

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
SEPTEMBER 8, 2011**

(Approved: 10/13/2011)

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, 1:40 p.m., Thursday, September 8, 2011, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

Chairman Kevin Tanaka: The meeting of the Board of Variances and Appeals will now come to order. It is now 1:40 and we have a quorum of eight. The first item on the agenda, Trish?

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

B. PUBLIC HEARING

- 1. JEFFREE TRUDEAU representing DAVID C. BOLLES requesting a variance from Maui County Code, §18.16.210 to delete the requirement to provide shoreline access for a proposed subdivision (DSA File No. 2.3115) located at 170 Door of Faith Church Road, Huelo, Haiku, Maui, Hawaii; TMK: (2) 2-9-007:052 (BVAV 20110012).**

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

Ms. Kapua`ala: I do have a short presentation for the Board. Here, we have Hana Highway. The access to the subdivision is Door of Faith Church Road, and in pink, this is the subject parcel. This map shows 50-foot contour lines. So it shows the subject parcel at approximately, 350 to about 200 feet above sea level. Here's another map with imagery. Again here is – I believe this is Hana Highway. No, Hana Highway is going here. And the last of the imagery, the subject parcel is around here. And this map, we're able to view some views from the ocean. And the subject parcel is in this area. This is Door of Faith Church Road. I'll be happy to bring up any of this upon request. So that is all for the Department at this point. And representing the applicant today is Mr. Wayne Arakaki, the engineer. Thank you. Also, we have Ms. Lesli Otani from DSA. She's the civil engineer processing the subdivision. Thank you.

Chairman Tanaka: Mr. Arakaki, do you have a presentation for us?

Mr. Wayne Arakaki: My name's Wayne Arakaki. I'm the engineer for the project doing the subdivision. It's a three-lot subdivision. The area is 20 acres.

Chairman Tanaka: Mr. Arakaki, sorry to cut you off. I just wanted to check with you if you're agreeable to waiving the reading of the staff report?

Mr. Arakaki: Yes.

Chairman Tanaka: Thank you.

Mr. Arakaki: The property is 20 acres and it's along the ocean. It's along the cliff. You know, it's 20 acres. There's no County utilities in that area. It's got electrical power but there's no water, sewer. Everything is private. The property is along this cliff area. And there's another property before the ocean. You know, I wanted some— I came to this meeting. I just wanted some clarification maybe with Corp. Counsel. Would you consider this property a shoreline property?

Chairman Tanaka: Yeah, and that was something that was discussed, that we were discussing just before we started to be able to define—

Mr. Arakaki: I have this handout. There's a property owner, Mr. Linus Tavares. He owns five acres in front of the property. That question, I brought up before, but I could not get an answer about that. That's why we came here to the Board, yeah. And the reason being is because like if we were to provide one shoreline access to the edge of the cliff, it actually goes through somebody else's property. Now, I don't know how that person would feel, but I would think if somebody made a road in front of my property that goes nowhere, and then eventually – well, eventually, we're gonna do a road right across your property, I would feel kinda threatened. So don't get me wrong. I'm for shoreline access, but I just worried about what his neighbor's gonna do or consider. So that's one of the things I wanted to bring up.

Can I hand this out? You know, while I was working on this thing, I had one idea. It was kinda contact the owner and see if he'll be agreeable. And that's something I could never get done. So that's another thought in my mind to see if he would be acceptable in this right-of-way because it actually leads to his property, yeah, before the ocean. And it's very strange because the property is actually along the cliff. There's no usable area. It's mostly on the Hana side that can be used, but it's not fronting Mr. Bolles' property. It's very unusable.

And another thought is just liability. You know, when I was younger, we used to go down this kinda cliff area with just rope and ladder. But again, in this day and age where there's a lot of liability, anybody that get one accident or whatever, they're gonna sue the landowner. So that's another thing that came up with the – with Mr. Bolles. I don't know if something else can be worked out, but right now, it's more for liability kinda thing where as I understand it, he does provide the shoreline access. He's fully responsible. Do you have any questions?

Chairman Tanaka: Yeah, later on, if there are any questions, we would like— I guess the next thing would just be if there's any public testimony. If there's anybody here from the public who'd like to testify, they can sign up. You can come up to the mike. Please identify yourself, and we'll limit you to three minutes. The first name: David Brown.

Mr. David Brown: Good afternoon. I'm David Henderson Brown. I'm the Executive Director of PublicAccessTrailsHawaii@maui.org. And I'm just shocked. I'm not sure whether this needs a legal ocean access or not. Can you tell me that? I mean, we just heard a discussion that there may be a separate property between this and the ocean. Well, judging that your announcement in the paper is honest, but anything is subject to lawsuit, of course, I will give my testimony, but with the understanding that I'm still unsure about the actual facts in this case. But just not having facts doesn't prevent a person from testifying.

Good afternoon. I'm David Henderson Brown, Executive Director of Public Access Trails Hawaii. Public Access Trails Hawaii has a goal of public access to public lands. PATH respects the rights

of private property landowners. In this particular land action, the action of subdivision is not a right of Mr. Bolles, but a gift from the people of Maui County. In order for Mr. Bolles to receive the gift of subdivision, he must provide shoreline access. Shoreline access may be expensive, but Mr. Bolles was fully aware of the laws before attempting subdivision. You Members of the Board of Variances and Appeals represent everyone in the County of Maui including, Mr. Bolles. You have the obligation to uphold the law. Please deny this variance. The 21st Century on Maui will be the century of increasingly limited access to the ocean and the mountains. Please do your part to maintain and increase public access to public lands. Thank you very much.

Chairman Tanaka: Thank you. Okay, sorry about this, the next name – is that Moses?

