

**BOARD OF VARIANCES AND APPEALS  
SPECIAL MEETING  
DECEMBER 27, 2011**

**(Approved: 1/26/2012)**

**A. CALL TO ORDER**

The meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Kevin Tanaka at approximately, 1:31 p.m., Tuesday, December 27, 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.)

Chairman Kevin Tanaka: Call the meeting of the Board of Variances of Appeals to order. It is 1:31 and we have six of us here. I guess, as usual, Tremaine – I mean, Trish – or it's not Trish. Shall I ask you? Communications?

Mr. James Giroux: I can speak to the first matter.

**B. COMMUNICATIONS**

**1. Communications and Temporary Restraining Orders Regarding the BVA.**

***An executive session may be called in order for the Board to consult with their attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.***

Mr. Giroux: In talking with the Chair, we thought it would be important to put this on the record just so everybody knows kind of what's going on, and is in the loop as far as what kinda transpired from our last public meeting. Anyway, we denied an applicant a variance. The applicant came back into the room, was very confrontational with one of our Members who will remain– Accusations were made, not sustained. And there was a conduct that kind of raised our concern about that person. A couple of days later, another Member got a phone call at their work place and they recorded that message, called us, Corporation Counsel. We listened to it. We thought that the message was threatening enough that it raised our concern that we should prepare or start to prepare a temporary restraining order in order to protect the Members of the Board. We got a litigation attorney involved, and we began documenting the case, and making sure that we could – if this escalated any more that we could immediately go into court and get a temporary restraining order. From the preparation of the case, we further contacted the Members who had been contacted. There hadn't been any further attempts by the applicant to make contact, so we decided to draft a letter directly to the applicant warning him that his behavior was shocking to us, and that any further behavior similar to that, or any attempt to contact any of the Members off the record would be seen as a threat, and that we would be immediately going into court, and getting a restraining order. As of this date, we've gotten the police reports that we generated. And we have the paperwork that would be necessary to file a TRO. At this time, our office feels that the letter we wrote was responded to the way we expected it to, to basically, let the person know that we're not gonna tolerate any contact with the Members off the record. And that any movement or any report from our Board Members would cause us to take action in the courts in order to make that TRO a reality.

So as far as Corporation Counsel is concerned, we wanted to let the whole Board know so that everybody's on the same page, and that there is a possibility that we may have to deal with this person again in the future as far as any type of variance or an appeal because their case is such that it probably would come back under our jurisdiction. So we wanted to proceed very cautiously, and to make sure that we had maximum protection for the Board as far as we don't want this type of activity to interfere with the ability of the BVA to do a full and fair objective job, but we're also concerned about the safety of the Members first and foremost. So that's kind of where we're at with that. So if there's any questions or anything, I can field them.

Chairman Tanaka: Well, James, as we're discussing this right now, do we need to refer to it as a previous applicant or – I mean, don't be specific to the—?

Mr. Giroux: Yeah, I think at this point I would wanna try to just keep it like as we are. I think we all know who we're talking about. I would hate to give any more reason for them to come in, and start making a case, and we're like, no, that's not where we're at. The point is, you do not harass our Members. You do not be confrontational with our Members. And if you do, their legal counsel can and will take action that we deem appropriate.

Chairman Tanaka: Okay. Well, specifically, I guess, if we call for an executive session, the recording stops and it is off public record.

Mr. Giroux: Yeah, and we can talk about further legalities of what is – what's – what are we looking for, and maybe what are the facts that have caused this to be a concern.

Chairman Tanaka: Yeah, can I do that, then?

Mr. Giroux: You can ask for an executive session.

Chairman Tanaka: I'd like to call, if there's no objections from the Board Members, I'd like to call for an executive session.

(The Board went into executive session at 1:36 p.m. and ended at 1:43 p.m.)

Chairman Tanaka: The question about the time limit, 60-day time limit, and variances becoming automatically approved if no decision is rendered, I just wanna open that up for discussion that maybe if I had been on top of it at that meeting, and under different circumstances, I guess, anyway, the applicant could easily have waived that 60-day number, and it could've been prolonged. In hindsight, that one specifically was, I think, not as crucial anyway. But I guess that's something as far as the Planning Department, do you have any comments or feelings as to just that 60-day?

Mr. Rick Tanner: James, did you mention that Hawaii County eliminated that?

