BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MAY 12, 2011

(Approved: 6/9/2011)

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Kevin Tanaka at approximately, 1:33 p.m., Thursday, May 12, 2011, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

A quorum of the Board was present. (See Record of Attendance.)

Chair Kevin Tanaka: Call the meeting of the Board of Variances and Appeals to order. It is 1:33 and we have a quorum of seven Members. First item on the agenda, Unfinished Business, our orientation. Trisha, are you gonna start?

B. UNFINISHED BUSINESS - Orientation

1. **County of Maui Sexual Harassment Policy**
2. **Area Variances**
3. **Use Variances**
4. **Rules of Practice and Procedure for the Board of Variances and Appeals**
5. **Title 12, Streets, Sidewalks, and Public Places, Maui County Code (MCC)**
6. **Title 16, Buildings and Construction, MCC**
7. **Title 18, Subdivisions, MCC**
8. **Title 19, Zoning, MCC**
9. **Ethics**
10. **Sunshine Law**
11. **Discussion of Boards and Commissions Booklet distributed by the Department of the Corporation Counsel**
12. **Maui County Charter**
13. **Chapter 91, Administrative Procedure, Hawaii Revised Statutes (HRS)**
14. **Chapter 92, Public Agency Meetings and Records, HRS**

Ms. Trisha Kapua`ala: I'd first like to turn this over to Allan DeLima. He's the Administrative Officer for our Department, and he has a presentation on the first item, B-1, the County of Maui Sexual Harassment Policy.

Mr. Allan DeLima: Good afternoon. As Trisha said, my name is Allan DeLima. I'm the Administrative Officer for the Planning Department. And I'm here today to give you a brief overview of the County's sexual harassment policy. And the operative word is "brief." I'm Portuguese and I'm a fast-talker, so don't blink because I'm gone. And don't panic, but this was the most exciting slide in the whole presentation. I used to work for Civil Defense for a long time. I did presentations on the hurricanes and tsunamis. It was easy to keep everybody's attention because the graphics were always impressive. Sexual harassment doesn't lend itself even to humor because I'm violating the whole spirit of sexual harassment.

This first slide is what the County of Maui Sexual Harassment Policy looks like. And you should all have a copy in your binders, but if you don't, see me at your convenience and I'll make sure that you get a copy.

Now, the definition of sexual harassment: sexual harassment means unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct, or visual display of a sexual nature directed by an officer or employee to another officer, employee, or a private individual. All personnel must refrain from the following conduct: making unwelcome sexual advances or request for sexual favors, making remarks of a sexual nature, using gender-based or sexually abusive language and sexual innuendos, visually displaying materials of a sexual nature, physical contact of a sexual nature, and then the catchall phrase, "any other similar actions."

The County of Maui has a zero tolerance policy against sexual harassment and will not condone or tolerate sexual harassment in the workplace. This policy is applicable to Board and Commission Members, as well as County officers and employees.

Now, the process for filing a complaint: an individual who feels subject to sexual harassment should immediately make a complaint to his or her supervisor. Board or Commission Members who feel subjected to sexual harassment should make a complaint to his or her Chairperson. If the Chairperson is the alleged offender, the report should be made to the County's Equal Employment Opportunity Officer. And in our case, the County's EEOO Officer is the Director of Personnel Services.

There are several options for filing a complaint. The complaint may be filed with the Planning Director; the Planning Deputy Director; the Board or the Commission's Chairperson; the Director of Personnel Services, who is the County's EEOO Officer, again; the Hawaii Civil Rights Commission; or the Federal Equal Employment Opportunity Commission. You are encouraged to first seek internal remedies before using outside agencies as we kinda pride ourselves on keeping our own house clean.

Now, a complaint may be informal, which is a verbal or written, and an unsigned allegation. Or it can be a formal complaint, which is written and signed allegation.

The investigation process: investigation will be conducted in an unbiased, fair, and discrete manner. There will be all the appropriate safeguards to maintain confidentiality and protection from embarrassment that the law allows. An individual who is found after an investigation to be an offender shall receive the appropriate warning or discipline. Any disciplinary action prior to implementation will be reviewed by the Director of Personnel Services and approved by the County's EEOO Officer. There shall be no retaliation or discrimination against the individual who has made the complaint, conducted an investigation, or acted as a witness. Retaliatory conduct is illegal and constitutes a separate violation.

So I promised you brief and I guess I delivered for you. Is there any questions? If not, thank you so much for your kind attention.

Chairman Tanaka: Thank you very much.

Ms. Kapua`ala: Thank you, Allan. Okay, area variances and use variances. So for my portion, I will go over area variances; use variances; Title 12, Street, Sidewalks, and Public Places; Title 16, Buildings and Construction; Title 18, Subdivisions; Title 19, both Zoning, and actually, Interim Districts; and also appeals, which is all of the titles that you have jurisdiction over in the Maui County Code.

"Practical difficulty," this is a term that you will hear often. It's one of the standards used to analyze whether a property or a request qualifies for a variance. Variances that are based on practical difficulty, which are typically, area variances are generally considered to be less serious deviations from zoning requirements.

Here are some examples of area variances that the Board has previously granted. Namely, this is Kamehameha Schools. It's located in the public/quasi-public district, and they received three variances to have buildings that exceed the height ordinance by 35, 45, even 50 feet in some cases. So let's move on from here. So buildings that didn't comply. Also, in their football field/soccer field/track area, the score board and the lights received variances because it didn't qualify under the public/quasi-public ordinance.

Again, practical difficulty, and this is all based off of a Department of Corporation Counsel memo that you should have in your binders. There's five criteria to consider, which balances the need, the harm, and the alternative solutions. One, how substantial is the variance in relation to the requirements. Two, if the variance is allowed, the effect of the increased population density thus produced on available governmental facilities.

This is Maui Memorial Medical Center. In this case, it is a government facility. They received a height variance as well for this portion, the newest development of the hospital. You might recognize it like this today. For a long time, it was only this, and they needed a substantial variance, actually. They needed to exceed the heights by 51 feet.

The third criteria, whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to the adjoining properties created. Four, whether the difficulty can be obviated by some method feasible for the applicant to pursue other than a variance. And five, whether in view of the manner in which the difficulty arose and in consideration of all of the above factors, the interest of justice will be served by allowing the variance.

So in your staff reports, the staff, and most likely, the Department of Planning will use these five criteria to help analyze the applicant's justification and criteria used to grant the variance.

This is in Launiupoko. You might know that there is an issue there for walls. And it arose out of the fact that there's pedestal walls used by MECO to put their meters on. Basically, the standard is within the ag district and the rural district. In this case, it's the ag district. A wall cannot exceed four feet in height if it's located in a setback area. So as you can see, this exceeds the height. The variance was applied for. It was denied. The applicant removed two to five feet, in some cases. Now, was there a substantial change produced in the character of the neighborhood? Was there any other way to prevent the difficulty if the variance wasn't granted? This is what his property looks like today.

So in general, less scrutiny is used for practical difficulty for area variances. The greater the deviation from what is required, the more scrutiny should be given. And these considerations do not substitute the criteria for the variance as mandated by County Code. They're simply additional guidance. So if they qualify for practical difficulty, that's just a component. You know, you still have to look at the variance criteria itself as mandated by the County Code.

Here's another term we often use, "unnecessary hardship." Variances that are based on unnecessary hardship are typically for use variances, typically. And they're generally subject to a higher level of scrutiny.

So here's an example of a use variance. It's also an area variance, but a use variance we granted for Kapalua. This is a telecommunication tower, basically. It's a stealth monopole used for cell phones and located in the golf course district. So it was supposed to be a flag pole, but in this picture, there is no flag.

So unnecessary hardship: the land cannot yield a reasonable return if only – if used only for the purposes allowed in that zone. This is not a use variance, but this is something to consider. This is Mrs. Hecht's, Margaret Hecht's subdivision. She requested a variance to provide curbs, gutters, and sidewalks – oh, no, just paving for her subdivision. She has this large parcel here, and she was gonna make a small parcel here, and she didn't wanna pave going up. Now, if she didn't get a variance for paving, could her land not yield, get a reasonable return? If she didn't get this variance, she cannot otherwise use her property. That's what you should be looking at. Here's a Google image or a Bing image. This is the property. They used the analysis that we have a bamboo farm. You know, if we have to pave, we're gonna lose our bamboo farm. We're not gonna be able to use this property, otherwise,

Now, for reasonable return, we wanna look at the permitted uses as determined by the Zoning Ordinance. This criteria is met if none of the uses would allow the landowner to get a reasonable return. Now, reasonable return does not mean maximum return. So in reasonable return or unnecessary hardship, the Zoning Ordinance, therefore, prevents reasonable use of the land. Again, I cannot use this property reasonably unless I get this variance. And it doesn't mean that I cannot maximize my use. I just cannot reasonably use it.

So the variance, in this instance, would be used to prevent what would amount to confiscation of property or regulatory taking due to the application of the Zoning Ordinance. James, what is "regulatory taking?" It's – government takes your land, yeah?

Mr. James Giroux: Yeah, in the Supreme Court, there's a series of cases on takings. And basically, it's really complicated, but you can break it down to if the government has laws that restrict the use of the property so much that the property just basically loses the use of that land, then the government should compensate for that loss. So that's your basic theory of regulatory taking.

The other taking is where the government actually, you know, sits on your property, or they allow other people to use your property. So it's just a subsection of the takings. And the Constitution says that the government cannot, you know, take land from a private citizen without just compensation. So that's the idea. It doesn't mean that the government can't make laws. It means that if those laws go so far that the citizen loses the practical use of that property, then the

government should compensate that person for that.

Ms. Bernice Vadla: And would that be after-the-fact they'd buy it and they – I mean–?

Mr. Giroux: It's kind of like a forced sale. The government, when it – well, when it makes general laws, it may not take into account that that's what will happen. So it can't – when it makes the law, it can't compensate anybody. But when that person comes in for a permit, and that law affects their ability to do what they need to do to use their property, then the government then has to enter into a little dance, you know. Okay, do we wanna avoid litigation and make this person an offer? Or do we just let him sue us and we'll negotiate in court about the price that the court might deem that we have to pay? Or do we make the argument that they do have reasonable use, it's just that they don't have a maximum return? So those are all of the– You know, and that's the purpose of the variance process is because if a person is going to make that claim, they have to first come to you and make a pitch that says, you know what? If I don't get a variance, I'll lose pretty much all use of my land. And if you disagree, then they can go to court and say–

Ms. Vadla: You have that backing.