Mr. Moses Aki Kahiamoe, Jr.: Good morning, Board Members. My name is Moses Aki Kahiamoe, Jr. And I live out in Huelo and also my family over there for generations lived down there. So what I'm here today is to just catching upon what's going on right next to where we live. And I just got some things that I need to be addressed right now.

This place that we are talking about, my family had access for years since I was growing up. And including the neighboring properties, my grandparents owned majority of the south of this property where we are talking about now. And this area has an original trail of going back there, back in the 1881 days. There's a map out on this specific area. Also, this area that we are talking about has got some sites on it. And when I was small and family, we used to go on the jeeps, and go out there, and look at this place, and kinda malama, take care the area, if you understand. Yes, the place is steep, but when we go out there, we go out there for culture talking about ohana. Looking over at Keanae, you can see Keanae specifically, the names of the places that where this place is at, a lot of them come from my family, original names, the Moki's Pond.

So just to kinda bring everything together is I hope at this point that– The people never even get with us. We live there. And they never come, and talk to us, and tell us, eh, you guys know anything about the property? Nobody knew nothing. And then all of a sudden, we get guys doing construction with dozers, pushing stuff away, then we hear this coming up. This guy like do all this. Why you like do that? In this area where we used to go and– Somebody gotta look at this whole thing, and kinda assess what's going on. Well, this morning – this afternoon, I hope you guys don't grant a variance. And I want you look into the piece of the property that we're talking about because there's ancient trails that we use back in the days and still do at the time. Hopefully, we can kind of work together, the community, so that we can protect cultural access. Thank you.

Chairman Tanaka: Sorry. I have a question for you. Trish, any one of those maps that you can bring up. Can you point out about where you live and actually how you actually got through where some of the trails that you talked about.

Mr. Kahiamoe: All these properties right here going down, my grandparents used to own all this right here. I live in this area which we own inside there, inside this gulch. The access is this road that he's talking about, the other owner, Jackie Tavares. Our border line from our – my grandparents' house was this, including this gulch. All this we go down, go through here. The other access is this line where we used to push cattle. This whole area. The general area that we're talking about is on this mount right here and overlooking this area. When you stand over here, you can see Keanae. It's like sticking out right here. That's where the rest of my family's from, yeah? So if you look at this whole area, we once owned all this, all this. That's why the access, somehow

we gotta work the way because my driveway – in fact, this road, my grandfather own all this. And you come here, this is the starting of my driveway right here go down, and go down in this gulch all inside there. Yeah. So it's kinda like my own backyard. And just to– After I graduated, I graduated in high school, Baldwin '78, I went into the army and did 21 years and I retired out. So now I coming home to show my kids what home is about and it's getting fewer. We doing the water thing going on and everything else, you know, so we now we get this now–no access. So it's kinda hard.

Chairman Tanaka: One more question. Now, when you talk about the trails through that property from the top of the cliff down to the ocean, are there trails that you've used and–?

Mr. Kahiamoe: Yeah. Well, this three that we used to use, you know, we haven't went back, but I know this place already got taken out. This is one short area that you gotta go down sideways and go down here. And the other one is gonna be at this point going inside. So all these right here is kinda like sheared off, but there's all access that goes down here. Like for us, we live out here, so we know how to go out there. I mean, I'm not talking for the whole – I not speaking about the whole public, you know. That'd be pretty crazy to have anybody. They don't know how to go down there and stuff. But, you know, to the fact that the people who live there from there should have some kinda of right of – a free way of going, yeah?

Chairman Tanaka: Thank you. Any other questions from the Board?

Mr. Ray Shimabuku: Mr. Chair, I have a question for the first testifier.

Chairman Tanaka: Mr. Brown.

Mr. Shimabuku: Mr. Brown.

Mr. Brown: Question?

Mr. Shimabuku: Yeah, Mr. Brown, your organization, do you have maps or information on trails in that particular area?

Mr. Brown: Not more than what's demonstrated here.

Mr. Shimabuku: Is that like registered in your organization's–?

Mr. Brown: No, no, it's just common trail knowledge–what you've seen here. Nothing extra. Thank you.

Chairman Tanaka: Okay, thank you. The next person, sorry again, Frank–?

Mr. Frank Iachelli: Ichelli. Hi. My name is Frank Ichelli and I live on Huelo Point. Moved there some years ago. And the reason why I'm here is because this is an important issue for me and my neighbors. It's the reason we live on Huelo. It's for the view and access to the shoreline. While I may not be true adept at climbing down cliffs, there are some trails that previous caretakers have shown me. And I want to at least be able to access the pali and see spectacular views that are only accessible from that particular point. You can see all the way to the west and you can see Hana

and Keanae. And it's absolutely spectacular. And I think – and I speak for a lot of my neighbors, at least every single one I've spoken to that maintaining this access is important to us and it's important to the whole community.

And I – if you wanna know where I live, right over here, at this corner property that– I'm on record now. Okay. I live right over here on this corner property right at the corner of Door of Faith is right adjacent to the property.

It's my belief that access to the property provides a value to me and my neighbors. And to take away that value to us and assign it exclusively for the benefit of one person takes away from all of our value, and gives it exclusively to one person, and that hardly seems right to me. So this is why I live here, and that's why I'm here, and that's why it's important.

Mr. Shimabuku: I have a question. So do you have information on the trails that you use to go down to the beach?

Mr. Ichelli: You know, I've walked the pali, and I have walked part of them– The previous caretaker showed me a way down the trail. He's not here anymore, but it's essentially on the northwesterly side.

Mr. Shimabuku: Can you point that out to me where that would be?

Mr. Ichelli: Right there. This point right here.

Mr. Shimabuku: So there's only one point that you would go down from?

