads, the requirements, I think that there's always an issue of liability. I think the County Council also – they're always hesitant to accept roads because of that. And the State and the County are always fighting on who actually doesn't own roads now. They actually wanna not take no admissions of ownership. And that's how we get stuck with old government roads now because the State and the County don't want to take ownership responsibility because of the liability issue.

Chairman Endo: Mr. Giroux, having said that, I recall that, and you can correct me if I'm wrong that the flip side to that where negligent maintenance on the roadways or whatever are the things – can be liability to the County or State. On the other hand, generally speaking, there's a legal principle that discretionary actions or decisions are not subject to that same standard of liability. So in this case, we would be making a policy discretionary decision to allow the variance which generally would fall under a different category.

Mr. Giroux: That's possible too. Like I said, what the standard of proof or the standard of liability is, is a different issue.

Mr. Tanaka: Anything's possible as far as lawsuits. I mean, the guy sued McDonald's because his coffee was hot. Well, personally, I wouldn't wanna see any improvements done to this road. I haven't been down in years. Once upon a time in my life, I was down there almost every weekend, but – and the circumstances, well, the physical circumstances of the width of the area would be – and I wouldn't wanna see it improved to our usual County standard because that would significantly change the character of Nahiku. I used to go down that road when it was not even paved. Sorry.

Chairman Endo: That raises a good question. Were there any letters from neighbors either in support or in opposition to the variance?

Ms. Kapua`ala: None, sir.

Mr. Ray Shimabuku: Mr. Chair, I would agree that anything can happen. And being that the staff comment on that number four question that Nahiku Road would not have no access into any of the properties, I think that's a good reason that no liability would fall onto the property owners because it's an existing condition. I can see if they were gonna make an entrance from Nahiku Road. Then, you're altering the road itself. Then, it would be qualified for improvements. But being that the entrance is on Hana Highway, I agree that I guess the liability wouldn't be as bad if it was coming from the Nahiku entrance side.

Ms. Vadla: Well, the only reason I mentioned that was because we're the ones that are putting the stipulation on the subdivision owners saying that they need to do the improvements. So we're actually requesting that to be done. So in lieu of that, I don't know if it would put the onus on us as the County to get some indemnification or something like that from that.

Chairman Endo: Well, I'm assuming that the applicant has no qualms about signing the standard

condition of our indemnification hold harmless.

Mr. Tadaki: The applicant has no objection.

Mr. Nakamura: Chair, I have one more comment that I just kind of thought of that I didn't include in our report. Our Department has in the past taken into consideration the fact that certain roadways are not being used for access even though they are adjoining the subdivision. It doesn't remove the requirement to improve that roadway but – because there is a minimum standard that says – I think it says something like "The improvements as may be required by the Director." So it gives us some discretion on the nature of the improvements, but it says that – to a minimum of 20 feet. And in the ag district, the improvement is 20 feet. In urban, it would be the curb, gutter, sidewalk, that type of thing. So we have in the past, taken into consideration that certain roadways are not being used for access. We have reduced the heights of improvements that were required, but it has to be to the minimum of 20 feet, but we have taken that into consideration. In this case, we haven't analyzed it to a great amount because we never got to that point of them submitting construction plans or anything, but it's possible that we would reduce certain things, but in the case of an ag road, if you're gonna go to 20 feet, there's not that much to reduce. But what I'm saying is in the past for other urban ones, we have taken that into consideration that it not being used for access, and we have reduced the standard.

Chairman Endo: So you would perhaps have reduced the amount of shoulder required?

Mr. Nakamura: I guess it might be possible. The 20-foot pavement couldn't be reduced because of the wording in the code, but beyond that, I guess we could consider proposals beyond the pavement. We could say you need to do drainage, and swales, and cut back the bank, and all that. I mean, that's the standard requirement of the Department. Now, would we choose to reduce that? I don't know if we would or wouldn't, but just the pavement alone would require the cutting back of the bank and those types of things. But I only bring it up because the concept, we have applied it in the past taking into consideration, is access actually being granted or used off of that roadway.

Mr. Kamai: Question. Having said that, Lance, where does this – in other words, having accepted substandard roads that's designed according to your folks' approval, whatever that is, if it's a swale, pavements, where does the liability fall in terms of our decision-making, in terms of hold harmless, insurance, and so forth when the County has in the past approved something like this that's substandard? Does the burden fall on the County having designed a substandard or being – accepted a substandard design?

Mr. Nakamura: That's not a question I can answer. I don't think what I just said changes what Corp. Counsel mentioned about potential liability.

Mr. Kamai: Personally, I would like to see the roads stay as it is. If the County were to design something that's substandard than what is normal under the 20 feet width with a swale, does that indemnify us from any liability?

Mr. Giroux: Lance, I think what he's asking, has the County developed rural or ag roadway standards?

Mr. Nakamura: Yes. In this case, if you were to go to full standards, that would go up to Engineering Division for their determination, but normally, I would say 20 or so pavement and a graded shoulder with swales at a minimum. The actual width of the right-of-way and the pavement would depend on how they classify the roadway. But in this case, pavement, grass swales, that's generally the standard.

Mr. Kamai: And that's what I don't wanna see, personally.

Chairman Endo: Then you should grant the variance, then.

Mr. Tanaka: I have a question for Glenn or for the owner, I guess. You stated that there is no intended access off of Nahiku Road to that parcel. Is that something that can be added and say that there will be no – you know, changing it from intended use to there will be no access off of Nahiku Road?