Mr. Giroux: Yeah, the history on that is that back – well, under Chapter, I believe, 91-14, that's our Administrative Law, it said that if you're gonna be giving a permit, a development permit, that the administrative board has to come up with a deadline to give itself that if they don't take action by a certain amount of time that the permit would be automatically approved. Following that, the Board

of Variances picked a timeframe to hear variances and to make – have decision-making. So under Chapter 91, you have your Board rules that were adopted, and adopted a timeframe that basically – And there's two timeframes. And it's confusing because one is a 120-day timeframe that doesn't have a consequence, but then you have a 60-day timeframe that does. And it says that a variance will be automatically approved. Subsequently, there was litigation on the Big Island where they – it was unique in that the Board of Variances had the exact same language we do as far as a deadline. And it granted a – for them, they have public hearings for subdivisions, and they granted a subdivision because the Planning Director, I believe, didn't act in time. There was a deadline they needed to act on the variance. They didn't. And so it was granted. They had two County departments go against each other, and it ended up going to the Supreme Court that – fighting over this time issue. And the holding that the Supreme Court made was in analyzing Chapter 91-14 was that a variance is not considered a development permit. Therefore, there is no mandate under State law to create a deadline. And so that's something we have to look at in our rules. And it would probably have to be taken up as a policy issue at a future time. But there is no actual requirement for there to be an automatic approval of a variance. So that's been established by State law. So that's something that as far as rule-making and discussion probably should be put on a future agenda item for discussion because we've had, I believe, two cases already that have gone to the circuit court, and they've come out two different ways. One said that, yeah, it was granted. The other one said it wasn't granted. So it's – in order to comport more squarely with State law, it would – I mean, it would be to your benefit to be able to look at variances with a little bit more of a breathing room because they do become aberrations of zoning. And as far as not – a lot of times we're faced with the idea that we don't have enough information, and the idea is that you don't wanna just rezone by proxy or by non-action. That's not a good planning tool. So it's just something to think about.

Chairman Tanaka: I mean, I like having – you know, there's a deadline. So if there's something that an action should be taken, a decision should be made, but having it done – Well, in our last case where, okay, if we're gonna have the 60 days would be the next meeting, there is that chance that we don't have quorum, so therefore, we cannot meet, so the variance is granted. And the only reason a variance was granted was because we didn't have a quorum, and that's what I'd like to avoid. But on the other hand, saying that, okay, we need to act, so let's make sure that the applicant says okay. Here's the information that we need so we defer an item. Within 60 days, we see it again. And it's fresh in our minds because there have been some that have come before us, and in the meantime, in the six months that go by, Board Members change so they're not informed, or a Board Member wasn't present at the first time around. I guess that's just something more to think about. But like I said, too, if after-the-fact, it could've been deferred again because I could've just asked the applicant if they're willing to –

Mr. Giroux: Yeah, get a complete waiver of time restraints in order to collect information, or like in this situation where the facts of the case may change if they were able to obtain an easement. But the facts of the case were that that didn't look like it would've happened anyway. So it's just a case-by-case basis.

Mr. Ray Shimabuku: That's why we had some confusion at the beginning because they asked for a deferral, actually. I think you brought up the question: is this for a deferral or are we going to proceed?

Chairman Tanaka: Yeah, and it was just because they didn't have proper representation, so they did not know.

Mr. Tanner: And at that first hearing, that was the advice that Ray gave them— you need to be represented, professionally, you need to get an attorney. That's the best advice they didn't take.

Chairman Tanaka: Well, yeah. I mean, that's hard. I mean, it was kind of pitiful in that because they just didn't understand what was being asked for. And granted, it costs money to hire an attorney or a planner that would've known.

With that, Trisha or Francis, I have a question. In a case like this, if the applicant comes to you or calls and says, okay – well, you tell them of course that you cannot do this, you need a variance, or there's a problem, you either need to fix it or to get a variance. I mean, how helpful – to what extent do you help out the applicant because I guess what I'm asking is, what is your job description? How far do you have to go? I mean, you tell them this is what you need.

Ms. Trisha Kapua`ala: I help them out in any and every way possible except for the criteria. So I'll – my job is to get – help them get the best, cleanest application to you so that you can make your decision without having to defer because you need more information. That's my job. And I'll tell them – I'll give them my professional opinion on setback variances or whatever that it fits the variance criteria or not. But I always tell them that it's their right to apply. It's a discretionary approval meaning it's this Board's whole discretion. And I can tell them the facts. I mean, more often than not, we recommend denial. And more often than not, this Board will approve it.