Mr. Ichelli: It's the only point I know of. There could be others. I haven't lived there all my life, so I can't speak to other places.

Mr. Shimabuku: Okay, thank you.

Chairman Tanaka: Thank you. Any other questions? Is there anyone else from the public who wishes to testify on this matter?

Ms. Lucienne deNaie: I didn't sign up so– Can I sign up afterwards? Aloha. My name is Lucienne deNaie. I'm here representing Waipio Bay Benevolent Association. We're just a bunch of folks that live around Waipio Bay, Door of Faith, and a couple of ahupuaas over. So I'm here 'cause some of my neighbors couldn't come today.

We very much would appreciate if there was community access to the pali. This isn't so much about access to a beach or to the shoreline 'cause the pali itself is just a wonderful place to walk. I've walked there for many, many years. I've lived across the street from this property for 26 years. And I sent in some written comments. A lot of other folks in our neighborhood, too, have walked the property. It's like the former owner – as long as you left his cows alone, he was fine, you know, that you walked along there as long as it's respectful.

And I could maybe address a little bit about Linus Tavares' property because I spoke to Linus this week and let him know kind of what was going on. He wanted to know what was going on with this

hearing and everything. He lives over on the Big Island, by the way. And the property that's his is like down the side of the cliff face, so I guess you could say it's between this property and the ocean, but not for any practical sense.

And other folks in our neighborhood do give access like down the gulch to some of the pools on . . . (inaudible) . . . Stream. There's two individual properties that give access to that. All you need to do is just check in with somebody. One has a little waiver. One doesn't. You just check in. So there's a precedent in our neighborhood that folks appreciate that these resources kinda belong to everybody, and this was old style. And so the folks who have lived there for a number of years respect that.

Also, regard liability, I believe that HRS 520 kind of addresses liability. And you folks might wanna look into that because the sea is like for recreation, and recreation is defined as just walking, looking at cultural sites, nature. You know, you don't have to get to the bottom of the cliff and be in the ocean in order for recreational access to be important. So I just wanted to make that point. Also, as folks have mentioned, there was an old road that went here, and I included like the old map from Huelo Plantation that showed this road. And this road traversed a corner of this property. It went through this property and to the neighboring property. And it was here in the Kingdom days. So what this is telling us is people went here. There was traditional access. And I believe the law really protects this traditional access.

Also, while the cliff is steep, it's a nesting ground for birds. And the Invasive Species Committee comes down there because they're trying to protect the native birds. And they've been tracking these parrots. And we all give them permission to go on our property. They go on my property. They go everybody's property. But this would allow them some sort of an easy access where they don't have to like ask permission every time. If someone's out of town or out of state, they can't go. So it could solve that, too, if there's just some sort of community access that is simple.

I think most people in the community, it's not so much in need of parking because we can all walk there, and our guests can walk there, and our friends can walk there. It's more just that there be an area left. And I brought some pictures that you folks can have just to show what it looks like and where you could walk because I think it's important to – you know, the maps are good, but it's important just to know what it looks like. It is really a beautiful place.

And then like Mr. Kahiamoe said, you know, they did a whole cultural preservation plan for this land, but no cultural access was granted. It was kind of a big mistake. They never talked to anybody. And all these families lived there for hundreds of years, and they all know about it. I'm learning from them. And we're all so appreciative. So this could be a way of addressing cultural access, too, so that Moki's kids could know what he knows, and their kids could know what they know.

So if you folks could not approve this variance, but work with the property owner maybe to instead assign cultural access, and that might relieve them from some of the cost and stuff because cultural access doesn't have to be 15 feet wide. It doesn't have to be paved. It just has to work so people can access it. It looks like under the statute that you folks might have the flexibility. The Director might have the flexibility to do that. I think that would make everyone in the community happy. If the landowner could live with that, I think it would be a good way of trying to figure this out, because this isn't really about getting down to the ocean. It's about protecting a beautiful cultural resource that is the largest parcel left on Waipio Bay that's undeveloped.

And I did mention in my comments, my husband and I hope to dedicate our land as a little park someday. And this trail would be right across the street. It would be so nice for our whole community to have like a park. Our land is very lightly developed. We've never developed anything on the coastal part so it could just be kind of a natural area. Our houses will decay pretty soon. They're small, little shacks. So they go away, then the community has a park and they have a trail. And it helps perpetuate the culture in our community for everybody. Whether they're Hawaiian or not, they can all learn from it. Thank you.

Chairman Tanaka: Thank you very much. Any questions from the Board? Thank you. Anybody else from the public wishes to testify? Seeing none, we'll now close public testimony. Any – to the Board, any questions for the applicant, to the Planning Department, to DSA?

Ms. Jacqueline Haraguchi: Can you tell me what the—? I have a question. Can you tell me what the HRS 520 says about shoreline access and liability?

Ms. Kapua`ala: I do have HRS 520-4 up regarding liability of owner limited. However, I have to direct that question to our Corp. Counsel.

Mr. James Giroux: It's HRS 520? Do you want me to go over there and read it?

Ms. Kapua`ala: I can read it. Liability of owner limited, Subsection A:

Except as specifically recognized by or provided in Section 520-6, an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes does not:

1. Extend any assurance that the premises are safe for any purpose;
2. Confer upon the person, the legal status of an invitee or licensee to whom a duty of care is owed;
3. Assume responsibility for or incur liability for an injury to person or property caused by an act of omission or commission of such persons;
4. Assume responsibility for or incur liability for any injury to person or persons who enter the premises in response to an injured recreational user.