Mr. Giroux: Yeah. And it's another legal theory. It's called, "exhausting your administrative remedy" that the courts won't entertain that claim until they've come to this Body and exhausted that remedy. So you might hear litigants say, you know, if I don't get this variance, I'm going to be forced to go to circuit court. So that's what they're talking about, not so much that they disagree with your ruling. It's just that they're in a process of trying to get compensation for a perceived loss.

Ms. Kapua`ala: Thank you. Okay, this is what Corp. Counsel says as far as looking at reasonable return. It's the applicant or landowner's burden to prove that without this variance, I cannot get a reasonable return. And Corp. Counsel wants us to look at these things: the five types of evidence to be considered. And we didn't do this in the Hecht situation, but the initial purchase of the property, the market value of the property, the expenses for maintaining the property, the amount of mortgage, the annual income, yeah? So – and again, it's the applicant or landowner's burden. So what Mr. Pierce, their attorney, could've done is use this. You know, if I can't have a house on the larger lot, I can't pay my mortgage. I can't pay for the taxes for this land. The annual income – you know, it's not a good analysis, but he could've done this. It's his burden. So failure to sell the property for a permitted use after vigorous effort to sell is also evidence the land will not bring a reasonable return.

Okay. This is the second element of unnecessary hardship. The plight of the owner is due to unique circumstances and not to general conditions of the neighborhood, which may reflect unreasonableness of the Zoning Ordinance itself. Unique circumstance is something common throughout the County Code criteria for granting variances. That's the very nature of a variance that I have a unique circumstance that is not prevalent or common in the area; therefore, please grant my variance or else I can't use my land.

Mr. Giroux: Trish, can I comment on that?

Ms. Kapua`ala: Yes.

Mr. Giroux: You know, because Maui, we have a few situations where the County's entered into large lawsuits, you know, because of different decisions made administratively. And the courts have kind of given us a stern warning that if it's a situation where it's affecting a large amount of people that it's not really – the fix really isn't a variance. It's that the legislature has to go back, re-analyze its law, and make a legislative decision to change that law. It's not for the Board of Variances to decide whether that law is good or bad. It's for the Board of Variance to look at a unique situation, facts on its face, apply the law to that piece of property, and see if it's unique. I think that Maui, a lot of times, gets itself into unique situations because of its historic nature where we have towns that are built. The whole town is, you know, unique, in that it was built before the car. And then we passed laws regarding parking and situations like that. So we've created certain situations where I think, you know, arguments can be made that a subdivision would be unique or a city plat would be unique in the sense that it's historic. It was built before– The homeowner or the owner may have bought it, but it bought it in a town that already violated every Maui County code. So it has that unique type of feature or context. But the court has told us that, you know, if the County created that problem, the problem isn't for the Board of Variances to go in and fix that for the County Council. It's for the County Council to go in and fix it.

Mr. Bart Santiago: Sort of respect to the Launiupoko walls.

Mr. Giroux: Yeah, point and chief. Yeah, the geography didn't cause it. The – you know.

Ms. Kapua`ala: Very well stated, James. I mean, those are excellent examples. Parking requirements in the small towns: Paia Town, Lahaina Town, Wailuku Town, Lanai, and Launiupoko. There are no unique – it's hard to find a unique situation because it applies to the entire – like what James said, the subdivision or the plat, generally speaking, not parcel-by-parcel. I used the Hecht plat in this example. The property is around here, you know, but there's other landlocked properties, and they can't subdivide either unless they provide five miles of pavement, which is a million dollars a mile. You know, why shouldn't Mrs. Hecht get a subdivision variance versus everybody else has that difficulty? So is it a unique circumstance or is it unreasonableness of the ordinance itself? It says "Zoning Ordinance," but not necessarily zoning. It applies to all ordinances.

Oh, I also included a picture of the Sandhill Estates, which is in Maui Lani. This is a huge lawsuit that the County went through. This is the Old Sandhill Estates. And what many people don't know is that this was also graded, yeah? If you go drive through Sandhills, the street is obviously, cut through, you know, and there's properties above you. And you measure height from the lowest grade, you know. And then there's obviously, fill in some places. They have the luxury of being there for a long time without any – without anyone blocking their view. But now this new subdivision comes in. They put mass grading in the subdivision. And now, the County, business as usual, would measure height from the finished grade, yeah? And so they sued. And basically, it went up to circuit court, and the courts, like James said, decided that, you know, that we have to uphold the definition of height, which is to use the finished grade – to use the lower grade, the original grade or the finished grade, whichever is lower. So if you cut it, that's the lower grade. If you fill it, you use the original grade, whichever is lower. Therefore, some of these lots, you can't even build on it. But none of them are unique. They have not even attempted to come to you because they know that they are not unique. Judge August already said, you're not unique, but that doesn't prevent them from applying. So talking about unreasonableness of the Zoning Ordinance itself, we now

have a proposed amendment to the height, the definition of height, which would exclude Maui Lani and other development from this definition, but obviously, it didn't do it for Lanai. We just went to Lanai for a height variance, yeah? So anyways–

And unique circumstances, again, the focus must be on the features of the property rather than the circumstances of the owner. That's because variances run with the land. Personal situations of the present landowner should not be considered. And that's because when the landowner changes, that means the circumstance surrounding the granting of the variance will change. And that cannot be the case. You have to grant a variance based on the land feature itself, the geographical, the topography, the location, something about the land that provide the unique circumstances or unique circumstance.

Oh, this is the Sandhills. Whether– You know what? My slide. That's Sandhills. Okay, the last element of unnecessary hardship: the use to be authorized will not alter the essential character of the neighborhood. The variance is therefore used to prevent the use – important to prevent a use variance which results in intrusive, incompatible uses. Essential character considers the applicant's interest, but also protects the interest of the neighboring property. So whether the property – the variance would alter the essential character of the neighborhood.

Again, I use the Hecht's case where she didn't wanna provide pavement, and she got her variance, but we didn't necessarily look at this. This is the Hana Highway where she got her variance. You know, is it gonna alter the essential character of the neighborhood if she paves it? And you granted the variance. You granted the variance. So I think in this case, you did a good job. It – the variance, if not granted, the variance would've altered the essential character of the neighborhood as far as paving is concerned.

So we're gonna go one-by-one. Title 12, this is the criteria for granting a variance for street, sidewalks, and public places. You don't see a lot of these, but here it is anyway. The exceptional variance desired arises from peculiar physical conditions not ordinarily found in most districts or because of the peculiarity of a business. And that pertains to uniqueness. The exception of a variance desired is not against the interest, safety, convenience, and general welfare of the public. The granting of the permit for the exception or variance would not adversely affect the rights of adjacent property owners or tenants. And the strict application of the terms of this chapter will work unnecessary hardship and practical difficulty on the property owner or tenant. Wow, that one's tough, yeah, James? You have to prove both unnecessary hardship and practical difficulty. For a variance, you have to qualify for all of the criteria. You know, you, the Board, must find that all criteria exists. It cannot just be one, two, three. It has to be all four.

Title 16, Building and Construction. So this is the Building Code, the Housing Code – I mean, Electrical. That the strict application or operation or enforcement of the code provision or provisions appealed from would result in practical difficulty or unnecessary hardship. So again, you're looking at an area variance versus a use variance. For building and construction, it's typically gonna be area, but then again, you also have to look at how the property is being used, yeah? So unnecessary hardship is the criteria there.

Two, the granting of the variance shall not be detrimental to the public health, safety, or welfare. Three, the granting of the variance would not be injurious to the adjoining lot and buildings thereon.

And four, the granting of the variance would not be contrary to the purposes of this code and public interest.

Okay, 18, Subdivisions, which is also the jurisdiction of Public Works. That there are special geographical or physical circumstances or conditions affecting the property that are not common to all property in the area. That's uniqueness. That the variance is necessary for the preservation and enjoyment of a substantial property right of the petitioner, and extraordinary hardship will result in the strict compliance of the provisions of this title because of the special geographical or physical circumstances affecting the property. So these two are tied together. If you cannot find that they meet number one, they cannot qualify for number two.

The special geographical or physical conditions are the result of – or not the result of previous actions pertaining to the subdivision. So another one that ties directly into number one. The granting of a variance shall not be detrimental to public health, safety, or welfare, or injurious to other property in the vicinity. And the last one just talks about zoning. It's because – it says that the property has obtained the appropriate zoning provided that the interim zoning shall not be considered appropriate. And that's because you cannot subdivide interim zoned land. So there's interim zoned land. A lot – most of it is in Molokai and Hana. Every place else is all zoned already.

Title 19, we have a – we have jurisdiction over Title 19, Planning does. And we have a few more things for you to consider when granting variances. The Board shall not – the Board shall comply with the General Plan and community plan of the County. And you guys are familiar with community plan and General Plan? The Board shall not grant an application for a variance which requests a use that does not conform with the applicable community plan designation for the property. So what that means is if the community plan designation is single family and they are requesting a variance to put a hotel up, if the community plan is single family, you can't grant a use variance to allow a hotel. That just circumvents the whole process. That's not what the variance is for. The Board may grant a variance if it finds that due to a particular physical surrounding, shape, or topo condition of the property, compliance to the provisions of this chapter will result in hardship to the owner, which is not mere inconvenience or economic hardship. And that's because the inconvenience or economics of an applicant is again, very personal. It's an individual circumstance. If you grant a variance because, oh, it's a million dollars a mile to pave, I can't afford it, then you would be kind of having a prejudice, you know? You only grant variances to people who can't afford it or– Okay.

The last one, interim, interim zoning districts: any action of the Board whether granting or denying a variance shall be referred to Council for approval. So what that means is, is if you get a request from an interim zoned property, then your action whether approval or denial becomes a recommendation for Council action. And in the interim district, the Council, County Council, has the final authority. So the Council may override any action of the Board as the case may be by an affirmative vote of at least five of its members.

And these are the two conditions that must exist for the granting of a variance in the interim district: that strict enforcement of any provision of this article would involve practical difficulty or unnecessary hardship. And the desire or relief may be granted without being detrimental to the public interest, convenient, and welfare. That's bare bones, right there. That's the nature of a variance right there.

Mr. Santiago: A question on interim zoning.

Ms. Kapua`ala: Yes.

Mr. Santiago: I know I read past articles up in Kula where a property was interim zoned. I'm not quite sure why this has taken so long for it to be considered interim zoned.

Ms. Kapua`ala: Yeah, the name implies that it's interim.

Mr. Santiago: Not for 50 years.