Mr. Giroux: And it's important to remember that all variances are considered a contested case, so the person applying for the variance has the burden of proof and production. And the burden of proof is by a preponderance of the evidence. So they have to, whether they're represented or not, show that there is enough evidence to say that they may fit into that criteria of a variance, because the variance is not something that's taken lightly. The whole purpose of zoning rules or laws is because of health and safety. And that's usually one of the biggest criteria is you look for is that if you are – if it does meet these criteria, does it interfere with health or safety? And that's the – you know, we have health, safety, welfare, aesthetics, but the health and safety are the two biggest ones where having setbacks in an urban area, it's critical sometimes as far as fire protection, lighting, noise, you know, the feel of the residential character of the neighborhood, those types of things. I don't think any variances are looked at as lightly as far as do they meet the criteria or not. Usually on paper, you should be able to figure that out. Photographs, a description, a TMK map, usually those are sufficient to determine whether or not that property meets all of the criteria of a variance.

Chairman Tanaka: If you tell someone that you need to apply for a variance, if they come in and you talk to them directly, you hand them the packet. And it says, fill in the blanks, and then this is what is required for a variance. And the thing is, any other lawyers or planners that come before us and present, they know, and they'll attack those criteria to get their point across where this – you know, the previous application did not have a clue that that's what they should've done.

Ms. Kapua`ala: I think they had an attorney draft it—the application. Francis, you might recall we returned the application initially because they needed a Title 16 as well as a 19 application. And

then you got a— I was out. And that correspondence happened with an attorney's office and Francis. And so what happened is they resubmitted, but on the application, the attorney wasn't the applicant. I think they were just hired, apparently, to draft the application. But I think you can remember it. The criteria wasn't really sufficiently filled out. They didn't provide lengthy responses to justify the variance.

Mr. Shimabuku: As I recall, yeah, they had mentioned that they did have an attorney, but it was so costly that they decided to go on their own. I guess my question would be, you know, after the first meeting that we had, and they were seeking advice, and the advice that I said to them to go get a lawyer. I was wondering if they approached you after that to seek more help on what else they need to do.

Ms. Kapua`ala: Not sure if this is okay for the record, but I wasn't there at the first meeting, but I did see him. He came in the office and wanted to know more about the Maelua letter. And I felt uncomfortable talking to him then. That was the first time I met him. I didn't meet him at the previous meeting. And I tried not to carry the conversation on further because he was kinda griping to me, and that's not the proper place. It doesn't make a difference what I think or know. You know, it's all up to you to make the decision. But I just gave them the facts. I didn't help him at all. I, in fact, tried to end the conversation as soon as possible. He came in again to give me the deferral letter, and he even followed me outside to meet my husband for lunch. I said I have to go. He just, let me just follow you. He walked me outside, and I had the paperwork with me still on my lunch break, you know, instead of just submitting it to the office so—

Mr. Giroux: Obviously, Trisha's more tolerant than the average citizen.

Ms. Kapua`ala: This is the first time I'm speaking of it, but it was very uncomfortable. I didn't try to help him.

Mr. Giroux: We would've used that as part of our case.

Ms. Kapua`ala: I never was asked.

Chairman Tanaka: You know, James, would it be appropriate for—? So someone comes into the County and they say, well, no, you can't do this, or you either need to fix — or whatever the process may be. But would it be appropriate for the Planning Department to say, okay, this is the variance application, and Trisha will be as helpful as she would be, but on top of that, just add that typically, a planner and/or lawyer knows the process, so that would be your best course of action?

Ms. Kapua`ala: I say that a lot.

Chairman Tanaka: Oh, okay, okay.

Ms. Kapua`ala: There's people that, you know, they don't learn or perceive the world in paperwork. You know what I mean? It's just Greek to them and it's confusing. The application is overwhelming to some, so that's the only thing you can do is have someone else prepare it for you. Because I've been in situations where I know they don't have money, so I'll help them. And I'll physically rip out papers, and collate it, and say, here, this is what you need to submit. But it'll come back around

and say, oh, remember, you said you didn't need that? And for some reason, there's a misunderstanding, and then it's staff's fault when really, you shouldn't be preparing things for them.

Chairman Tanaka: Yeah, they'll make statements like, the County or the Planning Department said this. Yeah, okay.

Ms. Kapua`ala: Yes, yes.