And finally, Subsection B:

An owner of land who is required or compelled to provide access or parking for such access through or across the owner's property because of state or county land use, zoning, or planning law, ordinance, rule, ruling or order to reach property, use for recreation purposes, or as part of a habitat, conservation plan, or safe harbor agreement shall be afforded the same protection as to such access including parking for such access as an owner of land who invites or permits any person to use that owner's property for recreational purposes under Subsection A.

Mr. Shimabuku: Mr. Chair, I have a – I guess this would be for James. So how would that section in relation to the no trespassing issue?

Mr. Giroux: I think when you read the code, it says that "if you permit it." If that's permitted and then

there's another section that says that, "if it's required." So what Title 18 is doing is it's requiring that by County code. And that's authorized under Hawaii Revised Statutes 151. So basically, there's no trespassing issue along that path. So the liability doesn't run to the County. And on that path, it doesn't run to the landowner.

Now, the issue of trespass, then that's a different story, but also the idea is that the State is trying to limit the liability of landowners and the County in order to encourage access to shoreline. And that's confirmed underneath PASH, which is your native Hawaiian rights in order to have access to cultural activity. And it's also again reinforced under 205A, which is your special management area, which is basically, mandated through Federal law that the State have laws that allow for the preservation of coastal areas. And part of Hawaii State Law 205A requires that all State agencies follow the objectives and policies of 205A. And some of those policies are to preserve access to beach recreational areas. So in that context, that's the nutshell of access in Hawaii is that the empowering statute of what you're looking at is – has multiple areas within State law that encourage it, and it also – the legislature has seen it as important, that it actually limits liability of landowners in the County.

Mr. Shimabuku: Thank you.

Mr. Bart Santiago: I have a question. Where potentially the danger and liability that exists such as this location in the cliff? Has it ever been challenged as far as the liability standpoint in court?

Mr. Giroux: I think as far as the – I think the only inroads that I know of that are in the State area where the State actually has control–DLNR. I think where we saw the – it was more involving cliff areas in a valley on Oahu where the cliff gave in. I believe it was Rainbow Falls.

Mr. Santiago: Or that stream in Kauai where they . . . (inaudible) . . . access?

Mr. Giroux: Yeah. And the issue was that it was under State control, and the State hasn't waived liability in that area. So what the legislature did, it actually gave private citizens more protection than it did your own State. So the State, once it has control, has to maintain its access areas in a safe manner. And we've seen areas along Haiku where DLNR has refused access because of the danger in cliff areas. But as far as I know, the State law is still good protection for a private homeowner.

Ms. Kapua`ala: Excuse me, Mr. Santiago and Giroux. There's case notes here on HRS Chapter 520. And it does speak about a lawsuit where the terms "invitee" or "licensee" was – well, whether it was recreational or nonrecreational was very key without charge or fee. Can you see, James?

Mr. Giroux: Where are you, Trish?

Ms. Kapua`ala: Shall I read? It's very technical.

Chairman Tanaka: From what you said, it sounds as though that specifically was if you're invited or you're charged to go there.

Ms. Kapua`ala: Then you wouldn't be covered under this law, yes. So since the person who sued did not pay, was without charge, he was not an invitee or licensee, the landowner – it says here,

“The landowner owed no duty to prevent or warn plaintiff or plaintiff’s use of landowner’s land, access land, and use of public beach, and ocean-fronting land.”

Mr. Giroux: Yeah, that’s really technical. I haven’t read that case, but from my reading of Tort law, what happens is if somebody sues that you would bring this statute in as a defense, and then the other lawyers would try to poke holes in it. And I guess in this case, I believe what’s happening is that people are raising the issue of, well, you should’ve known, you should’ve told me, you should’ve put a sign out, but the law is saying is that, no, there’s no such duty for that if you meet the criteria of the statute. And that’s what the statute is saying is that if you’re – if you don’t meet that criteria of you should’ve told me, then the landowner is not responsible for signage or keeping the property in a safe condition. So again, just to make it a little clearer, if the landowner was charging money for somebody to go to the beach, then he is responsible for signage and keeping the place safe. So that’s the loophole, the exception.

Mr. Santiago: It’s not ocean or shoreline access—that case in Kauai—where the landowner is being sued even though they did not charge access to that stream. It’s not – I know they’re going through some cases right now, or suits, lawsuits because of that accident.

Mr. Giroux: Yeah, and again, I’m not too familiar with the facts of that case. And again, Tort law is just so – they make it so the lawyers make all the money at the end of the day. It’s pretty clear that if you fit within that statute that that’s your defense.

Mr. Santiago: Okay. Thank you.

Chairman Tanaka: I have a question. James and I were discussing this before we got started and Mr. Arakaki actually brought it up. I guess this is a question for the County, for Lesli. It’s the definition of shoreline, access to shoreline, which is physically, not the case for this parcel.

Ms. Lesli Otani: The code— This is Lesli Otani from Public Works. In reference to Section 18.16.210, the first line states, “Where a subdivision fronts along the shoreline for other public use or recreational areas, right-of-ways to these areas shall be created.” And the code goes on. The Department’s view has been “fronting the shoreline,” and also, “public use and recreational areas,” we take a broader view of that. So even if maybe there’s not actual water right there, we view it as it is a public use and a recreational area all along from the public roadway to the shoreline because what happens is that sometimes we get shoreline access in piecemeal fashion. And I think one of the subdivisions brought up was I believe Peahi Farms. And that’s an instance where they had a large land mass that was close towards the ocean, but there was also pieces above between Hana Highway and the ocean. So we took it in piecemeal. And that’s similar to how we do road-widening lots which we’re famous for. We take it all along the way as people develop. So even if in theory the argument is that it’s not along the actual edge of the water, our broad use of the term “public use and recreational areas,” we fit that in where we wanna get it for the public all along the way.