Mr. Tadaki: Well, in terms of accessing the subdivision by motor vehicles, there will be no subdivision access from Nahiku Road. It'll be strictly from Hana Highway.

Mr. Tanaka: But if it were to be put into wording as part of the variance that says as part of the variance, there will be no vehicular access from Nahiku Road to that parcel?

Mr. Tadaki: I'll let Mr. Otomo respond.

Mr. Otomo: Kevin, to answer your question, the owner is willing to designate on the final plat that no access will be permitted along that entire frontage on Nahiku Road.

Chairman Endo: So in addition to that, you could make it a condition of the variance, and then also ask that they put it on the plat map. Okay, the Chair suggests that somebody make a motion either up or down.

Mr. Shinmoto: Excuse me, Mr. Chairman. I'd like to remind the Board that there are criteria. And this is a Public Works variance, but there are criteria to follow. Just because I don't like to see the road in Nahiku like this is not meeting the criteria. You need to go to the four items under the criteria and follow that. And just because they're gonna do the access here or there, whatever, you still need to follow the four items of the criteria to recommend approval. So I'd just like to remind the Board that we are criteria-based, so to follow that, please. And it would make it easier for us to also write up the findings after you're done.

Mr. Tanaka: I'll give it a shot. I would so move to approve the variance as presented due to special geographic, physical circumstances of the parcel. That it is not from the owner's previous actions. This would not be – well, in my belief, this would not be detrimental to public health and welfare. With the condition that it so be recorded that vehicular access shall not – there will be no vehicular access from Nahiku Road to the subject parcel. And because I know the road and I'd like to see it stay the same. And with the usual hold harmless agreement.

Chairman Endo: With or without insurance?

Mr. Tanaka: With, with. I don't know. I'll just leave it at that.

Chairman Endo: Okay. Is there a second?

Mr. Santiago: Second.

Chairman Endo: Okay, it's been moved and seconded to grant the variance with two conditions: one being that there be no vehicular access to the subdivision off Nahiku Road, and with the standard hold harmless provision as set forth in our rules. Just for clarification, though, Kevin, do you wanna just use the justifications set forth in the applicant's memorandum?

Mr. Tanaka: As presented by Chris Hart and Partners.

Chairman Endo: Yeah, as their justification for the criteria being met? You do?

Mr. Tanaka: Yes.

Chairman Endo: Okay, so if there's no objection, we will – the Members will consider that a friendly amendment to the motion. Seeing no objection, we'll amend the motion as such. Discussion? No discussion? All those in favor, please say aye. Opposed, please say no.

Mr. Cerizo: Just for clarification, that includes – the standard insurance policy is included in your motion?

Mr. Tanaka: No.

Chairman Endo: No, it did not include the insurance.

Mr. Cerizo: So there's no insurance. Okay, thank you.

Chairman Endo: Yeah, no insurance.

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

**VOTED: To grant the variance with two conditions: one being that there be no vehicular access to the subdivision off Nahiku Road, and with the standard hold harmless provision as set forth in the BVA rules. Further, to use the justifications set forth in the applicant's memorandum as the justification for the criteria being met.**

**(Assenting: K. Tanaka, B. Santiago, R. Phillips, B. Vadla, W. Kamai, R. Shimabuku.)**

**(Excused: S. Castro, R. Tanner.)**

Chairman Endo: **And the motion passed.** So your variance is granted without an insurance requirement, but with the hold harmless indemnification provision.

Mr. Tadaki: Thank you very much.

**D. APPROVAL OF THE SEPTEMBER 21, 2010, MEETING MINUTES; AND THE OCTOBER 14, 2010 MEETING AND SITE INSPECTION MINUTES**

Chairman Endo: Okay. Members, we have the September 21, 2010 and October 14, 2010 meeting minutes and site inspection minutes. Assuming you've all had a chance to review them, the Chair would request a motion to approve or amend.

Ms. Phillips: Move to approve the minutes.

Ms. Vadla: Second.

Chairman Endo: Okay, it's been and seconded to approve both of those dates' minutes. Discussion? Hearing none, all those in favor, please say aye. Opposed, please say no.

It was moved by Ms. Phillips, seconded by Ms. Vadla, then

**VOTED: To approve the September 21, 2010, meeting minutes; and the October 14, 2010 meeting and site inspection minutes.**

**(Assenting: R. Phillips, B. Vadla, K. Tanaka, B. Santiago, W. Kamai, R. Shimabuku.)**

**(Excused: S. Castro, R. Tanner.)**

Chairman Endo: **Motion is carried and the minutes are approved.**

**E. DIRECTOR'S REPORT**

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

Chairman Endo: Trisha, is there an update on BVA contested cases?

Ms. Kapua`ala: No update. Thank you.

Chairman Endo: No update for today.

**F. NEXT MEETING DATE: November 10, 2010, Wednesday**

Chairman Endo: Our next meeting is November 10, a Wednesday, not Thursday, but a Wednesday. And we will then be hearing the Nishida final arguments on that NOV on November 10.

Mr. Tanaka: The November 10, that's the only item on the agenda—the Nishida?

Ms. Kapua`ala: Yes, at this time, yes.

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

adjourned.

**G. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at 2:49 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairman  
Kevin Tanaka, Vice-Chairman  
William Kamai  
Ray Shimabuku  
Rachel Ball Phillips  
Bernice Vadla  
Bart Santiago, Jr. (1:47 p.m. - 2:49 p.m.)

**Members Excused:**

Steven Castro, Sr.  
Rick Tanner

**Others:**

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