Mr. Giroux: Yeah, I think understanding the process versus the criteria is two different things, because oftentimes, I think staff is put in the position of telling somebody, okay, you understand you've got a zoning violation. That means you're not in compliance with zoning. There is a process called a variance. That's something that you can apply for, but it's not the County telling the person you're gonna get it. Just apply, you'll get it. It's not a permit. It's a process. And I think that's where the public has a hard time understanding. And it's hard to— I think for us, we do understand it. We've been trained. We've gotten a feel for it. The public, for the first time, never dealing with the County, or never dealing with a land use issue, it can be confusing. And I think the fairest thing you can do is tell them you need to speak to an attorney. That's the only advice that as a lawyer, that's the only advice I could give somebody. And one of my biggest clients is the County, and I have to speak to the people in Fire, and say, you know, you're building that thing really big, and we understand you have to because of training purposes, but you're gonna have to go get a variance. You're gonna have to apply. And as their attorney, I can't tell them, oh, garans, ball barans. I gotta tell them, you know, this is the criteria, and chances are there's the high probability that you won't get the variance because this is the criteria, and this is what you need to show. But I can't tell them not to at least put their packet together, present it, have their argument, have their day in court, and have decision-making. And that's why we do the decision and order. That's why we want the discussion to be clear about what are we looking at in order to meet the criteria. And that's the process. The hard part is that people also look at the government as being their advocate. And there's a fine line there because the preponderance is on them, not on the government to prove that it meets the criteria. And that's, I think, where sometimes there can be confusion.

Chairman Tanaka: Well, I guess, we see that a lot. People come in and say, well, it's so minor. But the letter of the law says something, no matter how minor it is sometimes. And they feel like they're coming to us, and they're saying, well, you have to tell me why it's so major. Okay, well, thank you very much.

I guess for the future, we'll talk about the 60-day time limit, and slowly discuss that, and get input from our Members as well as other – if anybody else from the Planning Department has any input as well.

Mr. Francis Cerizo: Whenever you want to put it on the agenda, you can just request staff to put it on the agenda. Do you want to put it on the next agenda, or next year's agenda?

Chairman Tanaka: Yeah, maybe Tremaine or Trish, when – on a meeting that there's one item or something that we have the time to—

Ms. Kapua`ala: That could be the next meeting or the next two meetings. The next meeting is an appeal. The meeting after that is a variance. And in February, on the 9<sup>th</sup>, which is the first meeting,

we're actually looking at giving you a proposal for rule amendments. So it wouldn't make this rule amendments, but we can talk about it.

Chairman Tanaka: Yeah, I guess timing wise, that would be good.

Ms. Kapua`ala: At the next meeting or the same meeting as the rule amendments on February 9<sup>th</sup>?

Mr. Giroux: Well, we could have both discussions as long as it's clearly delineated on the agenda. One would state the rules that are already drafted, and then the other one would be more of a policy discussion regarding whether or not we're gonna proceed to start drafting or looking at amending—

Ms. Kapua`ala: That section of the rules.

Mr. Giroux: Yeah, time limitations or—

Chairman Tanaka: Okay, yeah, so for the February 9<sup>th</sup>.

Ms. Kapua`ala: Okay.

Mr. Giroux: And, Trish, you can put both of them on because there might be a discussion whether the 120-day rule is too short also. I mean, the 60-day rule, there's gonna be an issue of whether or not there should be a consequence of the variance being automatically granted. The 120-day rule would be more of an issue of — because the — usually rules state that once an application is deemed complete, then the clock starts ticking. I think ours is that once the Director receives it or—? No? He deems it complete.

Ms. Kapua`ala: 120 days from the day the application is deemed complete, which is usually right around the time when the 60-day rule would take effect. It's usually the same day, if not, one or possibly, two meetings off. It kinda works, but—

Mr. Giroux: But doesn't the 60-day rules trigger after the first public hearing?

Ms. Kapua`ala: When the public hearing is closed, which is usually the same day as the first public hearing.

Mr. Giroux: And that language could probably be looked at, too, if we don't completely eliminate the timeframe. The issue of have we completed our public hearing has become litigated also.

Chairman Tanaka: Yes, since we closed public testimony, and then they come back again, and we reopen public testimony.

Mr. Giroux: Yeah, yeah.

Chairman Tanaka: Yeah, so that'll be discussed, I guess, on that agenda.

Ms. Kapua`ala: Okay.

Chairman Tanaka: Yes, thank you all for being here. I just wanted to make sure that everybody was aware of what happened, and the process necessary when something like this does happen. Francis or any of you, have you ever had anything that has come where anyone from the public has actually harassed anyone other – anyone else in the Department?

Mr. Giroux: I've harassed Francis a lot.

Mr. Cerizo: No, not in our Variance Board. But, you know, at Council, sometimes you have it, Planning Commission.