Mr. Giroux: I think I understand that concept. In reading 115, the public access, the coastal and inland recreational areas, it’s pretty clear that the State legislature has viewed the ability for the County itself to go in and then condemn areas to actually create a wider scope of recreation. So it wouldn’t make sense for the County to go in and condemn a strip, or to create an access, and not in its own permitting process have preserved a way to get there. So I believe that that’s the take that the Department is taking is that it’s blocking – I mean, it’s close enough to the shoreline that

it's a recognized access area that because you're coming through the subdivision process, that is the time to look for access issues.

Chairman Tanaka: I guess, Lesli, I understand what you're saying, but the actual – because there is the Linus Tavares property between an actual shoreline and this parcel – but you're saying that to get to the – I guess it's – to get to the Linus Tavares property, you would need access across this parcel.

Ms. Otani: Well, two points: one, in theory, yes, we would want it to be eventually be contiguous to wherever the State line is or the ocean would be. The other thing is that although I haven't researched this in great depth, and I haven't looked at the old deeds, but when you look at some of the old subdivision maps, when the Tavares Family had subdivided, they actually showed the edge of their property as the top of the pali. So I'm not sure if that tax key was a remnant maybe where they owned on their old deed or award, and where the subdivision line was drawn back in the '70s or previous. It may be that the line was drawn at the top of pali with them thinking that that is where their property ended, and maybe their property went farther. But again, I haven't researched it or looked at the old deed.

Chairman Tanaka: We do have another question that I guess I'd like to address the question directly to the Planning Staff Planner, Mr. Paul Fasi. Regarding the SMA requirements, SMA minor requirements, what were the requirements put on as far as the first pass on this for this parcel?

Mr. Paul Fasi: Paul Fasi, Planning Department. Are you referring to the subdivision portion?

Chairman Tanaka: Yes.

Mr. Fasi: Of this project? I believe that – I think there's a confusion here. And on one thing, we're talking about beach access and the public right-of-way. And the second item is the actual subdivision itself. And they're kind of separate because let's say, for example, he's not granted the beach access, or he is granted the beach access, it doesn't preclude him from not being subdivided. You know, the subdivision process is kind of a separate issue. So I don't quite understand what you're asking.

Chairman Tanaka: Well, was there a requirement that said that shoreline access must be a part of—?

Mr. Fasi: It is. Anytime we review large parcels of land that front the shoreline that are on or near the shoreline, we are required by County code and State law to say that they are required to put in a public right-of-way beach access. That is County code. That is State law. And no one can circumvent that just because they have beach frontage. There's only so much beach frontage here on Maui, and the Planning Department feels that you can never have enough beach access.

Chairman Tanaka: Was it specifically defined as to the actual infrastructure that you wanna see: a paved, striped parking lot—?

Mr. Fasi: Well, I know the Fire Department, Police, they wanna see a nice paved road going down there, but in this case, I don't think it's practical. If it was an ocean frontage area where there's an actual beach and you're gonna have heavy recreational use, then we would say, yes, okay, you

have to work with the Police Department, work with the Fire Department, put in a parking lot, and put in a nice paved road with a turnaround area down there. We've done that before, but in this case, I don't think we can go to that quite extreme. And the Department would be satisfied with having a public right-of-way access there that's 15 feet wide as required. The minimum is 15 feet. Now, we're not gonna preclude what the Fire Department or the Police Department wants to put, but there has to be some kind of a public right-of-way there.

Chairman Tanaka: So as part of the SMA requirement would be that a plan would show 15 feet from the property edge, a straight line that runs parallel along the edge of the – and the Fire Department and the Police Department would have to review? Is that–?

Mr. Fasi: We would put it out and ask for comments from the departments, correct.

Mr. Giroux: Well, just as clarification, maybe you can explain to this Board because we're looking at a variance from subdivision, but I believe the Department has granted an SMX, an SMA exemption?

Mr. Fasi: What we did was there's an SM2, which is a minor permit, in Planning Department jargon, for a subdivision. However, it's not just a paper transaction subdivision because also proposed were some improvements, and improvements being a road, fire hydrants, and a water tank. So with those improvements, it becomes more than just a paper transaction subdivision. Now, if he removed and took out the construction activity, okay, that would then put it into another category, and that would be an exemption, what we call an SM5. Okay, if it's just – he's allowed up to four lots, subdivide up to four lots with no proposed construction activity proposed, and that's just basically, a paper transaction, no development proposed.

Mr. Giroux: So as part of the SM2, were there plans that were submitted that showed beach access?

Mr. Fasi: No, there were not.

Mr. Giroux: So where is the County expecting this access?

Mr. Fasi: We don't know yet. The Planning Department hasn't really actually drawn out where we would want this access to be. We would again put it out for transmittal and perhaps work with DSA and see what's feasible, what's the best route for a beach access along this particular piece of property, and looking at the lay of the land.

Mr. Giroux: I mean, because it puts this Board in a really difficult position when they're looking at a subdivision variance where there's an SMA overlay where there's no clear direction from the Department at this point. What effect on your Department in administering 205A would this Board be put in as far as granting a variance? I mean, what – how would that affect your Department's ability to guarantee access to the shoreline?

Mr. Fasi: If this Board granted the variance and so he didn't have to put in a public right-of-way, how would that effect the SMA permit? We would just have to go ahead and process the permit without the public right-of-way. It's this Board's prerogative to either grant him the variance to the right-of-way or not. And we'd just have to go – we cannot challenge what the BVA is putting forth, I don't

think.

Mr. Giroux: Paul, I've got a problem with that because the State law says that all State and County agencies have to follow the policies and objectives of 205A.

Mr. Fasi: Correct.

Mr. Giroux: So the Department taking that position isn't consistent with State law.