Ms. Kapua`ala: But that doesn't mean that the County is gonna change it for them. It's – the interim, indefinitely interim. There's a whole ordinance saying what you can or cannot do in the interim district. And–

Mr. Santiago: They just haven't gotten to it?

Ms. Kapua`ala: Yeah, they haven't gotten to it, and it's very strict. There's not a whole list of permitted uses. So basically, if you don't qualify as a permitted use, which only allows basically, single family dwellings, and farming, and stuff, then you gotta go to Council. There's no special use permit provision. There's no opportunity to get administrative approval or Planning Commission approval. You gotta go straight to Council and ask for a change in zoning, basically. You know, Council still has all authority over the interim district. If you wanna do something here, you have to change it, whatever you gotta do.

Mr. Santiago: In one case was the Kula Lodge.

Ms. Kapua`ala: And it's still interim up there.

Mr. Santiago: Interim zoning, yeah. I mean, they were trying to get through the permitting for their expansion.

Ms. Kapua`ala: What they should've done a long time ago is change the zoning. Yeah, that's – then they wouldn't have to– James, do you have anything to say about that? About interim?

Mr. Giroux: Yeah, Maui County has an interesting history with interim zoning because back in the day when the State was deciding to make their agricultural zoning areas, Maui County had already started on its path of zoning. And so, Maui County has some interesting situations with properties that have been zoned – were zoned prior to the State ag law, some properties that were zoned right after the State ag law passed. And those properties that actually were zoned after the State ag law was passed was technically, legally. And the Corporation Counsel had declared that if it's illegal, then the County should look at those as interim. However, the courts have come back and said, again, it's not for us, Corporation Counsel, to administratively change the zoning because it was done through ordinance, but it's for the Council to go back and correct that. We've had some developers who were able to actually get to the Land Use Commission and actually change those properties to urban before the County took any type of action, which it wasn't looking to do anyway. But the courts have kind of looked at that and said, well, that's fine, because now, they're in

compliance to all areas of regulation even though the County went and allowed that property to be zoned prior to the State – the State changing that property to urban. Because we – technically, we don't have jurisdiction over lands that are still in ag. We can't just go and zone a property that's in ag to hotel. It wouldn't work. It's not allowable. The only thing we – with something as State ag, what we can do is have it County ag, and then we give special use permits or conditional use permits for use. So the interim provisions were actually made for properties that when the ag ordinance went into effect and these properties weren't zoned ag, they went into the interim provision. So you have large areas of Paia, Hana, you know, other pockets that you'll find–Kula, maybe–interim lands that basically, went through the process of either getting a variance or conditional permits, things like that. But the idea is that you're supposed to be working yourself out of this interim thing. In Hana, I think one of the big problems is that the community plan actually has a lot of these lands marked for rural. And so when people try to go get rural, then they still run into, you know, problems about people not wanting it to be zoned rural even though it's community plan rural. So it's a tough situation to be in when these properties are – you know, they're just nonconforming as far as being consistent on all tiers of the land use law. So, you know, I think it's something that you'll probably see.

The last – the last variance from interim that I witnessed was Maui County had a – has under landfill, a small portion that is still interim. It's supposed to be mostly ag out on the Central Landfill, but they have a sliver that's interim, and they were putting – allowing a – I wanna say the diesel – cooking oil to diesel conversion out there. And they had to, in order to get that up and running, had to go through this process because of the interim zoned land. So that was the last one I saw.

Ms. Kapua`ala: If you think about it, Hana and Molokai would be like the most non-developed places, and those are where all the interim districts are. No subdivisions there.

Oh, okay, Title 19, the comprehensive zoning provisions. So it's not interim. It's under the comprehensive zoning provisions, which is residential, rural, agricultural, business, public/quasi-public, hotel district. Every zoning you can think of, this is what they would have to qualify for. And again, uniqueness. There is an exceptional, unique, or unusual physical or geographical condition on the property, which is not prevalent in the neighborhood or surrounding area. And the use sought to be authorized by the variance would not alter the essential character of the neighborhood. That strict compliance with the applicable provisions would not prevent reasonable use of the property. And finally, that the conditions creating a hardship would not result – were not the result of previous actions by the applicant.

So the way that our Department analyzes this, every Department is responsible for analyzing its own criteria. So Planning will provide you a staff report for Title 19. We say that if they can provide a unique circumstance, then they can qualify for number two and three because– This is the unique circumstance. This is the hardship criteria right here: prevent reasonable use. The unique circumstance has to prevent reasonable use or a hardship, cause a hardship, and then the conditions creating the hardship were not the result of previous actions by the applicant. So if you don't have a unique circumstance, and you don't have a hardship, then whether or not it's your fault, you can't qualify for a variance. So then it's a self-imposed hardship, you know? The hardship is the fact that you applied for the variance, you know?

Okay, and then lastly, you have jurisdiction to grant appeals. The Maui County Charter authorizes

the Board to hear or determine appeals alleging error from any person – alleging error from any person aggrieved by a decision or order from a department charged with the enforcement of zoning, subdivision, and building ordinances.

And these are the standards: in order for the Board to grant an appeal, you basically, have to qualify for one of these things, one of three criteria. So variances, you have to qualify for all three, or all four, or all five. For appeals, you just have to find one, and this is the burden of the applicant to prove this to you that the subject decision or order was based on an erroneous finding of material fact or erroneous application of the law. So did the Department base their decision on improper facts or neglected to base their decision – they based their decision on – and neglected some of the facts? Or did they erroneously apply the law? Two, the subject or decision or order was arbitrary or capricious in its application. And three, that the decision or order was a manifest abuse of discretion. So did that Director abuse his discretion? It's self-explanatory.

Now, the Board may act as the hearings officer, or appoint a hearings officer to conduct a contested case. That's basically – a contested case is basically a mini trial. The Department is now put in trial. The applicant has the burden to prove that they have been aggrieved. And the BVA rules provides the framework for the appeals' procedure.

Before I move on or conclude, I will say that in the case of a notice of violation where the Department issued a notice saying that you are in violation and therefore, you have a fine. You know, they provide a remedy, correct the fine – I mean, correct the violation. Or you can appeal to the Board of Variances and Appeals. In that case, the Board must conduct the hearing. And you will have – you actually two hearings scheduled in the upcoming months. Other than that, if it's a decision, and by the Director that you think it might be a little complex or beyond your scope of understanding of law, you can appoint a hearings officer. We have a list of hearings officers that have all gone through the Department. They have applied to the Department to be a hearings officer. And we contract them. We pay them to conduct the hearing for you. And what they'll do is after they do all that stuff that they do as required by law, they'll give you a report, and you can make your decision from there.

And here is the typical procedure. The Board may conduct the contested case. Oh, here we go. The Board grants or denies the appeal. The aggrieved party, which either would be the applicant or say, the Department that you ruled against. It may go to the Second Circuit Court. And the Second Circuit Court, in that appeal proceeding, may either reaffirm your decision, remand it, which means send it back to you for further deliberation, or reverse the decision that you make completely. And we actually have two of these now, yeah, James? The Wightman Appeal, Mr. Wightman was fined by DSA for building without a permit. You denied his appeal because the Public Works' Director didn't err or they were correct.

Mr. Giroux: Yeah, I think his complaint was that he wasn't given a permit even though he asked for one. And the allegation was that he built a structure without a permit. So his appeal was denied based upon, you know, the facts that were represented to this Board that he did build something and he didn't have a permit at the time he built it. So I think on appeal, I read the – actually, I will be putting this on the agenda on the next agenda to discuss because I've been assigned to be the attorney to represent at the Circuit Court level. So actually, I will be talking about it further about strategically what you guys wanna do with that. So probably, I should stop talking about it on the

record now.

Ms. Kapua`ala: Okay, so that's one appeal and the Makila Appeal.

Mr. Giroux: The Makila.

Ms. Kapua`ala: The Makila Appeal, the Makila Nui and Ranches I, II, and III, you granted the appeal. You found – you gave relief to the applicant. And therefore, the Department appealed to Second Circuit Court.

Mr. Giroux: Yeah, and that one, I'm assigned, too. So we'll be talking about that at the next meeting. There's deadlines and things like that. But the main thing that I can talk to you on the record about is that these types of appeals are – they're administrative appeals, so it's not like you're being sued. You're not being named personally. It's kind of the process. And like I said in the case where somebody is trying to assert regulatory taking, you're kind of like the step that they need to take to get to the next level. And what the court would look at, they don't even – as the Board, you don't even produce a case. You produce the record, and that's all the Judge will look at anyway. There's really no arguments to be made. There's no defense to be made. It's just here's the record, here's our deliberation. And I'll go into it in my power point about what the Judges will do once the case gets up there and what their thinking is as far as how they review these appeals.

Ms. Kapua`ala: So is this a good segue way into your contested case?

Mr. Giroux: Yeah, well, I've got the Ethics and–

Ms. Kapua`ala: You wanna do that first?

Mr. Giroux: And the Sunshine Law. And then I can–

Chair Tanaka: Before we move on – well, my question is, you know, a lot of times where it's just an agenda item determination of a hearings officer, at what point – who makes the decision whether it'll come before the Board versus going to a hearings officer?

Mr. Giroux: Well, it automatically has to come to the Board for that decision-making. So the Board decides. A lot of times what you'll do is you'll be told this is the nature of the appeal or this is the nature of the contested case. And a lot of times, the questions should be how many witnesses they think they'll have; how much time do you think this will take. And the lawyers will tell you, this is purely a legal matter. We just have an argument on the law. And especially when they're appealing administrative decisions from the Department heads. They'll tell you it's simple. This is what the law says. We disagree on what it means. No witnesses. No discovery. No interrogatories. You know, so that's the kinda stuff once they put on their case, you can make a decision right away. It's just that it's on the law, and then you gotta be comfortable interpreting subdivision law, zoning law, that kinda stuff.

When the litigants come in and say, well, I've got 15 witnesses; I expect to go at least three weeks; I've got 42 interrogs that I'm sending out, that's when you're like, oh, this is bad. This is bad. And

what we've done is that in the arena of the notice of violations is we've really tried to change your rules to treat those notices of violations as unique appeals, not as appeals as an administrative decision, but appeal of a notice of violation. And we basically have tried to eliminate that: interrogatories and, you know, depositions, and requests for documents, and, you know – because the issue is we need the facts: where, when, how and why, and then the law that's being enforced. And that shouldn't be – take more than a day to figure out.

And sometimes the litigants will wander off, and it's for the Chair to say, well, that's not germane to the proceeding. We need to proceed as to – you know, do you photos? Do you have maps? And the parties should have already exchanged those. And what we're trying to do is get the Department to do their notices of violations in such a way that they can just hand it to the litigant and say, if you wanna appeal, this is all you need to go in front of them. It's got everything we used. You know, it's got the photos, the letters. You don't need discovery. This is it.

And that's the way most low level criminal cases are produced in the district court. You know, you just ask the Prosecutor, can I have my police report? He hands it over to you. Judge, I want a trial. And then within six months, it's done. And it should be that quick. And that's what we've been trying to encourage the Department is that if your enforcement's gonna be effective, you need a quick turnaround. You need decisions. You need to get these things decided. And then if they're gonna appeal, they can appeal. They can go to Circuit Court and go on, but the idea is that people tend to rectify violations if they know there's gonna be a quick resolution. If you know that the County takes five years to administratively process a violation, there's really no incentive to tear down the wall, get your house shortened, put your setback correct. But if you know that in six months, you're gonna be in front of us, and then 30 days, you'll be in front of the Circuit Court, and then after that, you've got fines to pay, there's an incentive. And that's not really the way the County's worked in the past. And with these new rules, we're hoping that we can actually make enforcement something that's reasonable instead of a joke because it really needs to– You know, people, they'll respond. They'll respond when there's a need to respond. And I tell you what, with the lawyers, when there's a negotiated settlement, and you know there's nine people sitting waiting to hear your case, there's a huge incentive to get reasonable. And that's what we're trying to get at.

Ms. Vadla: Take the emotion out.

Mr. Giroux: Yeah, take the emotional out. We know you put a lot of money into that wall, but you didn't have a permit. Can we be reasonable? And that's where people do respond to the fact that we're gonna go through administrative hearing first, and then they've got to deal with the Circuit Court after that. And it really makes the work easier for everybody when you don't have 300 appeals. One person comes. They understand the system. It works. Everybody else says, okay, I get it. I can do that. That's the reason I can – you know.

Mr. Santiago: So we won't have any more cases of construction equipment in ag lots.

Mr. Giroux: Those are – you know, no comment. But that is the whole purpose. And you can see it in the Circuit Courts when there's backlog and cases don't get to – you know, people get frustrated at the system. And that's what we're trying to eliminate is give people a hearing. Let them know that we are a venue. They will be heard. And that they will have a process.

Chair Tanaka: Is it possible for this Board to say, we wanna hear a case versus a hearings officer or vice versa where we – I'd rather have a hearings officer, you know, go through that process first?

Mr. Giroux: Yeah, it's part of the discussion. And that's part of the initial – when somebody – there's always that – you know, it says that you're – it puts it on your agenda, but there's no action. The only discussion is whether or not you're gonna be the hearings officer or not.

Mr. Santiago: I guess it's dependent on the case, how complex it is.

Mr. Giroux: Yeah.

Mr. Santiago: If we're not comfortable with the subject matter, then it's something we can decide not to hear.

Mr. Giroux: Yeah. And I think the NOVs by law, by our rules, you have to hear them. There's no hearings officer. And that's part of our streamlining to get that done. So you're the judge, Judge Tanaka.

Chair Tanaka: Well, we are the judge.

Mr. Giroux: Yeah, and another thing about that, just real quick, procedurally is that it is like a trial. And your Chairperson is kind of like the judge. You guys are the judge and the jury. So issues of procedure and issues of evidence, the Chairman will make an initial ruling. And if you absolutely disagree with the Chairman, it's an appeal of a decision of your Chair, if you get a second, then that decision is given to the Board. If somebody – let's say there's somebody who wants to introduce a big packet of evidence. And the judge says, that's kind of irrelevant. It doesn't have nothing to do with your structure. We're not gonna take that into evidence. Now, if you're curious, and you say, well, I appeal, I wanna see what's in there. Then you need a second to somebody to say, yeah, me, too. And then it goes to the Board for immediate vote. Do you want it in or you want it out? No discussion. You want it in? Okay, it comes in. So – and then at that point, you have it. It's in the record, but you can still deem it irrelevant. So administrative law kinda errs on the side of letting a lot of evidence in, but still, there is the minimum of is it relevant? Is it redundant? Is it gonna get you to Point B? And that's where the Chair would make the initial decision as things were coming in. And what you'll see is that in an administrative case, you know, both parties with their binder. And you say, do you have any objections to their binder? No. You have any objections to their binder? No. Okay, it all came in. So it's a very easy process unless there is actual disputes to the documents where maybe photos, people object. Oh, that's not accurate. That doesn't look like anything like the property, it does, or whatever. You know, so those are the types where an attorney may make an objection, initial decision by the Chair. If there's an objection by the Body that says, they disagree, then you just try to dispose of it like that, quickly, and then move along.

Chair Tanaka: Yeah, so like your example, if – you know, a lot of times we come into the meeting and there is packets of material that – so it's actually the Chair who says, no, this is not – it was not received in a timely manner? Because there have been times when the attorney comes up and says, well, we apologize for this reason, but this is something that wasn't included in your packet and – because for me, personally, I look at it, I go, ah, now what is this? Because you flip through

the material before you come to the meeting. And then when you sit down, there's additional material here. So – and then there's – as far as administrative rules, anyway, you know, a time track that it has to be served by a certain date and– So it's not a Board's collective decision to say, okay, well, we'll review this new material? It's the Chair that says, no, we're not gonna look at it, and if the Board wants to, it'll say–? Is that–?

Mr. Giroux: Yeah, that's tricky because there's so many scenarios that that can happen. And I understand what you're talking about. I think the initial response is that if you are already in an official – you know, you've already started a contested case, let's say, and in the middle of the trial or hearing what will happen in that situation is that somebody may produce something that wasn't actually given to the other side. And that's more crucial when you're under – in a formal setting, because that's an issue of disclosure. It's an issue of timing. And your pre-hearing order will actually state that these documents need to be exchanged by a certain time. Now, the issue is how do you remedy that because then if the other party has an objection, most likely the remedy will be I didn't get a chance to see this. So you have to decide are we gonna take a break so that the other side can see it? Once they've seen it, there may be issues of surprise. You know, we're not prepared to address this. So then you have to decide an issue of fairness. Are we going to defer the whole meeting because of this? And it really raises some serious issues of fairness, due process, and if you don't allow it in, then the other party is gonna say, well, you know, I didn't get a chance to fully litigate. So you're caught behind this Catch-22. You know, the frustrating is, is that sometimes lawyers actually purposely do that because they know they're gonna put you in a pinch. So you gotta – don't react emotionally. React logically and say, other party, what's your position? Oh, we'd like time to see it. Okay, we're gonna take a break. The person comes back. Other party, did you get a chance to see it? You have any problems? Yes. This just opens up a whole can of worms. I could've talked to my investigator. They could've gone. They could've taken photos. I could've done – you know, we could've been prepared for this. We're not. Now, you gotta – it's an issue of a continuance. Are we gonna grant a continuance?

So on one hand you have speed and efficiency. On the other hand, you have due process and fairness. And the Chair is gonna be put in a tough spot to make that call. And the Board at that time is gonna decide, well, Chair, it's your call. Hey, I don't know. I think we gotta go forward. We've gotta move forward. We can't be taking breaks, you know. That's the kind of discussion that should happen amongst the group in order to get that balance of, you know, efficiency versus fairness and due process. So it does happen. I've seen it happen.

Chair Tanaka: Oh, yeah, because both ways, since I've been on the Board where, you know, there's something, and I say, well, I wanna hear it. And the other times that I felt, well, it was clear cut that they missed the date. And if they had met the date, it would've been in our – you know, that kinda thing.

Mr. Giroux: And the other thing is like again, your rules do have, you know, deadlines and things that need to be processed. And most of your rules do have a caveat that says, you know, as long as your final decision hasn't been made, you can review it. As long as the other party can show that there was good cause, you know, that this information wasn't available at the time, and now the hearing started, and now it's available, and yada, yada, yada. So you gotta hear out that argument and make a decision based on that, you know, those facts.

Chair Tanaka: Just my two cents in part of this where – because you – sooner or later, we'll hear things that – and I've had discussions with James where a person will testify and you have to make the decision within yourself. Do I believe what he's saying? Do I not believe what he's saying? And taking the emotion out of it where it's – you know, you will have to act, and that's a dilemma that I struggled with.

Mr. Giroux: Yeah, let me expound on that because there's two situations where I can see where you're dealing with notices of violation where somebody will say, you know, this fact is true or it's not true. And the other party will say, well, the fact is true or not true. So you'll have two people, and they're saying the opposite thing. Now, an issue of credibility is that is there something about the person's testimony that makes you believe that person's more credible than the other person. Is there any reason why the person who's giving you this information has to lie? Has that been brought out on the record? Or is that a question you should ask? And when there's attorneys who are on it, and they know that it's gonna come down to he said, she said, they will look to issues of credibility. They'll dig up things to say, you know, okay, did you pay your taxes? And sometimes it's reasonable and sometimes it's not. That's where the Chair is gonna have to make the call of – did you pay your taxes? It's like – well, if that really makes or breaks somebody's credibility–

Mr. Stephen Castro, Sr.: What has this got to do with anything?

Mr. Giroux: Right. It may or may not. That's where it's really tough as the finder of fact that draws that line. And that's where an administrative decision is made collectively. And sometimes people, they don't have anything, but they're just making a smear campaign. And then you gotta decide, okay, was that just a smear campaign, or seriously, does this guy have a problem with credibility? And usually what you wanna see is whether or not the testimony within the hearing is consistent, not whether extraneous matters – and didn't I – I saw you steal a shopping cart. It has nothing to do – you know. So there's that gut reaction of credibility can be tested through questioning. And that's legitimate. And then you gotta decide where are we wasting our time? Where have we gone astray? Because most of these cases can be figured out on its facts. There's a photo. There's a map. There's a letter. There's something that says this is true and I can rely on it.

The other issue would be an appeal of a decision of the Director where one of the categories is, you know, is there a mis-reliance on the facts? Does it come down to is the road 16 feet or is it 20 feet? What's the right-of-way? So you're asking yourself, okay, did he believe that the road was 16 feet ? That's why he denied the permit? Or is there an engineering document that shows that this road is 20 feet, therefore, he made the mistake? So you have to put these – you gotta collect those facts and put them – and say, this is what I'm relying on, and I feel that it's credible.

Ms. Vadla: Yeah, a lot of times it's, did they do their homework?

Mr. Giroux: Right. You get those, too, you know. That's the big thing. And the thing with credibility is you don't necessarily have to call somebody a liar to not believe them. It's just that it's not making sense. They're – their perception may be wrong. They may have a motive that, you know, just seems like they're willing to stretch the truth.

Ms. Vadla: Or they didn't understand.

Mr. Giroux: Or they didn't understand. And that's where you, as a Body, you have the right to ask these questions to clarify that. You know, where were you standing? What time of day was it? Was the sun in your eyes? You know. You don't have to beat the guy up to get to the truth of saying, you know, farm equipment? Farm equipment? I'm having a hard time with that. But that's where you – I think the more experience you get in hearing these cases and asking those questions to really– Again, you're the finder of fact, and you're gonna be the finder of law. So that's what you're being asked to do when you're in a contested case.

Chair Tanaka: I mean, we can discuss this – I mean, a previous – I mean, just to let you know, there was a case that we had that the statement was made by the applicant that he had a crane on property. And it was stated that the crane is used to prune his trees for his agricultural activity, and the trees were about three feet high. So, I mean, basically, he's stretching it. So that's the kind of thing that potentially, you'll be hearing in the future. And that's what we'll have to–

Mr. Santiago: Didn't one of the testifiers questioned whether or not they had a permitted ohana, or whatever it was, or something to that effect? Or maybe it was unpaid taxes. I don't know.

Mr. Giroux: Oh, yeah, and there's attacks on our inspectors. You know, they were mean to me, and they looked at me mean.

Ms. Vadla: Did they ever let somebody on to do the inventory?

Chair Tanaka: No.

Ms. Vadla: They never did, huh?

Chair Tanaka: So their appeal was denied.

Ms. Vadla: That could've really solved the – I mean, it could've brought some continuity to it, right?

Mr. Giroux: Closure.

Ms. Valda: Yeah, closure.

Mr. Giroux: Some civility would've probably brought that to an end. Well, people draw their lines.

Chairman Tanaka: And then another thing I wanted to share, in Trisha's – you know, we're talking about certain criteria that has to be met. A lot of things are clear cut where there's a map, and there are lines drawn, and distances, or easements, or setbacks. But it does – there are areas where it can be subjective where describing a unique physical or geographical circumstance. I mean, you can take one extreme and say, well, Hana is Hana, period. Or you can go in on two properties that sit next to each other that – you know, two exact rectangles that mirror each other, and try to argue that this one is unique from this. So that's something that individually, as we're seeing things presented to us, we have to – for ourselves. And that's why there's a Board and that's what we'll be discussing when it comes in front of us.

Mr. Giroux: Yeah, and what I wanna emphasize in that area is that it's okay to disagree with other

Members of the Board, but you don't wanna really engage in extended debate on the issue. Your job isn't to change the minds of your other Board Members. You can make your argument and make it to the Chair that this is how I see it. This is my perception, and my feelings, and my take on it on how I am gonna go. And that's so the other Board Members know where you're at. And that's the issue of debate. It's not, oh, well, that's ridiculous, or how can you see it that way? If we eliminate those types of conversation from the Board, I think everybody can be comfortable in the decision that they're making, and the other people can respect that you see it differently. You don't agree. That's okay.

And again, it takes five to make a decision, five people to make a decision. And the thing is you guys – you can actually get five people to vote one way, and they all can see it all differently too. And that's where it's important that sometimes what you'll see is we're gonna bring findings of facts and conclusions of law back to you even though you made a decision. We need to clarify what that decision was based on, and why, and we wanna put it in that document because it will justify your decision. And really, the concern from Corp. Counsel and your staff is that we want any decision that you make to be upheld. And any decision you make could maybe and probably will be challenged if the other party doesn't agree. So that's the whole purpose of that. And a lot of times that procedurally gets mixed up in the emotion, and gets mixed up in the expediency and sort. And that's what you'll see us trying to guide the litigants to say we're gonna hold off on our decision-making. You guys give us a document that fully gives your perception of what happened at this hearing. And then when you give that to us, we'll make a decision, because then we don't have to debate what's facts and what's not.

So both parties will put it down on paper of what those facts they feel have been established and will have either agree or disagree. And I think that will eliminate a lot of what we saw where – the motions to reconsider and things like that because we'll already have a document before you to get that. And it may take one more meeting or it may take one more hearing date, but what it'll do is it'll make it a lot easier to make decisions when you can look at a document and say, you know, Finding of Fact No. 17, that just doesn't make any sense to me. Does anybody else have that feeling that that's not what happened at the hearing? You know, I mean, we didn't base it on that. We're basing it on no. 18, but 17, we need to take that out of the document. So those were types of discussions that would happen. It could happen prior to you making your decision or after as far as creating your findings of fact and conclusions of law. And what we're gonna try to do is have that conversation before we make a decision. But we're gonna have to see how the litigants play along.

Chairman Tanaka: So it's not final until the decision and order is actually produced and signed, then?

Mr. Giroux: Yeah. And there may be times when you do make a decision, but your decision and order needs to be hammered out. You don't change your decision, but on the facts of what you are deciding or on the law that you're deciding, it needs to be very clear and precise that that's what your decision is based on. You know, like, if it's clear and – if the Director was clear and erroneous or did he misuse his discretion? You can vote that – deny the appeal, but now we need to know, okay, was it on "Y"? Was it on issue one, two, or three? So that's where that paperwork, it gets crucial. Because if the record reflects that it was an erroneous fact, but your findings of fact say that he abused his discretion, there may be a chance that the document gets overturned or your

decision gets overturned. So that's the kinda stuff that as lawyers and staff, we'll be – you know. So we're not here to influence or change your decision. We're here to make sure that you're able to get to the place where you make that decision, you're comfortable with it, and that that decision will be upheld, if challenged. So we're not here to say, oh, that didn't– We're here to say if that's your position, then is it based on these facts? Then it's clear. Now, we've – you know, we have a solid document.

Ms. Kapua`ala: So thank you. Do you wanna take a break before we move on or do you wanna just plow through?

Chairman Tanaka: What do you guys feel?

Mr. Castro: Well, actually, I gotta head out in about–

Mr. Giroux: We gotta get the Sunshine Law out.

Chairman Tanaka: Rick, you have to leave?

Mr. Tanner: I do, yeah.

Chairman Tanaka: You gotta leave too?

Mr. Castro: Yeah.

Chairman Tanaka: We still got quorum, so we can still move on.

Mr. Castro: Unless you wanna discuss the Sunshine Law or what is the most important right now?

Mr. Giroux: The Sunshine – as long as I get the Sunshine Law out of the way.

Mr. Tanner: . . . (inaudible) . . .

Chairman Tanaka: Our two Members are ethical, so we're not worried about that. But you guys have gone through this before.

Mr. Castro: Yeah, we've gone through this before.

Mr. Giroux: Yeah, no problem. Just ten years ago, we signed a consent decree. When this law first kinda came out, our Commissions weren't following it, and so we got sued. And then we signed a consent decree promising that we will do a training on the Sunshine Law every year to new– So it's basically, really, the only thing in my presentation that needs to be done, but if a Member already had it, then that's fine.

Mr. Castro: Thank you.

(Mr. Castro and Mr. Tanner then left the meeting at approximately, 2:56 p.m.)

Mr. Giroux: Okay, our Open Meetings, the Sunshine Law, and this is from Hawaii Revised Statute, Chapter 92. Take five?

Chairman Tanaka: Okay, two-minute break.

(A recess was taken at 2:56 p.m., and the meeting reconvened at 3:01 p.m.)

Mr. Giroux: So this is Hawaii Revised Statute, Chapter 92, our Open Meetings Law. What is the Sunshine Law? The Sunshine Law is Hawaii's Open Meeting Law. It governs the manner in which all State and County boards must conduct their business.

What is the general policy and intent of the Sunshine Law? Open governmental process to public scrutiny, conduct business as openly as possible. The Sunshine Law is to be liberally construed in favor of open meetings. Exceptions to the Sunshine Law to be strictly construed against closed meetings. Absent a specific statutory exception, board business cannot be discussed in secret.

Open meeting-every meeting of the Board is open to the meeting and all persons are permitted to attend. All interested persons shall have an opportunity to submit data, views, or arguments in writing on any agenda item. All interested persons shall have the opportunity to present oral testimony on any agenda item. The Board may make reasonable time limit of oral testimony. And I believe the standard is about three minutes now.

So, notice–a written public notice at least six calendar days before the meeting, a list of items to be considered at the meeting, the date, time, place. No additions, once the agenda is filed, unless two-thirds' vote of all Members to which the Board is entitled. And no item shall be added if it is reasonably major importance and action thereon will affect a significant number of persons.

So your agendas will most likely have a lot of contested case stuff, so you won't be adding a lot of things to your agenda. If you're gonna add something, you gotta make a motion, get two-thirds of vote to get it on. And part of the discussion should probably be, is this gonna affect other people and their rights? If it's about voting on who's gonna do the snacks next week, not a problem. If it's about are we going to, you know, decide to change a rule or develop a policy, we should put that discussion onto the next agenda item as discussion of policy regarding public's rights to testify more than three minutes.

Mr. Santiago: With respect to the public notice, what is the format? How is that–?

Mr. Giroux: That's – basically you get – the agenda is posted outside on the Clerk's – on the first floor. And it's also posted on the door. And that has to be done six days before the meeting. Also, what else does the County do? Sometimes there's – yeah, the web site, and some public hearings, according to law, have to be posted in the newspaper. And some laws say – I guess the SMA law would say, yeah, 43-day – 45 days, the public notice?

Ms. Kapua`ala: I'm not sure.

Mr. Santiago: Like Planning Commission matters.

Mr. Giroux: Yeah, and it depends what type of permit it is on what other notices are given. But the minimum of a hearing, just for a hearing, is six days. And it's posted on the door, or posted at the Clerk's, that meets the Sunshine Law. And you don't have to worry about it. If there is an issue, staff will usually catch it first, bring it to my attention, and then I'll probably have to tell them, ooh, that didn't work. We're gonna have to cancel that or things like that.

Ms. Kapua`ala: If you see – if it's here before you, proper notice was given, and you never have to worry about it.

Mr. Giroux: Yeah, and if there wasn't, somebody with either object or – you know.

Ms. Vadla: They'll let you know.

Mr. Giroux: Yeah, and then you'll know what we're talking about so– Ooh, no notice. No. Okay, minutes–minutes are mandatory. The minimum requirement is that the date, time, and place of the meeting has to be in the minutes; Members of the Board recorded as present or absent; substance of all matters proposed, discussed, or decided; and the record of any votes taken; any other information requested to be noted by Members, and a public record is to be made available within 30 days of the meeting. So those minutes are pretty much verbatim. They're recorded. That's why we're always trying to talk into the mike, because Tremaine over there has to type everything we say, even though we're mumbling, and ahing, and oohing, and umming. And so you don't have to worry about the content. You do have – on your agenda, we do adopt the minutes. And that's an opportunity for you to look at it. See if you were misquoted. Or if you did say it, that's what you said. You don't change that. If you just didn't like the way you said it, we're not gonna change that. But the idea is that it's your opportunity to basically, you know, edit. And what I would do is look at what you said and make sure you're happy with that. Even if you don't adopt your minutes, by law, we have to give that to the public within the 30 days, because they have a right to review that, and it has to be available to them.

Let's see. What is a meeting? A meeting means the convening of a board for which a quorum is required in order to make a decision, or to deliberate toward a decision upon a matter over which the board has supervision. More than two Members of a board cannot gather to discuss board business. And there are exceptions.

Let me discuss the idea of a meeting. When two people are in a room, that's not a meeting. Okay? Those two people can discuss Board business, but you cannot agree or lobby to have the other person commit to a decision. Okay? When three people enter the room, there should not be any discussion of Board business. At that point it becomes an illegal meeting, because there's no minutes. It hasn't been posted. The public isn't privy to it.

The issue of Board business is a touchy one, because when I talked to the people, the OIP people, the administrative body that oversees this law, I asked them, you know, how you guys define that? And what they said is that you have to see what is reasonably gonna come before your Commission. And sometimes when you're a member of the community, there's issues out there, you go to public meetings, you go to the PTA meeting, unless – for this Board, unless somebody says we're gonna take this to the Board of Variance, what do you think, you know, then you would say, I can't comment on that. This is probably gonna be before my Commission and I don't want

to discuss the matter. So that's a safe indication that if somebody is actually gonna ask for a variance that you probably don't want to enter into a discussion about what your position would be or things like that.

There are exceptions to the meeting rule and one of them is the investigative exception. Let me see. Oh, here. Here's a good definition of what board business is: matters over which the Board has supervision, control, jurisdiction, or advisory power, and that are before or reasonably expected to come before the Board.

Your executive meeting, that's an exception to the Sunshine Law. And it's a meeting closed to the public. And a vote is taken at the open meeting of two-thirds of the Members present. And there's a lot of reasons to go into executive session, but the one I would be probably be saying, you know, this is probably a good time for us to go into executive session is to consult with your attorney on questions and issues pertaining the Board's powers, duties, privileges, immunities, and liabilities.

Ms. Vadla: So would that get done at the regular meeting? You just tell everybody to leave?

Mr. Giroux: Yeah, yeah. We've had situations where we were in deliberation and an attorney said that's an illegal meeting. I'm gonna sue you guys. And that was like, oh, okay, that's a good indication we're gonna into executive session to discuss your rights, duties, immunities, and powers. And that's a good time for me to be candid with you about, you know, your decision-making process, and what your rights are as a body, and what possible ramifications of any possible decisions might be in order – you know, if there's concerns of, you know, are we gonna get sued because of this? And there's issues now out there especially, with the churches and stuff. There's the RLUIPA, our Religious Land Use and Institutional Act, and issues of, oh, if you don't give me this permit, I'm gonna sue you, and yada, yada, yada. And I would, you know, say, yeah, we can go into executive session, and discuss what RLUIPA is, and where this falls in that arena.

Chairman Tanaka: Does the recording stop?

Mr. Giroux: What happens is, is there are minutes, but those minutes are sealed. And what we'll do is when we go into executive session, I'll tell you that this is for the purpose of discussing this issue of liability, and that our conversation has to remain on that topic. We cannot go off and start discussing substantive issues that should be discussed on the record.

Those minutes are discoverable, meaning that they're sealed. They're confidential. That means I can be candid with you, but if the litigants who are not allowed to be privy to that conversation feel that they were prejudiced, then they can go to court, and they ask the Judge to open that document. And the Judge will read it and decide whether or not we strayed beyond the scope of our executive meeting. And then if he does feel that we have, he will hand that over to the other side. And then they can do a motion to overturn our decision or whatever.

Mr. Santiago: With respect to personal liability, can we be sued individually?

Mr. Giroux: People can file a lawsuit and name you individually. And that's something that we can talk about as far as what would happen in such a case. And usually, in land use cases, if you're not doing something that would violate somebody's constitutional rights, you shouldn't be held liable

for your decision. There's a judicial immunity type of case that our Litigation Department would pick that up and basically, indemnify you. We'd go to Council to get special coverage, argue that you were within the scope. And that's kind of why my role is so important in that if I'm advising you that, hey, this is kinda dangerous, maybe you shouldn't mention that you don't like them personally. Those are the types of things that I would caution you on. And I would probably wanna go into executive session and explain why. They're gonna say you're making your decision based on this. And they would probably try to sue you personally. And there's a lot of criteria. And I think when I get into my contested case thing, I give you a list of things to think about while you're in contested case to avoid that type of scenario.

Ms. Vadla: You know, real quick with that, if there is somebody that's coming in front of the Board that you do know personally, is it right for you to excuse yourself from that case? Or how do you deal with that?

Mr. Giroux: It's a two-edged sword. I mean, if you know the person, friendly-knowing, then there really isn't a conflict. I mean, it's not a conflict, per se, just because you know people. The flip side is that there's been people who knowingly have problems with people in the community, and they're not comfortable with you being on the Board. And that's just a matter of if they wanna raise that issue, that's fine. It doesn't mean you'll have to recuse yourself.

Ms. Vadla: Oh, okay. I didn't know if it was your obligation. You know, we've had some business dealing or something that – you know, or whatever.

Mr. Giroux: Right, right. And what happens is that under your quasi-adjudicatory duties, there is this other analysis of the appearance of impropriety, which is a little higher than our ethics issue of do you have a financial, you know, thing. And if you – I mean, if you had sued somebody, and they sued you back, and they owe you money, you know, avoid the whole situation. Just say, well, we got a personal issue and I ain't voting on this one. I don't wanna end up in court again.

Chairman Tanaka: If you have a question, talk to James first to clarify as I do a lot.

Mr. Giroux: Yeah. And the idea is we'll kick it around, and if we can't, you know, get a resolution. And just to warn you, I'm super conservative. I mean, I know I don't look it, but as far as when it comes to the law, I'd rather advise you in a way that would avoid litigation and avoid problems, because I really don't feel that as a volunteer, I really–

Ms. Vadla: Yeah, you don't put yourself in that place.

Mr. Giroux: Yeah, you don't – if you can avoid a senseless lawsuit, my advice is usually to the side of, okay, here's your options. And this is legal. This would be safe. And this would get you out of here. And you can not worry about this in the future. But I also do cherish the right for a citizen to participate, meaning that I really want you to look at – you know, you have a First Amendment right. You don't give up those rights just because you're on the Board. But a lot of times, that's gonna be a judgement call. You know, where are you going to draw that line as far as your community participation and things like that. So if you want to discuss that with me, I'm always open to that discussion.

Chairman Tanaka: Yeah, even in advance. When you get their agenda, you see something that – either call James or because it has happened once before, and we only had a quorum of five. And when we got here, it became an issue.

Ms. Vadla: I remember that. I think they wanted a bigger–

Chairman Tanaka: Oh, no, no, no. But because if there's only five of us here, and you have to recuse yourself, then we lose quorum.

Ms. Vadla: Oh, I see, right, yeah.

Mr. Giroux: Yeah, then we have no action. And as far as the Sunshine Law goes, one of the exceptions of the Sunshine Law is the contested case. And it says that the board exercising its adjudicatory functions under Chapter 91. Your Board is unique in that all variances, by law, are adjudicatory. Even if there's no intevenor or whatever, it's still the same – you know, they have to show their burden of proof. They have to – you know, it's their burden of production. They have the right to fully put on their case. But according to the Charter, all variances have to have a public hearing. So that trumps the Sunshine Law's exceptions. And because the exception is read narrowly, we would go to the Charter. And what we'd do is we have a public hearing. We hear public testimony over a private matter, but when that's closed, and those people are not called as witnesses, you cannot use that information to decide the merits of the case. The merits of the case can only be decided by the information that is presented as the hearing. And it's – because the other party – just because somebody says something for three minutes, doesn't have the right of cross examination. We cannot test credibility. And there's a lot of things that don't– People have a right to comment. They have a right to give their side. And if they raise issues that you, as a Hearings Officer, want to follow up on with the litigants, that's fine. You know, if so and so says, you know, I know for a fact that that road is 16 feet. And it's always been 16 feet. And I measured it myself. And here's my measuring tape. You know, you just – you follow up in the hearing and say, you know, what are we looking at to make sure that this road is 16 feet? And so as long as it's part of the hearing. But if nobody in during the hearing brings any measurement or anything about the road, and during deliberation, you say, oh, but Joe testified that the road is 16 feet, and you make your decision based on that, we're gonna have problems, because that wasn't part of the hearing and the other party didn't have a chance to question it. Okay? So it's a little tricky thing in what your duties are there.

Okay, the enforcement of the Sunshine Law, the first one is voidability. That doesn't mean that if you violate the Sunshine Law it's automatically void. The language is "voidable." That means if somebody feels that you violated the Sunshine Law, they go into court, and they try to convince the Judge to void your decision. Then the Judge makes the decision whether or not the violation was such that it should be voided.

The other part of that is that a party can go in and try to get an injunction to stop your action. If you grant a variance, and it violated the Sunshine Law or whatever, they can go in and try to stop that variance from being viable.

The other is a misdemeanor. You can be guilty of a misdemeanor. And the Attorney General would pick up the prosecution if there was real collusion going on, and basically, decision-making

made outside of the public's knowledge.

And lastly, removal from the Board, and that's also pursuant to our Charter that any malfeasance could rise to the level of you being removed from the Board. Any questions? And what I tell people is that I'm not the Sunshine cop, but I do – I will say, hey, guys, you know, I see three people. I'll chime in, but I'm not the– Like I say, I have no enforcement aspirations, but I really – for your protection, I do–

Ms. Vadla: We need the protection and understanding, yeah.

Mr. Giroux: I do let you guys know when I feel that you're headed that direction. Ethics. Okay, this is the Ethics' part. And this is under the County Charter. The Board of Variances and Appeals is a chartered Board. So you are under the Ethics Chapter, Article 10. And main thing is – it should be in your packet, but to read the prohibitions. And the bullet-pointed ones are the ones that usually – you know, come up as issues.

You're prohibited from accepting gifts, business transactions or activities, or have a financial interest which may tend to impair independence of judgement in the performance of official duty, and fail to disclose a financial interest.

Now, accepting gifts, just because you're on this Board, doesn't mean you don't get Christmas presents. No. You have to look at if people are giving you gifts, you have to, in your head, something should go off and say, why are they giving it to me? Is this to reward me for something I did on the Board? Is this to influence something that's gonna happen in the future because of my position on the Board? If this is happening, you should either let the person, I can't – thank you very much, but I can't receive that. Or you can give me a call and discuss it. And we can talk about whether or not you feel that this is going to affect your ability to execute your duties.

Mr. Santiago: Is there a dollar threshold?

Mr. Giroux: There's not a threshold, but there is this – there's an opinion called "Gifts of Aloha," where we understand that you walk into a room, somebody gives you a lie. You go to a meeting, somebody offers you food. These types of things are so manini that we don't feel that it would actually change your ability to be independent. And that's kind of the threshold that you – you know, there's no dollar amount but– I think the gray area is where people – we've had developers give blanket invitations to seminars and a night at the Sheraton. You know, so, that's when you really gotta – yeah, their variance is coming up in three weeks. Not a good idea.

Chairman Tanaka: James, ethically, do you have to disclose if someone attempted to give you?

Mr. Giroux: You know, I'm not sure.

Chairman Tanaka: I just thought about that.

Mr. Giroux: I have had Commission Members come up to me and say, you know, I received something in the mail, you know, a night at the whatever, and they weren't comfortable with it. But ethically, I'm not sure. I would have to research that to find out if that would actually be a violation.

I think it's in the accepting, though, is really where you gotta watch out. It's in the accepting.

Other issues that come up, you know, when your family members are in the development arena, stuff like that. And then the failure to disclose the financial interest. And a lot of times that's your– The code says "direct or indirect." But you really gotta watch for the direct. That's where people are gonna be like, weren't you the – didn't you work for them? And you're like, yeah, about ten years ago, but there's no financial interest, you know, things like that.

So if you do see things on the agenda that, you know, you're like, oh, boy, I wonder where that falls, you can call me, or you can get an opinion from the Board of Ethics. And if you are found to be violating the ethics, there is a fine and you can be removed from your office. Your rules state that whenever a member has a conflict of interest, the effected Member shall promptly make a full disclosure of the circumstances to the Board, and refrain from participation, and discussions, and voting. So in other boards, this rule actually says that they just have to refrain from voting. Because your situation is such that you're 99% of the time going to be doing adjudicatory work that you gotta remain out of the discussion, even if you have full disclosure, and you can't vote if you have a financial interest. And again, you know, people, if they're in litigation would also raise the issue of the appearance of impropriety. And that's where you have to say, well, if somebody would feel that I was — would have an improper analysis, let's say, about the outcome affecting their rights, then you have to take that into account.

When in doubt, get an advisory opinion from the Board of Ethics. And the reason is, is that if any officer obtains an advisory opinion from the Board and acts accordingly, or acts in accordance with the opinions of the Board, the officer shall not be held liable for violating any of the provisions of this article. So that really is the safe – you know, if your husband owns a contracting firm, and he needs to come in to get a variance for his employee or his client, and you go to the Board of Ethics, and they say, oh, yeah, that's not a problem, well, everybody else would be like, that's a problem. But if the Board of Ethics says that's okay, then that's okay. So that's really important for you to understand that going to the Board of Ethics isn't a bad thing. And a lot of people use the Board of Ethics like a weapon instead of a shield where they raised – you know, you see that with the Council Members. Oh, he's with the visitor industry and – you know, but you get there and they say, no, it's okay. You can vote on that. Well, now, it's a shield. So it's very important to understand the role of the Board of Ethics in County government. Any questions? No?

The other one is the contested cases, Trish?

Ms. Kapua`ala: You wanna go to that one?

Mr. Giroux: Yeah. I made up this power point just to get people – you know, discussion about where we are, what is a contested case. Try to take the mystery out of it. Get people comfortable with it, because that's a lot of what you guys do. Whether you know it or not, whether it looks formal or not, it is still a contested case.

What is a contested case? A contested case means a proceeding in which the legal rights, duties, or privileges of a specific party are required by law to be determined after an opportunity for an agency hearing. Required by law means that the hearing is required by statute, agency rule, or constitutional due process. In this case, all variances – in this – before you, all variances are by

law, contested cases even if there's not an intervenor. That means that the party has a right to present their case, to cross examine any witnesses. They can assert all the formal rights that they would if whether or not there's an intervention or not.

All appeals of the decision of the Director of Planning or the Director of Public Works is a contested case because that person who's appealing, their rights, duties, and privileges are being – what is this? Determined after an opportunity for a public hearing, which is allowed by the Charter. And they may raise constitutional due process issues. So all appeals and variances are contested cases.

In a contested case, a requirement is of notice. Now, that notice is different than the public hearing notice. Both parties have the right to be notified 15 days ahead of the meeting that they will have an opportunity to present their case. And they're given a letter, a certified letter, telling them that that's the date that they will have their hearing. And that they should be ready. And they have a right to an attorney and such. And that they have an opportunity to submit evidence, cross examine, have rebuttal of evidence.

The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence, as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. And this gives some people a lot of trouble. And what I try to do to is break it down. Real simple. If the person is appealing, then they have to bring the evidence to convince you that they're right. And that the amount of evidence that they have to bring is that preponderance of the evidence. Meaning that it's not like a criminal case where the criminal or the defendant has the right– I used to be a defense attorney–the defendant has a right to be proven guilty beyond a reasonable doubt. And that's our highest standard. And I used to tell people, the next highest standard is proof beyond all doubt. So it's a little lower, proof beyond a reasonable doubt. Now, preponderance of the evidence, you clock it down to about 51%, and you say more likely than not, is this the truth? Is this person right? Did he bring enough evidence to show that – what his position is, is true?

So I know we had a Board a few years ago that with the NOVs, they were holding the government to that beyond a reasonable doubt standard going, oh, but you didn't show this, and you didn't show that, and you didn't show the check that they used. And you're going, wait a second, no, no, the government does not have to prove that violation beyond a reasonable doubt. The violation is of the use of this structure as a transient use. That's what they have to show. And is it more likely than not that this is going on with all of these photos, cars, neighbors testifying, people coming in and out all looking like they're enjoying their two-week vacation, you know? So when you're collecting an evidence for that, keep in mind that, yeah, you'd like a lot of solid evidence, but while you're looking at the case being built, it's not beyond a reasonable doubt. It's the preponderance of the evidence. Did the State make a case? And on the flip side, too, on the defense side, you know, what are they bringing forth to show that these – all these 40 people were all family members? Then you get into the credibility. Then you get – you know, is this reasonable? So that's where it's really important to – when you're discussing the evidence, you know, is this evidence viable? Not is it solid beyond a reasonable doubt, but is it viable. And people can disagree on that too. Is there any questions on that as far as when looking at the level of proof?

This is very important–the decision-maker shall personally consider the whole record or such

portions thereof as may be cited by the parties. Every decision and order adverse to a party must be in writing and accompanied by separate findings of facts and conclusions of law. Those have to be served, and they have a right to judicial review of that.

It's very important, and I already talked about it that it's what is on the record, not your personal investigation. It's not your knowledge that you know that wasn't presented at the hearing. And that's not to say that you can't have personal knowledge. If you drive by that building every day, and somebody says, oh, you know, that building doesn't block that view. And you're like – ah – you can ask the question that will bring that into the record. You can say, isn't there a picture of somebody standing on that? Can we get a picture into the evidence that says somebody standing on there won't see the mountain from the–?

Ms. Vadla: But it has to be in there?

Chairman Tanaka: Can you make the statement by saying, well, you know what? I drive by that building every day on my commute to work so I know. Or do you have to phrase it–?

Mr. Giroux: I would avoid that statement in the sense that you now don't wanna become a witness. What you wanna do is – because now, if that is against somebody who's a litigant, you're gonna want you recused. Now, you're not gonna be able to vote. So you wanna avoid that. But it doesn't mean that you have to wipe your brain clear. It just means that you have to make sure–

Ms. Vadla: You have to approach it differently.

Mr. Giroux: Yeah. And you can ask staff, you know, can they get a photo? Because you have that right as the fact-finder to ask for that information that will clarify those issues.

Another issue is flooding, right? Oh, I know that intersection floods. I hear that all the time–I know that– Get Public Works in here. Sit them down. What studies have you done of that intersection? What are the engineering standards? What history do we have of flooding in the area? Now you have evidence. And I already talked about, you know, because we have to write that document. We have to write it and make sure that that's in there. That that was shown by Public Works through testimony that this intersection does flood on – during Kona storm season, something to that effect.

So, judicial review–this is very important to understand because an administrative agency's findings of fact are reviewable for clear error while its conclusions of law are freely reviewable. So anything that you find as a fact, the Judge would look at it and say was there any scintilla of evidence that that was in the record? Did somebody say it? Did a witness say it? Did a document come in that has that on it? Was there a photo? Is there anything that a reasonable person could've relied on? And it doesn't mean that, again, that beyond the reasonable doubt that that's true, but was it presented as evidence, and did people rely on it?

An example I put is like if a finding of fact was the person's shirt was red, and everybody testified that it was blue, and all the photos showed that it was blue, and on appeal, that is a major issue of identification, the color, red and blue, and the Judge says, whoa, that's clear error. There is no evidence whatsoever that there was a red shirt involved. Everything points to blue. So he's not the

finder of fact, but if there's a clear error made, he can make that decision.

However, on the law, if it's constitutional, statutory, he can interpret the law. If the Planning Director interprets a law that says that you can measure from finished grade or wherever you want, oh, the Judge goes in and says, well, you know, I know the Director was reading this, but the law says not wherever you want. It says from – whichever is lower. So now the Judge has that clear ability to go in and actually read the law, and make that decision of law. And his decision is reviewable by a higher court. But the Judge isn't to replace his judgement with that of the administrator. And so that's where it's a very fine line of is the Judge doing a good job.

An administrative agency's findings of facts will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or the appellate court upon a thorough examination of the record is left with a definite and firm conviction that a mistake has been made. So this is pretty much what the Judge will be doing in a nutshell. That's their job. And that's why evidence is so important. Reliability is so important. The whole context of the hearing is so important–the totality.

As a general rule, an administrative agency's decision within its sphere of expertise, which yours is variances, no, is given a presumption of validity. And one who seeks to overturn the agency's decision bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequence. So it's an uphill battle for somebody to overturn your ruling.

Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings, or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because of the administrative findings, conclusions, decisions, or orders are: one, in violation of constitutional or statutory provisions; or in excess of the statutory authority or jurisdiction of the agency; or made upon unlawful procedure; or affected by other error of law; or clearly erroneous in view of the reliable probative and a substantial evidence on the whole record; or arbitrary, or capricious, or characterized abuse of discretion; or clearly unwarranted exercise of discretion.

So during your hearing, what I'm going to – my comments are usually going to be limited to this standard. When I am watching you make your decision-making process, my concern is that your decision is upheld. And if I feel that – you'll hear me raise issues of process, procedure, because I know that's what the judiciary will be looking at on review. I will be explaining issues of constitutionality, constitutional due process, RLUIPA, other Federal laws. I will be making comment on so that it becomes part of your dialogue and your discussion.

I get called a lot to make judgements on jurisdiction. And that is one of the– As far as what your job is, you can assume that if it's in front of you, you have jurisdiction over it. Now, if I start making comments on the jurisdiction, then I need you to understand where I'm going with my comments, because you are what they call a Board of limited jurisdiction when dealing with appeals. If somebody appeals to this Board, they can only do it if there's jurisdiction. Now, if somebody comes in front of you with a speeding ticket, and says I want a variance from the speeding ticket, my job is to let you know, I know it's on the agenda, I know it's in front of you, but I know that you have no jurisdiction over it. And so my job is to make sure you don't waste your time deciding something

you don't have jurisdiction over.

The tricky part is where the lawyers come in and kinda cloud areas of jurisdiction. And a really good example came up where we – somebody – well, okay, a developer went to get a subdivision, and the Planning Department put conditions on the subdivision. Well, they did it way past their deadline. That was an issue, but some of the conditions were objectionable to the developer, so they appealed that decision of the Director. Now, it came before us and then we sent it to a Hearings Officer. The Litigation Department in my office got involved to defend the Subdivision Department, the Public Works, which I think Planning also got involved. And then the appellant had an attorney. And so when they went in front of the Hearings Officer, they – the County raised an issue about, well, wasn't this subdivision illegal because there is a case that just came out that said you have to get an SMA before you can get a subdivision? And, yeah, that's true. Yeah, that's an illegal subdivision. But that wasn't the question before us. And so when the Hearings Officer came before us with his report, he said, we rescind the subdivision because it violates State law. And the other attorney, the applicant's attorney or the appellant's attorney was like, you don't have jurisdiction to do that. You don't have authority. And I had to make that decision based on your limited jurisdiction that says your decision is not that you're going to revoke the permit. Your decision is when that permit was issued, was there a condition that was legal or illegal, and that is a completely different question of whether or not that subdivision was illegal. Now, that's not to say that you will never have jurisdiction of that issue because if the administrator goes in and rescinds that subdivision, the appellant has a right to appeal. And guess who they come before? You. Now, you have jurisdiction. And that's where the lines get fuzzy even for the educated, even for the practitioner, because they thought because it would come before you anyway, you had jurisdiction. And that's not true. The question before you was based on the pleading and the pleadings before you asked you a specific question. You can only answer that question. And so that's where it gets really tricky. And that's my – that's why I'm here.

Ms. Vadla: Is that the one out on the – out going towards Lahaina?

Mr. Giroux: Yeah, so that one's still in litigation, so we're moving forward. But that's the issues. That's the type of things where I will step in and I will try to explain to the best of my abilities where we are despite what's coming out from the public and other attorneys.

And no. 6 is really important about the arbitrary or capriciousness. And what I do is I tell my client, you, all I need is a hook. You give me a fact, and you give me a reason that five people can agree on, then my job is to make sure that that's sticks. So when there is that debate, you know, on the floor about, you know, this, that, and the other thing, the attorney's job is to make sure he understands what your arguments are, and that it can be clarified and made into a viable document. And Trish will also be doing the same. She'll be asking you questions about your decision so that we understand clearly what your position is, and that can we put it in the document so that if it is appealed, the Circuit Court can understand what your position is. And like I said, even within the Board, there can be disagreement, but at some point, there's gotta be enough agreement that that action is gonna be upheld.

So things to remember – back to – this is the last one. When dealing with a contested case, you are exercising your adjudicatory function. You must remain impartial and not openly make conclusory remarks until all of the evidence has been received. Your decision must be based on

the evidence on the record. Avoid any statements that may be mistaken as an attack on someone's race, sex, gender, or religion, because that's – if you follow this, I think that you should be able to get out of here without a lawsuit against you. And I've been doing this for about six years, and I don't think any lawsuit against a Member, knock on wood, has ever been substantiated while I'm here. And that's the way that I look at my job as a success to say that I'm protecting you, but I'm also allowing you to your job to its fullest extent. Okay? And call me any time.

Ms. Vadla: What's your number?

Mr. Giroux: Call me. Leave a message. What's my number now?

Ms. Kapua`ala: 270-7957.

Mr. Giroux: And we can kick around issues of ethics. We can kick around issues that concern you, procedural matters. No, I'm used to it. I mean, I really feel that that's part– I'd rather do that than find out about it because the lawyer's pointing at you saying, isn't she – the husband is so and so? And I'm like, oh, ah, yeah.

Chairman Tanaka: That was good. Thank you, Trish. Thank you, James. I appreciate throwing in a few examples here and there so that – for our new Members, it's helpful. Okay, the next item would be Item C, approval of the April 28, 2011 minutes.

C. APPROVAL OF THE APRIL 28, 2011 MEETING MINUTES

Chairman Tanaka: Jacqueline, I made the statement last time. Typically what I'll do is, and James talked about is when we get our packet, I'll go through and look, and say, okay, what did Mr. Tanaka say, and make sure there's nothing that's way off base or something. So, you know, rather than reading every word that everybody says, I'll just, you know, okay, I remember that. Then we come to the next meeting, and we need to approve the minutes. Is there someone who'd like to move to accept the minutes?

Mr. Santiago: Move to accept the meeting minutes.

Chairman Tanaka: I need a second.

Ms. Jacqueline Haraguchi: I'll second.

Chairman Tanaka: It's been moved and seconded. Please indicate by saying aye.

It was moved by Mr. Santiago, seconded by Ms. Haraguchi, then

VOTED: To accept the April 28, 2011 meeting minutes.

(Assenting: B. Santiago, J. Haraguchi, B. Vadla, P. De Ponte, K. Tanaka.)

(Excused: R. Phillips, R. Shimabuku, S. Castro, R. Tanner.)

Chairman Tanaka: **Okay, the meeting minutes accepted.** Next item, Director's report. Trish?

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: There is no update, but could you update me? The West Maui Village Appeal, this is the 2007 appeal on the park assessment fee for a subdivision, and the parties could not settle. And I think your decision was to schedule it for a contested case hearing. Is that correct?

Chairman Tanaka: Well, if I remember correctly, we're talking about getting in touch with both parties to say that we would like to set up a meeting. Was that–?

Mr. Santiago: And they weren't responding, right?

Ms. Kapua`ala: Okay, thank you for refreshing me. I did speak to Mr. Pat Matsui, and he said that they cannot come to an agreement. So basically, we should move forward and conduct a hearing.

Mr. Giroux: You need to give them at least 15 days notice.

Chairman Tanaka: I mean, I think it would be – you know, just say, well, in the next whatever, the next month or so, the next couple months, we would like to put this item on the agenda since there has been no progress.

Mr. Giroux: Yeah, Trish, I think send them the letter and then maybe put a date certain that we'll put it on the agenda maybe for a status hearing. And then at that point we can already establish whether or not we're going to get a Hearings Officer or–

Ms. Kapua`ala: One's been appointed.

Mr. Giroux: Oh, one's been – who's been appointed?

Ms. Kapua`ala: Judge McConnell.

Chairman Tanaka: But it wasn't resolved.

Ms. Kapua`ala: We never had a hearing. He has an open contract.

Mr. Giroux: Was McConnell also the mediator?

Ms. Kapua`ala: No, he never mediated.

Mr. Giroux: Okay, so maybe we should get a letter out to Judge McConnell that we expect a pre-

hearing schedule, something, show us that it's moving.

Ms. Kapua`ala: Okay.

Mr. Giroux: And if that doesn't work, we need to put it back on the – I mean, get all parties back in here then.

Ms. Kapua`ala: So it's okay for me to tell Judge McConnell to conduct a pre-hearing? Okay.

Chairman Tanaka: Yeah, yeah.

Mr. Giroux: And then maybe at the status report, see if there's a – if they at least have a pre-hearing schedule.

Chairman Tanaka: Yeah, so just so that they know, okay, well, it's not forgotten.

Ms. Kapua`ala: Okay, thank you.

Chairman Tanaka: Was that it?

Ms. Kapua`ala: That's it for me.

Chairman Tanaka: Okay. Again, thank you very much for that orientation. I found it to be useful as well, even though I've been through a few of these.

E. NEXT MEETING DATE: May 26, 2011, Thursday

Chairman Tanaka: Okay, our next meeting date is May 26. Do we know what's on our–?

Ms. Haraguchi: I don't, but I won't be here for that meeting. Sorry.

Chairman Tanaka: Okay. Yeah, Tremaine will make sure. You know, sorry, last meeting, and I wanted to hit myself after we went through our introductions, and even though we've been listening to James and Trish, you've been in contact with Tremaine, but these are the three main people, our three best sources. So if you have any questions, their phone lines are always open. They're very helpful to all of us.

As far as the May 26 meeting, do we know what's scheduled as of now?

Ms. Kapua`ala: We have an appeal of a notice of violation: Paul Andres of Wailuku Properties, appealing the Director of the Department of Public Works' notice of violation for installing two roll-up doors without first obtaining a building permit for property located on North Market Street in Happy Valley. And so that is where you will be the Hearings Officer. The Department of Corporation Counsel will be representing the Department of Public Works, and Mr. Andres will either be here in person or also have his representative. And James will help you conduct the hearing as the judge and jury.

Chairman Tanaka: I'll be here early. Well, I'll call you first. Alrighty, so that's our next meeting. Meeting adjourned. Thank you.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:59 p.m.

Respectfully submitted by,

Tremaine K. Balberdi

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Chairman
Rick Tanner, Vice-Chairman (1:35 p.m. - 2:56 p.m.)
Bernice Vadla
Stephen Castro, Sr. (1:35 p.m. - 2:56 p.m.)
Bart Santiago, Jr.
Patrick De Ponte
Jacqueline Haraguchi

Members Excused:

Rachel Ball Phillips
Ray Shimabuku

Others:

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