Mr. Giroux: Yeah, we – I just recently – we were doing the Halloween review for CRC and that got really contentious. And so we knew that was coming up. We had in previous meetings, we had actually physical confrontation, so we had called in MPD to be present. They were gonna be present anyway to testify about the road closing. So we just made sure that we had – you know, when there's something that we know is gonna be confrontational, contentious, where the community is really divided. Planning Commission, we see that a lot. Council, Wailea 670, where we had over 500 testifiers. So there's indicators that we look at to say, hey, this might be a good one to have either police presence or have undercover. Sometimes we just ask MPD to come undercover just to monitor the meeting. A lot of times– I'm starting to work closely with the community support arm of the MPD, and they actually do land use comments. So sometimes if the officer has made comments, and we know it's gonna be contentious, we just ask them to come anyway even though we know we have their written comment. Sometimes just having a uniform in the room helps out to calm everybody down or just settle people down.

The Chair has every right to recess the meeting, stop the meeting any time, if somebody is out of order and they are disrupting the meeting. If the person is shouting, yelling, interrupting, we immediately hammer the gavel. We go into recess and ask the person to leave. If they refuse to leave, we have every right to call the police and have them removed so that we can continue the meeting.

I've seen it all as far as that. I've had people yelling at me from the back of the room because they didn't like my legal advice. In Council, I've had people come into the well, start shouting at me, at the Planning Director. So it does escalate, you know, people's tempers. Sometimes it's human nature. It's excusable. Other times, it's threatening and not. You know, you just– Like Trish, her incident, in my professional opinion, seemed pretty confrontational, but they're used to it. They're used to the public coming in, being angry, being hot-headed, not thinking clearly, not understanding the process. But in a forum such as this, we do wanna maintain decorum. This is quasi-judicial. You are volunteers. You're volunteering your time. You don't have to be taking harangues from the public. You don't have to be second-guessed. It is a group decision. The decision to grant or deny an application is a group decision. And everybody has the right to have their opinions. And everybody should feel free to voice those opinions based on the evidence before them. And we wanna encourage that because that is part of the Sunshine Law is to have the public understand your reasoning. Whether they agree with it or not, that's – they can make their decision, but it's not for them to take it out on you. That's all the joy of land use.

Chairman Tanaka: Does anybody else wanna share anything with us this afternoon? Anything else? Again, thank you. I wanted everybody to be aware of that. Something happens, it's– I



applaud the way Ray and Rick handled themselves. They went through the right and correct process.

The next item would be approval of the November 23<sup>rd</sup> 2011 meeting minutes.

**C. APPROVAL OF THE MINUTES OF THE NOVEMBER 23, 2011 MEETING**

Mr. Shimabuku: I make a motion to approve as presented.

Mr. Tanner: I second.

Chairman Tanaka: It has been moved and seconded. All those in favor, say aye. Any opposed?

It was moved by Mr. Shimabuku, seconded by Mr. Tanner, then

**VOTED: To approve the November 23, 2011 meeting minutes as presented.**

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

**(Excused: S. Castro, B. Vadla, B. Santiago.)**

Chairman Tanaka: **Okay, our meeting minutes approved.** Director's Report, status on contested cases. Trish?

**D. DIRECTOR'S REPORT**

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

Ms. Kapua`ala: I have nothing to report, but I believe your Corp. Counsel does.

Mr. Giroux: The Makila Appeal, I don't know if you guys remember that. There was a subdivision in Lahaina in the ag district.

Ms. Kapua`ala: Four.

Mr. Giroux: Yeah, four properties.

Ms. Kapua`ala: Four subdivisions, yes.

Mr. Giroux: And so what happened is they consolidated those appeals. There was different issues, but ultimately, the Board decided that the Planning Department was too late in giving these conditions. And we found that those conditions were outside of the scope of the time period that they were needed to be given. During the litigation or during the – we had a Hearings Officer, Judge McConnell, who in his report, found that – what he wanted us to adopt was that the subdivision was illegal in and of itself, and therefore, they should not have been able to subdivide despite the conditions. At that time, my advice to the Commission was that we didn't have the

authority to rule on that. We're a Board of limited jurisdiction. The decision we needed to decide was whether or not they actually needed to follow those conditions from the Planning Director because they actually were denied final subdivision based on the fact that those conditions weren't followed. And that's the decision we needed to rule on.

Subsequently, there was a lot of litigation in the area of SMA and subdivision which was setting standards in the community as far as how the County can or should process subdivisions in the SMA. The County attorney who was representing the subdivision or representing DSA, Public Works Director, objected to our order as far as not in its result, but in its content of its finding of facts and its conclusions of law. They filed the appeal. They went to the circuit court. Jim Geiger is Makila's attorney. They entered into discussions, mediations, and there was possible settlement concerning the appeal. The County's position is that it's not appealing the decision. It's appealing the finding of facts and conclusions of law meaning that they just don't – didn't agree to how we reasoned, how we got to where we got, but they understand that that is the right conclusion.