Mr. Fasi: That's correct. It is the Department's position that we are recommending to this Board to deny this application for a variance. Now, if you don't agree with the Department, I don't know what – how that affects the Department, to tell you the truth. I would then have to consult with our attorney. In other words, how, you know, the BVA is gonna circumvent State and County laws, and we're kinda stuck in the middle. I don't have an answer to that.

Chairman Tanaka: Because this – the way I understand it is this Board – well, from what we have here referencing both County Code 18 and Hawaii Revised Statutes that we couldn't. We don't have the power to even if we thought it was the greatest thing in the world. And because what we're talking about being with the SM2 added to it, it's the Planning Commission that actually – does the SMA minor still–?

Mr. Fasi: No, the SMA minor does not go to the Planning Commission. It's not until it's a major that it goes before the Planning Commission.

Mr. Santiago: I have a question. When the SMA was granted, was there any kind of cultural inventory that was done because there's talk of rock formations and stuff such as that that was mentioned earlier in one of the testimonies?

Mr. Fasi: The SMA has not been granted yet, but, yes, there has been extensive archaeological studies on it, in fact, three that are the subject matter of another matter on this same parcel of land. But, yes, it's pretty extensively been researched.

Mr. Giroux: Paul, can I just try to get some clarification? As far as the process goes, the SM2 has been granted by the Department. However, there's an intervention, and it's in a contested case proceeding right now?

Mr. Fasi: There's an appeal on the SM2 decision to grant the SM2. That is correct. I stand corrected. Yes, that is correct, the appeal of the minor permit.

Mr. Giroux: So there has been no final decision on that SM–?

Mr. Fasi: No, not yet.

Chairman Tanaka: I guess for James, my question would be, wouldn't – if the SM2 were to finish its process, this would not – this potentially wouldn't be an issue for the BVA?

Mr. Giroux: I think the problem– I don't know if you want to discuss this in executive session, but I can talk about– The BVA, we had this situation before. And the issue again was subdivision, and

that was during an appeal process. And what the BVA has to understand is that it's a Board of limited jurisdiction. And the jurisdiction given to you is given through the charter or any ordinance of the Maui County Code. In a situation like this, there would be almost dual jurisdiction. You're being asked to cover one eye and make a decision. There's 205A, which is under the charter. The final authority is the Maui Planning Commission. However, in their rules, they are not reviewing an SM2 at this time in their rules. However, being that there's an appeal, that appeal is reviewable by the Maui Planning Commission pursuant to their contested case rules. So coastal zone management issues will be determined by the Maui Planning Commission. What you're being asked, in the middle of this process, is to eliminate their requirement to follow subdivision law. The subdivision law is consistent with 205A. Their requirement to require shoreline access is pursuant to, not directly, but it's consistent with 205A. The empowering statute of HRS is coming out of 115, which says that the Counties have to create ordinances that preserve shoreline access. So there's multiple levels of State statute that are being evoked. But what you're being asked to do is to modify or give a variance from Title 18, which is the County ordinance. So that's your limited jurisdiction. If there's any Federal, State, or other County law that requires that access, then they're going to have to follow those laws. But the caveat is, is that you are a sub-entity of the State, meaning that 205A does cover you in its mandate that you have to follow its objectives and policies. That's the hook. That's your underlying dilemma today is that you're being asked to make a decision, again, with one eye covered, but I believe as your attorney, I have to inform you of the other underlying issues that should go into your decision-making process.

Chairman Tanaka: So we would be – if we moved forward, and we discuss, and it's moved, and we vote, we're talking about approval or denial of a variance from Maui County Code 18.16.

Mr. Giroux: Yeah.

Chairman Tanaka: But we still need, yeah, to State law that – so we're in essence, giving a variance from two separate laws.

Mr. Giroux: Right, because 115 wouldn't change. What 115 says is that the Counties have to create laws to allow beach access. What the County did is they created 18.16, which you're being asked to not follow. So the empowering statute doesn't say that you can't change 18.16. What the underlying tone is, is that 205A does. But you're not being asked to determine 205A. It's an underlying mandate that the agencies, County and State, follow that law also in its decision-making process.

Mr. Rick Tanner: It's clear as mud.

Chairman Tanaka: Actually, I have a question. Mr. Arakaki, for you, I guess, representing the owner, Maui County Code 18.16 talks about that the owner requires public access, minimum width of 15 feet. It's not defined 15 feet of paved road, or ten feet of paved, and show – you know, nothing like that. One of the things that was part of the memo to us was that locations of such right-of-ways shall be agreed upon by the subdivider and the Planning Director. So meaning, there is leeway. It can be discussed and it can be compromised that, okay, we're gonna put in this. We're gonna make sure that access still exists. What it actually looks like will be discussed, though, will be decided.

Mr. Arakaki: As I said earlier, don't get me wrong, I believe in beach access. The only problem is

to where? Mr. Linus Tavares, I mean, I didn't get in touch with him, but I don't know what his feeling is. If you were to say that the Director and the landowner agrees to one certain situation, but Mr. Tavares totally objects, and there's an accident or whatever, isn't – I mean, wouldn't Mr. Bolles be liable?

Mr. Giroux: Let me address that. Again, what 115 says is, is that in that situation, the County under 115 has the power to go in and condemn that area that would allow that access. So what the County is saying is, is that in the subdivision process, that's the time for the County to look at the access issue. Now, if this access goes to nowhere, the County, in the next 20 years will still have that obligation under 115 to create that access.

Mr. Arakaki: Okay, so this access is floating. We don't know where it is. And then it goes to nowhere like you mentioned. Okay. This is just one idea. I'm just trying to think out of the box, but would it be possible where we can say that we're gonna be providing one access, but it's not gonna take into effect until the property condemns the property, Tavares' property, or whatever?