Anyway, I read the finding of facts and conclusions of law, and at another meeting I had with you, I said that if they are going to merely change the language in order to clarify the state of the law as it is now that I would be agreeable to agree to modify the language and then have the ruling stand. I got a redlined back from Jane Lovell and Jim Geiger. I looked it over. There was still some dispute about – like one paragraph. They had redlined about five paragraphs. They agreed with those changes. There was one paragraph that they're still– Because of what's going on in the courts and in the legislature, there's a lot of head-butting because right now, that area of law is really influx. It's just the legislature tried to respond to the case law that came out, and they tried to change the wording of the law in order to allow subdivisions to not be considered developments. But in changing the wording, they actually made it worse. So there's – when you read the law now, it says "Any subdivision of land is a development." Immediately below it, they added in "except for final subdivision." And as an attorney who's been practicing land use law, I'm gonna tell you straight up, it doesn't make sense. What happened in Leslie is the Supreme Court said that the Big Island cannot process a preliminary subdivision prior to the SMA permit. So you can see where you would wanna clean that up because that's exactly how Maui County does it.

So that's where the lawyers are now. They've set their positions. Makila's gotta move forward. The County wants to just have a clarity on the law as it stated as it was when we ruled on it. My input to the document was that I looked at it and realized that because the jurisdiction now is in the circuit court, the wording should include that it's the review of the circuit court. So I just offered my technical advice as far as cleaning that document up so there's no confusion as to who's order it is because what's gonna happen is it's gonna be an order of the circuit court. It's not gonna be an order of the Board because we've already ruled on it and it went through review in the circuit court. So it's like the Judge reviewing our decision saying yes, and then putting a stamp of approval as we agreed to the wording. So that's where Makila is at this time.

So I – just again, I wanted to bring it to your attention that that's what's going on. And to just get your approval that that is an okay way to go ahead as your attorney, because once they – you know, the way these cases go is that one day both attorneys wake up, and they're agreeable, and it's done. I don't wanna be in the way because we want this thing to get moving. And if the final decision at the end of the day is that your decision stands, I don't wanna be the one saying, oh, hold on, I gotta go to another meeting with the BVA to discuss the . . . (inaudible) . . . of our State

legislature's inability to actually formulate law that moves us in the direction that the whole State has already moved. So it's kind of – it's frustrating, I think, for everybody: for DSA, for our lawyers, for the developers. I think the day they clean that up, I think we're gonna take a State holiday and just celebrate. It's really – it's costing everybody a lot of money and a lot of headaches.

Chairman Tanaka: So in – if another developer came in, in a similar situation, a decision wouldn't – because the County is just looking for the right steps to follow.

Mr. Giroux: Right.

Chairman Tanaka: So–

Mr. Giroux: I think in a worst case scenario, and I probably shouldn't talk too much about it, but in the worst case scenario, you would have a developer who did go forward with their preliminary, did their preliminary subdivision, but hadn't gotten their SMA, and then the County would take away their preliminary saying we cannot process it because of Leslie and because of– But right now what the State did is it kind of took away that ability. It said, well, actually, final subdivision's not a development. So if the person receives the final subdivision, it would make it – it would put everybody in a weird place because we know that preliminary subdivision, in accordance to the law as it is now, is a development, yet final subdivision is not. And where does that–? The law is supposed to bring clarity. It's not supposed to bring absurdities.

Chairman Tanaka: Is it anywhere near completion, or a decision, or–?

Mr. Giroux: My understanding is that there's legislature– Well, Gil Agaran is a legislator. He's a former Public Works Director. There's people in the legislature who do understand what it is. It's just like in the County Council, the Planning Director takes something up there, people get involved, too many cooks in the kitchen, and something comes out, people vote in favor because they think they're doing everybody a big help, and it's not what – you know, it wasn't what the chef ordered. So that's democracy, right?

Mr. Shimabuku: It seems like this Makila is a long issue. How long has it been actually? It seems like forever ever since I got on board.

Mr. Giroux: A few years, I think. I mean, from the day that they got preliminary subdivision, probably be over three years.

Ms. Kapua`ala: 2008.

Mr. Giroux: 8, 9, 10, 11, yeah. Now, it's 12. Almost four, then.

Chairman Tanaka: Okay. Anything else? Anybody wanna share their thoughts about anything discussed?

**E. NEXT MEETING DATE: January 12, 2012, Thursday**

Chairman Tanaka: So our next meeting will be January 12<sup>th</sup>, and we have one appeal you said,

Trish?

Ms. Kapua`ala; Yes. Actually, it's an appeal that you've seen before: the Kaanapali Royal Condominium. Uwe Schulz was the applicant.

Chairman Tanaka: The enclosed lanais.

Mr. Shimabuku: The lanai issue, yeah?

Ms. Kapua`ala: Yes.

Mr. Shimabuku: Enclosed lanai area.

Mr. Giroux: Are these different units?

Ms. Kapua`ala: Yes. The intervenors in the previous case hired Key, Leong, Kupchak and Hastert. So the appellants for this new case have hired that firm as well—Oahu. So Mr. Murakami was here the last time and came before you. He didn't speak much, but he is one of the attorneys involved. There's three that filed on behalf of the applicant. And there's also possible intervenors. So you may be seeing an intervention on the next meeting as well. Mary Johnston has been assigned to litigate this on behalf of the Department of Public Works, and Fire hasn't intervened yet.

Chairman Tanaka: I'm sure that the applicant will bring up what was the decisions rendered in the past. It's been a while. I forget already what we did as a Board. Now, how much— James, question to you. As far as something like this where it's pretty darn similar, although— And I know it's been stated that a decision, a previous decision is not setting precedent for the next, but in situations like this where it's so similar, I mean, this could be two doors down, two apartments down—

Mr. Giroux: Yeah, I mean, to not get into too much detail, I think that in the past, we've had people come and say, well, you've allowed this and you've allowed that, and— You know, the word "precedence" is a legal term. There's a layman term that says it happened in the past, but actual precedence is that it's legally binding. And the thing with variances is that it's so specific to the property. And also, when you're dealing with an appeal, it can be very specific to the law that is propounded, meaning that you have to look at what the decision of the Director is based on what law they're trying to enforce, or trying to administrate. And you could have the same facts, but you can actually change the law. That's what makes the practice of law so difficult is that with the same facts, you can have different law. And this is a— To just illustrate is that in different states, something that's legal can be illegal. Having an opened bottle in Vegas on the street is legal. In Hawaii, it's illegal. The only difference is that's the law. The facts are the same. The situation is the same. It's just that the law is different. So if you have a decision of a Director where one Director is looking at a set of laws that he needs to administrate, and you make a decision, that doesn't mean that another Administrator looking at their own set of laws is gonna be the same outcome. So you really have to look at the laws that are being enforced, and being administrated, and being appealed that may make a difference. So we know that it may be the same complex, but we have to look at the totality. And yeah, if everything is the same, you know, there becomes an argument that you have to state it on the record why you would have a different outcome, why the different outcome would be had. But until we see all the facts, we cannot do any decision-

making until we see all of the arguments. And again, maybe arguments weren't made in the past that could change the outcome. And that's always something that we have to keep an open mind until all of the evidence is presented, and then make a decision based on that.

Chairman Tanaka: Trish, how long ago was the first one that came to us?

Ms. Kapua`ala: I don't think you made – the decision and order was not served till 2010. It took a while.

Chairman Tanaka: Yeah, so it came to the Board in 2009, possibly? Maybe not that long ago?

Ms. Kapua`ala: Maybe not. It might've been 2010. I know there was a holdup with issuing the D&O, but I don't think it carried over the year.

Chairman Tanaka: Because the facts could be the same. I mean, it could be almost – it could be the next unit that that's being appealed. But with five different Board Members, the decision could be the opposite of what was–

Mr. Giroux: It's possible. It's possible. And again, there's so many moving parts that we have to look at the totality of the evidence presented, and see if the applicant meets their burden of proof and production by a preponderance of that evidence.

Mr. Shimabuku: James, you mentioned about different Directors looking at the laws. Are you talking the same law with different interpretations by the Director or just total separate laws?

Mr. Giroux: Well, some of the difficulty in the development process sometimes is our subdivision, you know, where we do subdivision, and then the subdivision Director has to make decisions based on Fire's criteria, Water's criteria, Wastewater's criteria. So a lot of times it's not really the Public Works' Director making the decision, but they'll make decisions based on that input. So a different Director could come in and be maybe not aware of a decision, or they're just saying, hey, I can't do it because Fire – I have a letter from Fire that says it's inadequate, or I have a letter from Water that says they don't have water. So a lot of it falls on the Public Works' Director, but it's really not the – he's not that one that administers those rules or those laws. So it gets tricky because a lot of times you're looking at rules that the question is, is that a variance or is that an appeal? That's a lot of – I think we've seen in this Board a lot where somebody really should come in for a variance, they're just doing an appeal. But where somebody should be appealing, they're asking for a variance. So you get it both. You get both. You know, if somebody gets a notice of violation, they come in and they ask for a variance. Well, the process should be you should be asking for an appeal of your notice of violation. But then during subdivision, somebody doesn't like the Fire Code, they appeal the decision of the Director of subdivisions when they should be asking for a variance from the Fire Code. Again, all of the facts have to be reviewed as they are on the record.