Mr. Giroux: I think at this time, the County has to look at what's the logical entry point into the ocean and work from there. I don't think that– It's like the sidewalks in Kihei. You know, you can't walk from the school to the beach and stay on the sidewalk. You gotta go across the street because somebody didn't build a house. You can't say we're not gonna build sidewalks because it's gonna be hodgepodge.

Mr. Arakaki: Excuse me for being so concerned, but I'm just worried about the neighbor, what the neighbor's gonna do. I'm just thinking right now that maybe I should contact the neighbor and ask him for his opinion as far as where the beach access should be, if any. I think that would help, because I'm really worried about liability. And putting a beach access to this particular person's property and saying this is where it's gonna be without any consideration on his part, I think that's wrong. I feel that maybe I should contact him and ask him this question.

Chairman Tanaka: As far as the process with the Planning Department, yeah, I mean, that would be my question because we're talking about say you just gave a 15-foot strip right down the edge of the property that leads to another parcel, Mr. Tavares' property. Now, the way the County is interpreting shoreline access, not necessarily that you can– Help me out here.

Mr. Fasi: I think we're getting ahead of ourselves. And today is not to determine where the beach right-of-way is gonna be. The determining thing we need to determine today is that is he gonna have to provide a public right-of-way or not. And where it gets placed is for another day. But the decision that needs to be made today is that, yes, he is required by State and County laws to have a public right-of-way beach access. Now, the second part is where will that be and that's to be determined at another point. But we need to get past the decision-making point of is he or isn't he gonna be required to have one. Because then if he's not, then it's moot. But if he is, then we will determine that at another point in time.

Mr. Santiago: I have a question or clarification. Could someone define for me what the requirement is for a cultural right-of-way as opposed to just a public right-of-way?

Mr. Fasi: We don't have a definition for a cultural right-of-way. I'm not sure there is such a thing. I know Ms. deNaie mentioned that, but I couldn't imagine it being any different than the public right-

of-way. You can't have a cultural right-of-way meandering throughout this guy's property. That would be grossly unfair to the property owner. So we're not here to talk about cultural access. We're here to talk about beach access and coastal access. And this is not about access to archaeological sites that are all over his property. This is talking about a coastal resource and access for the public to get to that coastal resource. So you're getting a little bit off the subject matter.

Mr. Santiago: I just wanted to know if there was a definition.

Mr. Fasi: We don't have a definition in the – I'm unaware of one.

Mr. Santiago: Thank you very much.

Chairman Tanaka: Okay. Mr. Fasi is correct. That is the only issue. There is some flexibility on what the – what, where, how it looks is to be determined. I–just for the Board to start the discussion–Chair, it is of my opinion, it's straightforward. There has to be public access to the shoreline. On the extreme opposite end, we are talking about public access to Mr. Tavares' property, which is not the way the County views, interprets the code. I'm sorry, one more time, James, the – for us as a Board, we are looking at this as public access to what the County views as shoreline access.

Mr. Giroux: Yeah. I guess a lot of times because you guys are called the "Board of Variances," and then it's "and Appeals," I think a lot of times people forget which one we're doing. And so I think we had a case maybe about a year or two ago where it was a subdivision and it was a fire access. And the issue was, was the Fire Code reasonable or unreasonable, or was the person trying to get a variance. So again, being that we're a Board of limited jurisdiction, we have to look at the pleadings on its face. And what was brought before you was a variance, not an appeal. You're not being asked to second guess the Department's interpretation of frontal – fronting the shoreline. That's an appeal issue. What you're being asked to is assume that they are required to give shoreline access, and do they meet the criteria under the three-part test to not have to meet the County code. And again, it's that three-part test: the topography, the hardship, and the public welfare, health and welfare. Oh, it's five. Trish is saying its test is even harder now, five. But, Trish, maybe you can put that up there so it's clear that once you enter into the variance stage, the assumption is that the law is valid and that the interpretation of the Department's application of that law is valid. Now, the test is should it not apply to this property.

Ms. Otani: Chair, if I may clarify something while Trish is getting that up? Typically, the way the shoreline access for our Department works is that the applicant will submit to us a map showing where they propose the location, and also what type of improvements. And I'm not the engineer that routes or reviews the construction plans, but usually in this kinda case, it would be an easement or a right-of-way through the property to a specific area or areas, and it would end at the property line. So the access would actually be contained within the property being subdivided.

Chairman Tanaka: Thank you, Lesli.

Ms. Kapua`ala: And, Board, for the record, pursuant to Section 18.32.010 of Maui County Code, which is also mirrored in your BVA rules, here are the criteria which the applicant must qualify for in order for you to grant the variance. And if you look at the Department of Public Works' staff

report dated today, I believe the Department of Public Works does not believe that the applicant meets all of the criteria.

Chairman Tanaka: Okay, Board Members, any questions or any – for the applicant or for Planning? Discussion?

Mr. Stephen Castro: Mr. Chair, I have a question. Mr. Arakaki mentioned that he hadn't spoken to Mr. Tavares. So would this infringe on his rights by no one contacting him?

Mr. Giroux: It strikes me as strange because I think there is a notice requirement to 500 feet? No?

Ms. Kapua`ala: During the – for variances, it's adjacent property owners and those located across the street.

Mr. Giroux: Isn't Mr. Tavares' property adjacent to this property?

Ms. Kapua`ala: Yes.

Chairman Tanaka: But he was notified of a subdivision, not necessarily– Would that have included the fact that–?

Ms. Kapua`ala: For the variance.

Chairman Tanaka: Okay, so he was informed, then.

Mr. Giroux: The notice issue has been taken cared of.

Mr. Castro: Thank you.