Ms. Kapua`ala: I believe the rules say that you shall have a contested case, so you have to hear it, yeah?

Mr. Giroux: Yes.

Ms. Kapua`ala: Can the staff make a recommendation that the Board hears it rather than to remand it to – send it to a hearing officer?

Mr. Giroux: Yeah, that's always a possibility. I mean, this Board is – again, it's quasi-judicial, so no matter what the process, this Board always has the authority to say we wanna hear the evidence, or we wanna make that decision. A lot of times because of the contested– All appeals and all variances are contested cases, no matter what. However, because of the complexities of intervenors, a lot of times that's when we go into more of a formal setting, and then we start asking for hearing officers, and reports, and stuff, but it's not absolutely required. And a lot of times, staff will be privy to the complexity of a situation, or even the attorneys may actually have a position of whether they want the Board versus a hearing officer.

Ms. Kapua`ala: I'm saying this because our contracts for hearing officers are typically at ten thousand dollars each, and we used that up entirely for Judge McConnell, and had to open a new contract. And that's not even the court reporter that we pay per page on that also. And we have a very elaborate record of the previous case that if the Board wouldn't mind looking at that, might be able to deliberate on its own without having such extensive help from another attorney or a judge, retired judge.

Chairman Tanaka: Ten thousand dollars each case?

Ms. Kapua`ala: If they use up all the hours, yes. They can go up to ten thousand dollars. It's two hundred dollars an hour, and that's actually cheap. It's a reduced price for these attorneys.

Chairman Tanaka: How about we meet once a week and you pay the Board Members that prorated two hundred dollars an hour? Just personally, when I first came on to the Board since Randall Endo was Chair, I always felt comfortable that a lawyer was sitting in this chair running the meetings. So it became stressful when I moved over to this chair because it gets to the point where sometimes it should be a – I always feel like it should be a lawyer talking to a lawyer, or a lawyer talking to a judge rather than to me, or me talking back to the lawyer.

Mr. Shimabuku: That's why I feel inadequate sitting up there as a Vice-Chairman as well. But, Rick, you do a very good job.

Chairman Tanaka: Get used to it. I got another year but– Okay, let's see. Again– Oh, sorry to keep dragging this out, but I wanted to – as far as there are three Members that are not here, and the reason why I wanted to get together was to be exposed to and explained to the purpose of this meeting. In what manner would it be appropriate to fill the other three Members in as to what was discussed actually, I guess, in executive session?

Mr. Giroux: I think we still have minutes even though we went into executive session. I believe they can review that.

Chairman Tanaka: Oh, okay. Then the minutes will go out to all Members. The executive session is–

Mr. Giroux: It'll be sealed, but I believe the Members can review it.

Ms. Tremaine Balberdi: . . . (inaudible) . . .

Chairman Tanaka: Whichever the appropriate way, whether it be at the next meeting, whenever the next meeting that they attend, I'd just like to make sure that they have a copy of it so that they know – they're filled in as well.

Mr. Giroux: I don't know if we can release the copy, but we can let them know that it's in Tremaine's possession if they wanna go read it that they can review it. I don't think we can actually release it. It's gonna be sealed, but they can read it.

Ms. Balberdi: It'll be here. I'll have it at the next meeting, if they want to read it.

Chairman Tanaka: Okay. Then actually, I have a request of you, Tremaine, if you can let the three Members know if they are gonna be here that there is an extra – something that the Chair would like them to read. Okay.

Alrighty, thank you all for your time. Anything else? Any other discussion? We'll see you on January 12<sup>th</sup>. Have a happy new year, all.

#### **F. ADJOURNMENT**

There being no further business to come before the Board, the meeting was adjourned at 2:37 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  
Rachel Ball Phillips  
Patrick De Ponte  
Jacqueline Haraguchi  
Ray Shimabuku

##### **Members Excused:**

Stephen Castro  
Bart Santiago  
Bernice Vadla

Board of Variances and Appeals  
Minutes - December 27, 2011  
Page 16

**Others:**

Francis Cerizo, Staff Planner, Planning Department

Trisha Kapua`ala, Staff Planner, Planning Department

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