Chairman Tanaka: Other discussion by the Board?

Mr. Santiago: I have a comment or an observation, by granting the right-of-way, it's like the cart ahead of the horse, right? Because the land in front of it, we would need access also.

Chairman Tanaka: Eventually. Oh, you mean leading up to it? Yes, there are a couple of driveways that access that actual parcel. Is that true, Trisha?

Ms. Otani: I'm sorry. Could you repeat your question? I couldn't hear quite–

Chairman Tanaka: From the master, we see – it appears as though there are at least driveways and/or roadways leading up to that particular parcel.

Ms. Otani: There's – well, access is another separate issue in that area. And of course, the subdivision code is stricter than some other requirements, but typically, there are roadways in the area. There's Hana Highway above. And then there's, I think, Waipio or West Waipio that's below, and in between there in some portions, the old Hana Highway. A lot of people travel, I believe, through what's called Door of Faith Road. And parts of that is possibly through private land, parts maybe through old governmental roads, and part is through the partition that was done there back

in the early 1900s. And so I think if the question is if there's a road, there's a road leading down to the area, but access itself is a separate issue over the road.

Mr. Santiago: So we grant access. We figure out the—

Chairman Tanaka: Well, it wouldn't be granting access. It would be denying the variance application to delete access. Well, as part of what we talked about that access shall be provided, now, exactly what it looks like, that is to be determined. I would assume that the owner and the Planning Director, Planning Department, would be able to come to some compromise that's agreeable to both sides without much harm to either side. And the bottom line, access would still be granted, or there would still would be access.

Ms. Kapua`ala: Excuse me, Mr. Chair. It's been brought to my attention that Mr. Tavares' property ends here. And from here on belongs to the State of Hawaii. So the subject property has a boundary line here, and again, Mr. Linus Tavares' property ends here. And it looks like 3.45 acres of the shoreline area belongs to the State.

Chairman Tanaka: There you go. Trisha just solved the problem.

Mr. Santiago: From that road to the shoreline?

Ms. Kapua`ala: From which point of the road? Here?

Mr. Santiago: At the top.

Ms. Kapua`ala: From here to—?

Mr. Santiago: To the next road down, I guess. There you go. Right there.

Ms. Kapua`ala: From shoreline to the road? There is a measuring tool in meters.

Chairman Tanaka: So the question was distance from the end of the road to the property line? That was your question?

Mr. Santiago: From the road to the shoreline.

Ms. Kapua`ala: Should I go vertically? Hold on one moment. Let me highlight the parcel. Say here, 143.91 meters. Would you like a conversion of that?

Chairman Tanaka: Okay, so I'm — with the information that we have, back to the point that we are looking at the single issue of shoreline access, not trying to design it now, not trying to discuss what it should be, but that it should be, period, Board Members, any other discussion? Any other questions? Or I would entertain a motion.

Mr. Tanner: Mr. Chair, I would make a motion to deny the request for a variance.

Ms. Rachel Ball Phillips: Second.

Chairman Tanaka: It has been moved and seconded to deny the variance application. Any discussion? With that, I'll call for a vote. All those in favor of denying the variance application, please say aye. Any opposed?

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

VOTED: To deny the request for a variance.

**(Assenting: R. Tanner, R. Phillips, R. Shimabuku, S. Castro,
J. Haraguchi, B. Santiago, P. De Ponte.)**

(Excused: B. Vadla.)

Chairman Tanaka: **The variance is denied.** Thank you.

C. APPROVAL OF THE AUGUST 11, 2011 MEETING MINUTES

Chairman Tanaka: Okay, the next item on the agenda: approval of August 11, 2011, meeting minutes.

Mr. Shimabuku: Move to approve.

Mr. De Ponte: Second.

Chairman Tanaka: It has been moved and seconded. All those in favor of accepting the minutes, please say aye. Any opposed? None.

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

VOTED: To accept the meeting minutes of August 11, 2011.

**(Assenting: R. Shimabuku, P. De Ponte, R. Tanner, R. Phillips,
S. Castro, J. Haraguchi, B. Santiago.)**

(Excused: B. Vadla.)

Chairman Tanaka: **Approved.**

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Chairman Tanaka: Next item: Director's report, status on cases.

Ms. Kapua`ala: No contested case status to report.

E. NEXT MEETING DATE: September 22, 2011, Thursday

Chairman Tanaka: Our next meeting date is scheduled for September 22nd. Do we know what is on our agenda at that time?

Ms. Kapua`ala: Oh, yes, Waiohuli-Keokea Subdivision variance, and Huelo Hui Partition Subdivision variance. Both are being requested by their attorney, which is Paul Horikawa. One of them was deferred. I believe the Huelo Hui Partition was deferred because of the Department of Hawaiian Home Lands had voiced their opposition. So that one you might be a little familiar with as you've already received that staff report.

Chairman Tanaka: Oh, that's right. That's the conference. You and— Oh, okay, so we're — hopefully, we'll get quorum.

Mr. De Ponte: What's that? The 22nd?

Chairman Tanaka: 22nd.

Mr. De Ponte: I'll be gone too.

Chairman Tanaka: So making Trish's work a little harder, but we'll get through it. Thank you, Planning Department. Thank you, Board Members. Meeting adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:00 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Chairman
Rick Tanner, Vice-Chairman
Stephen Castro
Rachel Ball Phillips
Ray Shimabuku
Bart Santiago
Jacqueline Haraguchi
Patrick De Ponte

Members Excused:

Bernice Vadla

Others:

Aaron Shinmoto, Planning Program Administrator, Planning Department

Trisha Kapua`ala, Staff Planner, Department of Planning

Lesli Otani, Civil Engineer, Development Services Administration, Department of Public Works

James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel