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**MAUI PLANNING COMMISSION
REGULAR MINUTES
JANUARY 14, 2020**

[\(HYPERLINK TO AUDIO RECORDING OF THE MEETING\)](#)

A. CALL TO ORDER

The regular meeting of the Maui Planning Commission was called to order by Chairperson Lawrence Carnicelli at approximately 9:09 a.m., Tuesday, January 14, 2020, Planning Conference Room, First Floor, Kalana Pakui Building, 250 South High Street, Wailuku, Maui.

Mr. Carnicelli: ...January 14, 2020 is now in session. Happy New Year everyone. My name is Lawrence Carnicelli, I am the Chair. Also with us today is Vice-Chair Christian Tackett.

Mr. Tackett: Good morning Chair.

Mr. Carnicelli: Good morning. Also Commissioner Pali.

Ms. Pali: Good morning Chair.

Mr. Carnicelli: Good morning. Commissioner La Costa.

Ms. La Costa: Aloha kakahiaka Chair.

Mr. Carnicelli: Good morning. Commissioner Robinson.

Mr. Robinson: Morning Chair.

Mr. Carnicelli: Good morning. Commissioner Thompson.

Mr. Thompson: Happy New Year Chair.

Mr. Carnicelli: Happy New Year. And Commissioner Freitas.

Mr. Freitas: Good morning.

Mr. Carnicelli: Commissioner Castro and Commissioner Gomes are excused but we do have quorum, quorum is established. Also with us is Planning Director Michelle Chouteau McLean.

Ms. McLean: Morning Chair.

Mr. Carnicelli: Good morning, and Corporation Counsel Michael Hopper.

Mr. Hopper: Good morning Chair.

Mr. Carnicelli: Good morning. So just right at the start everyone just to let you know there are a couple of items on the agenda that will be removed and no action will be taken. We're gonna go ahead and cancel Public Hearing Item B.1, and also Communication D.1 on your second page of the agenda. However, what we...because they have been agendized we will give the public

1 opportunity to come forward and give testimony if they so choose. Is there anyone that would
2 like to testify on either one of these items? Going once, going twice. Okay, seeing none then if
3 there are no objections we'll go ahead and close public testimony on those two items.

4
5 Mr. Robinson: Chair?

6
7 Mr. Carnicelli: Commissioner Robinson.

8
9 Mr. Robinson: Are they deferred or are they canceled?

10
11 Mr. Carnicelli: Director.

12
13 Ms. McLean: Thank you Chair. The first item, the public hearing item which is the digital zoning
14 map for the Island of Lanai because it involves a minor amendment to Title 19 we thought that it
15 had to go to all three planning commissions but after we posted it and did the public hearing
16 notification we were informed that it only needs to go to the Lanai Planning Commission so that
17 one is off the agenda, you folks don't need to handle that. Then on Communication Item D.1, is
18 an off-site parking request and that involves a project that got an SMA Major back in 2005-2006
19 and also got an Off-Site Parking Approval at the same time and so there was confusion thinking
20 that the Commission had to act on this because the Commission acted on the SMA Major, but
21 the off-site parking can be handled administratively so there's no action for the Commission to
22 take on that item either.

23
24 Mr. Robinson: Thank you Director.

25
26 Mr. Carnicelli: Everybody get it? Great. Thank you very much. I guess Director we'll move
27 onto the agenda then.

28
29 Ms. McLean: Thank you Chair so that leaves us with one public hearing item today and that's a
30 request from Timothy Thevenard for a Bed and Breakfast Home Permit to operate Kuau'ele
31 B&B, a three-bedroom B&B in the County R-1 Residential District and State Urban District
32 located at 12 Alenui Street at TMK: 2 6 012:016 in Paia, and Tara Furukawa is the project
33 planner.

34
35 **B. PUBLIC HEARINGS**

- 36
37 **1. MS. MICHELE MCLEAN, AICP, Planning Director, transmitting a proposed**
38 **bill relating to zoning maps and districts, respectively described as follows:**

39
40 **A proposed bill titled "A BILL FOR AN ORDINANCE ADOPTING A DIGITAL**
41 **ZONING MAP AS THE OFFICIAL ZONING MAP FOR THE ISLAND OF**
42 **LANAI."**

43
44 **The purpose of the proposed bill is to adopt a digital zoning map for the**
45 **Island of Lanai. (K. Aoki)**
46

1 **Public hearing item is canceled. No action was taken. Matter only needs to go to the**
2 **Lanai Planning Commission.**

- 3
4
5 **2. TIMOTHY THEVENARD requesting a Bed and Breakfast Home Permit to**
6 **operate Kuau`ele B&B, a three-bedroom B&B in the County R-1 Residential**
7 **District and State Urban District located at 12 Alenui Street,**
8 **TMK (2) 2-6-012:016, Paia, Island of Maui. (BBPH T2019/0007) (T. Furukawa)**
9

10 **The Maui Planning Commission is the approving authority for the Bed and**
11 **Breakfast Home Permit because "an existing bed and breakfast home is**
12 **operating on a lot within a five hundred-foot distance from the lot on which**
13 **the bed and breakfast home is proposed." §19.64.050(A)3(c), Maui County**
14 **Code.**

15
16 Ms. Tara Furukawa: Happy New Year Commissioners.

17
18 Mr. Carnicelli: Happy New Year Tara.

19
20 Ms. Furukawa: This item has come to you for review because the applicant,
21 Timothy Thevenard is proposing a three-bedroom bed and breakfast on 12,000 of State Urban
22 and County designated R-1 Residential District land. There is one dwelling on site which was
23 built in 1937. The dwelling has four bedrooms total, two full bathrooms and a half bathroom.
24 There's also a kitchen, living room, laundry, foyer, covered deck, a garage which functions as
25 storage space and a detached carport with additional storage space. Before we go on I need to
26 clarify that the floor plan proved as Exhibit 5 was revised and the revised version was
27 mistakenly not swapped out for the one in the staff report. So before we started I handed them
28 out so it shows where the one...the owner's bedroom is located. The Thevenards will manage
29 the B&B and maintain the building. There's at least one B&B permitted home operating within
30 500 feet so that's why the application's being reviewed by the Maui Planning Commission. The
31 applicant Timothy and his wife is here today, well they're here today to respond to any questions
32 that you might have regarding the proposed operation.

33
34 Ms. Christine Thevenard: Good morning Commissioners. Happy New Year.

35
36 Mr. Carnicelli: Happy New Year, good morning.

37
38 Ms. Thevenard: I'm Christine Thevenard. As Tara said, we are in a 19...I'll just give you a little
39 rundown of who we are. We've been residents of Kuau since 1984. Our home was if anyone is
40 a Hawaiian music buff, our home was owned by Alice Johnson at one point, Hookipa Paka and
41 many other songs and it's been a renovated plantation style home so it's pretty much the same
42 on the outside, the outside's been renovated. We're great lovers of all things architectural so it
43 was important to us to keep that going and I'm also a shop owner in Paia for the last five years
44 and we're pretty well known around the block in Paia and we're very quiet, respectful neighbors
45 now and we don't see that changing at all having a B&B. We would keep it pretty controlled
46 being on the property. Our property is getting to be quite unusual for our neighborhood. It's one
47 of the few that only has one home on it. So we have a spacious backyard in relationship to the

1 rest of our neighbors. Also, I guess through the store I see a need, a lot of people's desires to
2 stay in that area and I don't know I think my husband and I...I've been schooled by many
3 kupuna here throughout the islands. We have a really good, rich sense of the Hawaiian culture
4 and Polynesian culture so we think we could give a little something to perhaps a lot of our
5 neighbors that might be doing the vacation rental thing, but we have a love of meeting people
6 and I think we'd be an asset to the tourism community and to have a pretty much super low
7 impact on the neighborhood 'cause we are now kind of a private property and I think it would
8 continue to be like that. And if you have any questions I would be delighted to answer them for
9 you.

10
11 Mr. Carnicelli: Thank you very much. What we'll do is we'll take public testimony and then after
12 that we'll do questions and answers if we have any for you.

13
14 Ms. Thevenard: Okay, thank you.

15
16 Mr. Carnicelli: Great. Thank you so much. Tara, anything else to add?

17
18 Ms. Furukawa: No, not at this time.

19
20 Mr. Carnicelli: Okay, thank you. Would you—

21
22 Ms. La Costa: There's anybody on—

23
24 Mr. Carnicelli: Nobody on the sheet. Is there anybody that would like to come forward and
25 testify on this particular item? Going once, going twice. Okay, so if there are no objections we'll
26 go ahead and close public testimony. And at this point in time we'll go ahead and open up the
27 floor for questions from the Commission. Commissioner La Costa.

28
29 Ms. La Costa: Thank you Chair. Owner, please, Ms. Thevenard. Thank you. Have you rented
30 out your home in any capacity on a short-term basis previously?

31
32 Ms. Thevenard: No.

33
34 Ms. La Costa: Thank you.

35
36 Mr. Carnicelli: Commissioner Tackett any questions for the applicant?

37
38 Mr. Tackett: Not at this time.

39
40 Mr. Carnicelli: Commissioner Pali.

41
42 Ms. Pali: Hi, I was just wanting you to comment on one of the letters in opposition of your
43 application. What is your response so that way we can just have an idea to the comment that
44 there are now more strangers here than friends and we really don't need any more traffic going
45 in and out of our small neighborhood?

46

1 Ms. Thevenard: Well, we actually tried to contact her. We see her husband pretty much daily
2 walking his dogs and she had no response to...tried phone calls. I would say that the
3 neighborhood's been like this for dozens of years or more even before the whole legalization
4 process and there's a lot of how do I put this, there's a lot going on in Kuau and you know it's
5 concentrated. I've been there a long time, I've seen it get very concentrated and I also feel the
6 rest of the island is in the same boat. So to address her concerns and I think, I think it also
7 comes from she's had a huge new development next door to her which is pretty huge and I
8 would imagine she's pretty discontent for having been in the neighborhood a long time too. I, you
9 know, I invite her to come hang out with us and you know, you've already passed so many
10 places in the neighborhood I've got to say out of a lot of the people doing it, we're people that
11 know the community probably best than anyone that's doing it already.

12

13 Mr. Carnicelli: Commissioner Robinson.

14

15 Mr. Robinson: Aloha Christine. You mentioned that you run a shop in Paia which shop is it?

16

17 Ms. Thevenard: It's across from Mana Foods it's called Luna and Tide. It's kind of a home
18 décor, gift, clothing shop, kinda like a little bit of everything.

19

20 Mr. Robinson: How many square feet is it?

21

22 Ms. Thevenard: It's 900 square feet.

23

24 Mr. Robinson: 900 square feet. Okay, thank you. Tara, I got one question for you. The
25 support and opposition letters are they just these two?

26

27 Ms. Furukawa: There was just one protest letter that was submitted.

28

29 Mr. Robinson: Yeah, there's one...oh, well there's one from her and then it's...there's one
30 opposition that was it then, no other?

31

32 Ms. Furukawa: Yeah.

33

34 Mr. Robinson: Okay, thank you so much Chair.

35

36 Mr. Carnicelli: Thank you. Commissioner Thompson.

37

38 Mr. Thompson: This is a question about the RFSs what were those for?

39

40 Mr. Carnicelli: Request for service. That's a question for Tara.

41

42 Ms. Furukawa: It was just a request for Public Works to provide copies of site plans on
43 background information and schematics pertaining to the property.

44

45 Mr. Thompson: Okay, thank you very much.

46

47 Mr. Carnicelli: Commissioner Freitas.

1
2 Mr. Freitas: Thank you. Ms. Thevenard, good morning. When I look at your floor plan I see
3 only one shower for three bedrooms is that correct?
4

5 Ms. Thevenard: No, there's two.
6

7 Mr. Freitas: Where would the other one be? There's a shower and there's a tub that's shared
8 by bedroom 1 and bedroom 2.
9

10 Mr. Carnicelli: Okay, is...is would you grab that piece of paper and actually grab it from him and
11 then come forward and so it can be on the record for all, 'cause we all need to see it. So if you
12 would step back or just...yeah, that's fine so we can all see it and you could point and speak
13 into the mic for the record. So I'm asking you to do a bunch of different things at once.
14

15 Ms. Thevenard: For the record if you go off the kitchen into the laundry room, it's original benjo
16 and where it says closet there's a shower next door to that in between the toilet and the closet.
17

18 Mr. Carnicelli: Does it also have a sink?
19

20 Ms. Thevenard: Yes it does.
21

22 Mr. Carnicelli: It's just not shown in that 'cause it says laundry and I see a toilet and then a
23 shower, a closet, washer, dryer but it doesn't show a sink.
24

25 Ms. Thevenard: There's a pedestal sink right by the stairs going up.
26

27 Mr. Carnicelli: Okay, and then the other one is the Jack and Jill between bedroom 1 and
28 bedroom 2?
29

30 Ms. Thevenard: Yes.
31

32 Mr. Carnicelli: Okay.
33

34 Ms. Thevenard: And we're thinking about doing an outdoor shower too.
35

36 Mr. Carnicelli: Make sure you get a permit.
37

38 Ms. Thevenard: We will.
39

40 Mr. Freitas: Also, if the Commission approves...well, maybe this is when we discuss I have
41 something—
42

43 Mr. Carnicelli: Go ahead ask your question.
44

45 Mr. Freitas: Well one of the conditions was that if...that there be a limit to two adults and two
46 minors per room, but when you measure the room they're about 13 x 13 and I cannot imagine

1 four people in a small room like that. Is it possible that later one we can change that condition
2 to just allow two per room if it does get approved?

3
4 Mr. Carnicelli: Tara, do you want to comment on that please?

5
6 Ms. Furukawa: Yeah, the Code requirement is typically two people per room.

7
8 Mr. Freitas: Regardless of the square footage?

9
10 Ms. Furukawa: Yeah.

11
12 Mr. Freitas: That's only about 169 that's why, not including the restroom yeah, I mean the
13 bathroom and shower. Okay, if you say so. That's all for me.

14
15 Mr. Carnicelli: That's a good question though 'cause even though the Code might say that is
16 this condition, Condition 5 in the staff report says that the B&B Home Permit is limited to two
17 bedrooms within the only dwelling.

18
19 Ms. McLean: It should be three.

20
21 Mr. Carnicelli: I know, so the floor plan is showing three bedroom and the condition says two
22 bedrooms and even that sentence doesn't make sense. It says the total number of guests shall
23 be limited to up to two adult guests and up to two minor guests per bedroom being rented. So I
24 think Commissioner Freitas did catch something there 'cause if you've got one for, it's three
25 bedrooms not two and if we're saying two adult guests and two minor guests per bedroom he's
26 right that is four guests, that's 12 guests.

27
28 Ms. McLean: Yeah, I would comment that that is what the Code allows, but I believe and
29 maybe Mike can confirm that the Commission could narrow that down. And it may be that in the
30 two smaller bedrooms perhaps limit that and then the third bedroom appears to be larger so
31 maybe that one would be appropriate and maybe get the applicant's feedback on that. But I
32 guess first if Mike can confirm that the Commission can narrow that down.

33
34 Mr. Hopper: I suppose it is a bit confusing though that the actual, the caption says three
35 bedrooms and I don't know if the situation was they applied for a three bedroom it was noticed
36 that way but the Department's recommendation is to only have two bedrooms or if that condition
37 just in error. So I don't know what the Department's recommendation is on that. I do believe
38 the Commission, I mean the Commission does have the authority to approve or deny and I think
39 they could, if they find that two bedrooms more appropriate than three I think they can state their
40 basis for that and grant the permit for only a portion of the property, but I think first thing's first is
41 to probably clarify what the Department's recommendation is because I mean again these are
42 proposed conditions so the Commission can alter them, but the application says that it's for
43 three bedrooms and the conditions, I don't know if the intent was to be more restrictive which
44 is...is possible but I'm not sure.

45
46 Mr. Carnicelli: Okay, Christine was your original intent to rent out three bedrooms or two?
47

1 Ms. Thevenard: Three.

2

3 Mr. Carnicelli: So Tara, where are we at?

4

5 Ms. Furukawa: It should be three actually. That's a typo, yeah.

6

7 Mr. Carnicelli: Okay, and historically have we, have we had four guests per room in B&Bs is
8 that what we do?

9

10 Ms. McLean: That's what the Code allows and that's the standard condition.

11

12 Mr. Carnicelli: Okay.

13

14 Ms. McLean: It's just to allow when parents travel with their...it's two adults and two—

15

16 Mr. Carnicelli: Two minors.

17

18 Ms. McLean: Two minors to allow for when parents travel with young kids.

19

20 Mr. Carnicelli: Sure. Do you have any other further?

21

22 Mr. Freitas: Yes, can you hold up the floor plan again. I didn't see where you said that 'cause I
23 got one more over here. Where's that other shower or —

24

25 Ms. La Costa: Show us all please? No, stand back there please so it's on the—

26

27 Mr. Freitas: The reason I ask this is if I'm a guest in bedroom 3 and I want to take a shower and
28 they may go to the what did you call it the Jack and Jill bathroom, they actually have to go into
29 the privacy of those renting bedroom 1 and bedroom 2 in order to get into the Jack and Jill—

30

31 Mr. Carnicelli: Right.

32

33 Mr. Freitas: --sorry, I don't know.

34

35 Mr. Carnicelli: Yeah, yeah.

36

37 Mr. Freitas: Yeah, so or would they go to the other one that you're talking about?

38

39 Mr. Thevenard: They would go to the other one.

40

41 Mr. Freitas: So, bedroom 3 has to go to the other shower.

42

43 Mr. Carnicelli: So, you're gonna share your shower with the guests in bedroom 3, four of them.

44

45 Ms. Thevenard: You know what I don't...I don't think we'd ever have that many people in our
46 ever. Well, never say ever, but we...we want it to be low key and we would probably be pretty

- 1 particular with our rental agents of who we'd want and how many people we'd want 'cause don't
2 want to live with that many people that's for sure.
3
- 4 Mr. Freitas: All right. Okay, that's all for me. Thank you.
5
- 6 Mr. Carnicelli: Thank you. Commissioner Tackett.
7
- 8 Mr. Tackett: So your bedroom because they're all labeled B&B bedroom, your bedroom would
9 be which bedroom?
10
- 11 Mr. Carnicelli: Oh we got a new handout.
12
- 13 Mr. Tackett: Okay.
14
- 15 Mr. Carnicelli: Owner's one is off the—
16
- 17 Mr. Tackett: Got it. Thank you.
18
- 19 Mr. Carnicelli: Yeah. So for me I guess I don't necessarily have a question just comment. I
20 understand your concern especially small bedrooms in older houses like that. But as I kinda
21 think about it that's going to be I guess the experience of the guests, you know, and if she's
22 trying to put four people into rooms that don't really shouldn't have four then the guest
23 experience is gonna go down and her business will go down. So I think that she...anyways, is
24 you guys can...we'll make a decision if we want to limit that further or not, but I'm, I'm okay with
25 leaving it as is personally but if you guys want to make changes to that I'm also okay with it.
26 Any other further questions for the applicant or for the Department at this time?
27 Commissioner Pali.
28
- 29 Ms. Pali: I just have to circle back to my original question to just help you maybe...so I had
30 asked what your response was in regards to the comments about more strangers than friends
31 and about the ongoing traffic and I know that you were attempting to explain what your thoughts
32 were on that but I was actually just asking what your response was, what are you doing to
33 mitigate these things and I don't believe I got the answer.
34
- 35 Ms. Thevenard: To mitigate strangers walking through the neighborhood?
36
- 37 Ms. Pali: Yeah, well so...for an example if we talk about limiting the number of people in this
38 bed and breakfast that could limit the amount of strangers. You see there's—
39
- 40 Ms. Thevenard: Oh yeah no I –
41
- 42 Ms. Pali: You see there's mitigation as a caring neighbor that is sensitive to other people's
43 thoughts whether you agree with them or not and so I'm asking you—
44
- 45 Ms. Thevenard: Right.
46
- 47 Ms. Pali: --have you considered what you could do to mitigate these?

1
2 Ms. Thevenard: I...you know because I haven't put a ton of thought into this 'cause I wasn't
3 sure I'd even make it through this process, but in a perfect world I'd like to rent my home out to
4 probably one family so it would maybe be parents and you know, don't really want little kids in
5 my house but it can happen, and you know, I'm thinking that I'm gonna rent it out to one entity
6 rather than by the room.

7
8 Ms. Pali: Which would help, right you would reduce the number of people.

9
10 Ms. Thevenard: Yeah, absolutely.

11
12 Ms. Pali: And that's a form of mitigation—

13
14 Ms. Thevenard: Yes.

15
16 Ms. Pali: --and taking in this into consideration.

17
18 Ms. Thevenard: Okay, that's what you're looking at.

19
20 Ms. Pali: So that's what I'm looking for.

21
22 Ms. Thevenard: Yes.

23
24 Ms. Pali: I want to know that you're listening to your neighbors, that you, yourself want to be a
25 good neighborhood and that you have really thought long and hard on these concerns because
26 that's what I need to move forward with a yes vote.

27
28 Ms. Thevenard: Yes, no absolutely.

29
30 Ms. Pali: If I don't get that, I don't feel like...I don't think that it's okay—

31
32 Ms. Thevenard: No, I –

33
34 Ms. Pali: --that we've lost neighborhoods to short-term rentals that's not the...that used to be
35 the old status quo, it's not any more, we're actually tasked to avoid losing neighborhoods for
36 these type of businesses, and so I'm on the fence right now. I'm not okay with the fact that this
37 neighborhood and the culture has changed due to the strangers and business making you know
38 profits over people's you know lifestyles in their homes that have been there for generations.
39 So if I feel like you've mitigated the concerns then you'll get support from me.

40
41 Ms. Thevenard: Well, I can say my property is gated. My neighbors don't even know when I'm
42 home or not now.

43
44 Ms. Pali: Okay.

45
46 Ms. Thevenard: And I don't feel that that's gonna make a big impact and other thing is the
47 entrance for the renters is going to be the back side of my house.

1
2 Ms. Pali: Okay.
3
4 Ms. Thevenard: Which is facing a cemetery.
5
6 Ms. Pali: Oh, okay.
7
8 Ms. Thevenard: The old Catholic cemetery.
9
10 Ms. Pali: Good to know.
11
12 Ms. Thevenard: I don't...
13
14 Ms. Pali: So that's the no so favorable side.
15
16 Ms. Thevenard: Right, exactly so I don't think that my neighbors are gonna be that impacted by
17 traffic.
18
19 Ms. Pali: Okay.
20
21 Ms. Thevenard: So I think that's another big one, and...
22
23 Ms. Pali: Okay, I think those are much better answers. I think just the first time you may have
24 misunderstood. Okay, thank you.
25
26 Mr. Carnicelli: Commissioner Tackett.
27
28 Mr. Tackett: Is there a beach access for this neighborhood?
29
30 Ms. Thevenard: There is. It's down at the very end of Alenui and a little bit to the left and then
31 straight ahead. It's a rocky beach so there...I don't think there's a...I don't know, I don't know
32 that it would be a high point for anyone staying in my house to be there unless, unless they
33 maybe zig zagged and walked all the way down towards Mama's Fish House.
34
35 Mr. Tackett: Is it shown on this map?
36
37 Ms. Thevenard: The beach access, let's see...I could show you where it is if you'd like. I think
38 it's too small to get filmed though.
39
40 Mr. Carnicelli: Is it Kalua, off of Kalua place on the bottom.
41
42 Ms. Thevenard: If you go all, if you go—
43
44 Ms. McLean: Are you looking at Exhibit 2?
45
46 Ms. Thevenard: Yes.
47

1 Ms. McLean: Okay, then—

2

3 Mr. Carnicelli: At the bottom left-hand corner, the bottom left-hand corner of Exhibit 2.

4

5 Ms. Thevenard: I can point it out to you where it is if you like. I don't think anyone—

6

7 Mr. Tackett: I can probably see from here, if you could give me a –

8

9 Ms. Thevenard: Okay, so if go, if you go to the end of Alenui.

10

11 Mr. Carnicelli: Or just turn it around so we can see please.

12

13 Ms. Thevenard: Okay, I'm just trying to—

14

15 Mr. Carnicelli: Oh, okay.

16

17 Ms. Thevenard: It would be right here.

18

19 Mr. Carnicelli: Oh, up there.

20

21 Mr. Tackett: Got it.

22

23 Ms. Thevenard: I've forgotten there is three beach accesses in this subdivision. One is at the
24 end of Malie Place and the one is off the map, off by Mama's Fish House, off of Aleiki Place.

25

26 Mr. Tackett: I think, I think depending on whatever the, whatever the result is, is probably
27 important that they know those locations just because if not, they're just gonna wander around
28 the neighborhood and try to get to the beach. Whether it's a good beach or not, people just
29 want to see it.

30

31 Ms. Thevenard: Right, right.

32

33 Mr. Tackett: Yeah, yeah. That was my question.

34

35 Mr. Carnicelli: Thank you. Commissioner La Costa.

36

37 Ms. La Costa: Will you please turn the map around again and show us where the letter of
38 protest where Mrs. Ikeda's home is.

39

40 Ms. Thevenard: Okay, let me look.

41

42 Ms. La Costa: Please, thank you. Said 73 Aleiki.

43

44 Ms. Thevenard: It's this one right here.

45

46 Ms. La Costa: I don't see it on the map.

47

1 Mr. Carnicelli: Exhibit 7.

2

3 Ms. La Costa: I don't see it shown on here.

4

5 Mr. Carnicelli: Oh, you're right it isn't on Exhibit 7.

6

7 Ms. La Costa: It's so quite a ways away from your home.

8

9 Ms. Thevenard: A couple of streets away.

10

11 Ms. La Costa: A couple of streets away. Okay, mahalo.

12

13 Mr. Carnicelli: She pointed to it. Did you see that Keaka? Thank you. Do you have any other
14 questions, comments? Director. Tara.

15

16 Ms. Furukawa: Okay, so there are two permitted STRH or B&B operations located within
17 500 feet of the property. As of September 30, 2019, there are 50 permitted B&Bs and the cap is
18 88. There are 44 permitted STRHs and the cap is 55. There are no open requests for service
19 and one protest letter was received. The application meets the criteria for a B&B Permit
20 therefore the Department is recommending approval of the permit until February 28, 2023 and
21 the Department is asking that the Commission authorize the Director of Planning to transmit the
22 written decision and order on behalf of the Planning Commission.

23

24 Mr. Carnicelli: Thank you Tara. So at this point in time I guess we don't have any further
25 questions for your so thank you very much Christine.

26

27 Ms. Thevenard: Thank you everyone.

28

29 Mr. Carnicelli: We'll go ahead and entertain a motion from the floor. Commissioner La Costa.

30

31 Ms. La Costa: I so move to take the Planning Department's approval suggestion and you know
32 what I mean.

33

34 Mr. Carnicelli: Move to approve as recommended by Staff.

35

36 Ms. La Costa: Sorry, it's been a month. Sorry.

37

38 Mr. Hopper: Just to clarify are you making any changes to the condition?

39

40 Mr. Carnicelli: We're gonna have to get to that, yeah. So at this point in time move to
41 recommend...to approve as recommended by Staff, do you I have a second? Seconded by
42 Commissioner Thompson. To address what Mr. Hopper brings up which is Condition 5, states
43 two bedrooms, would you like to have a friendly amendment to say three bedrooms?

44

45 Ms. La Costa: Yes.

46

47 Mr. Carnicelli: Is the second okay with that?

1
2 Mr. Thompson: No, I'd like to see one or maximum two.
3
4 Mr. Carnicelli: No, I'm talking about number of bedrooms.
5
6 Mr. Thompson: Yes.
7
8 Mr. Carnicelli: Oh. Okay, so you, so okay then.
9
10 Mr. Hopper: You have to have a motion and—
11
12 Mr. Carnicelli: I understand that Michal.
13
14 Mr. Hopper: Okay.
15
16 Mr. Carnicelli: I was trying for a friendly amendment and the second needs to go with the
17 friendly amendment. He's not okay with it. So now we need a motion to amend.
18
19 Ms. La Costa: I move to amend the recommendation two bedrooms in the home rather than
20 three as—
21
22 Mr. Carnicelli: Okay, well that's what written is two bedrooms. So you want it to read three?
23
24 Mr. Thompson: No, two.
25
26 Ms. La Costa: No, two.
27
28 Mr. Carnicelli: Keep it as is then?
29
30 Ms. La Costa: Correct.
31
32 Mr. Carnicelli: Got it, okay. So that's...does anybody amend to remove it other than three? So
33 everybody's...Commissioner Robinson.
34
35 Mr. Robinson: Thank you Chair. I'm sort of with my fellow Commissioner where having a
36 bathroom is a pretty big deal and having a shower and a family. I'm not so much thinking about
37 the bedrooms, I'm thinking about the amount of different associated parties renting the home.
38 You know I'm more the of having a restriction of renting out to just, to just one applicant or one
39 family. A family you know how many is in there, if they could the fit the three in there and they
40 can share the bathroom I think that's one thing. Other than that you know to two. So...and you
41 know it's if, if we're gonna look at a bed and breakfast, you know if we're gonna look at a local
42 person who's been here for a long time or if we're gonna look at them wanting to keep it quiet
43 you know it's I wanna, I wanna protect a guest comfort of stay, you know I know want to protect
44 their right to not be mislead and get that third bedroom and say all of sudden we don't have a
45 bathroom and I gotta take a shower inside the laundry room, you know...but at the same part
46 you know it's I'm also for, for free marketplace where people should be able to make money and
47 do it that way, and my hope is that if they can rent three out to a single family they can make

1 more money at a single rent hit and rent it out less that's my, you know maybe warped thinking
2 but that's why I think she might want to just keep that way and keep it one family and that's
3 where I would rather see our restrictions go is is to only rent it out to one, to one applicant or
4 one family at a time instead of having different people sharing a bathroom and a Jack and Jill
5 because one other person on the other side of the Jack and Jill could monopolize the shower.
6 That shower could be locked the whole time and I don't know if you guys have lived with Jack
7 and Jills but whoever is in there last has the power, you know.

8
9 Mr. Carnicelli: I have four sisters I know all about that.

10
11 Mr. Robinson: Yeah okay, so you know so that's where I think I would be more comfortable if I
12 was to support this, support this I'd be more restricting the applicants than the amount of rooms.
13 Thank you.

14
15 Mr. Carnicelli: So is, Keaka if I could just ask is would you be okay with then because of the
16 shower situation 'cause there's a, you know a toilet and a sink in that third bedroom but there's
17 not a shower, going to three bedrooms but only say tenant at a time, is that more what you're
18 going, like one group at a time?

19
20 Mr. Robinson: Yeah, I mean, you know--

21
22 Mr. Carnicelli: Is that where you're leaning?

23
24 Mr. Robinson: Families of the family can figure out a restroom situation, a shower situation
25 while people ...(inaudible)...parties they shouldn't have to be put up into that, you know that
26 type of situation, so yes, that's what I'm leaning towards.

27
28 Mr. Carnicelli: Okay. Christine would you come forward please? So obviously kinda what
29 we're discussing right now is, you know the possibility of say three bedrooms, one party at a
30 time, it looks like right now at least the motion on the floor is two bedrooms, you know multiple
31 parties. I would just like to see if you're okay with kinda like the thoughts that
32 Commissioner Robinson had.

33
34 Ms. Thevenard: If I understood you, you just...what I said is I'd like to have one party in the
35 house versus like different parties to every room and you would like one party as well.

36
37 Mr. Robinson: It's, it's what the Commission is saying is we're not comfortable with three
38 bedrooms of different parties, but I'm saying I would be comfortable with three bedrooms of
39 party.

40
41 Ms. Thevenard: I agree.

42
43 Mr. Carnicelli: Oh, okay.

44
45 Mr. Robinson: And that's what our debate is right now.

46

1 Ms. Thevenard: And what's funny is there's a B&B across the way from me and their shower is
2 outside.

3
4 Mr. Carnicelli: Sure. No, it's just different if we condition it that way rather than you saying okay
5 this is you know what my intent is and then the condition actually ...(inaudible)...

6
7 Ms. Thevenard: My intent would be to rent it to one entity rather than several different people.

8
9 Mr. Robinson: I think Chair though it's the third bedroom is gonna be we're gonna restrict it to
10 that one party. We're not going to be option to rent it to one party. I think that's where...

11
12 Ms. Thevenard: I also think that I personally would put a cap on my home between four and six
13 people.

14
15 Mr. Carnicelli: Six total.

16
17 Ms. Thevenard: ...(inaudible-not speaking into a mic)...six.

18
19 Mr. Carnicelli: Okay.

20
21 Mr. Robinson: I have six in my family alone, so I mean, just I'm just saying you know is bed and
22 breakfast people are looking for local accommodations at a cheaper price and that's gonna be
23 you know small families. You get to choose who want to rent it too, but there is certain laws that
24 protect against you know, fine picking who you want to rent it to.

25
26 Ms. Thevenard: Oh.

27
28 Mr. Robinson: And, and again three bedrooms and you know one of them has a, has a keiki or
29 an infant you know that, that moves that whole threshold. I mean, again, you know and it's up
30 to you, but that's not what I'm after guys. I'm after three bedrooms, one party other than that
31 then I don't think we can go past two bedrooms.

32
33 Unidentified Speaker: Three bedrooms...(inaudible)...bedroom two.

34
35 Mr. Robinson: Yeah, it's a typo though. Yeah. I mean she can only rent one if she wanted.

36
37 Mr. Carnicelli: Further, further thoughts.

38
39 Mr. Freitas: I guess I do, I agree with—

40
41 Mr. Carnicelli: Commissioner Freitas.

42
43 Mr. Freitas: Commissioner Robinson I agree, one party. This is what she had said, but if we
44 put it down in the conditions as one then it is one instead of leaving at three and assume she's
45 gonna only bring in one, so as much as I was not for approving it because it just seems like it's
46 not planned well and with the one opposition I can be, I can change my mind if it is one. I feel

1 this family has been in that area on Maui long time, I kinda want to support that type of
2 applicant, but if it can be changed one family. I don't know how we can do that.

3
4 Mr. Carnicelli: We can condition it that way to read something to the effect of like...first
5 sentence of Condition 5 that the B&B Home Permit is limited to, we'll say three bedrooms within
6 the dwelling rented to one single party at a time. I don't know does that work Director?
7

8 Unidentified Speaker: And more than six people?
9

10 Mr. Robinson: As up to 12. I mean I've had halaus in my house so you know, it's I don't want
11 to...not a halau be able to come over and do something, they're trying to save money and come
12 over to the islands, who has a sports team and if kids are gonna come in that's, that's what I'm
13 saying, I trying to, I want to leave it open for that, but again, it's still gonna be one party.
14

15 Mr. Carnicelli: Commissioner Freitas.
16

17 Mr. Freitas: When I look at the pictures of the rooms and with the bed inside there and when
18 you say a minor, a minor can be up to 17 and some minors are bigger than adults. My kids are
19 bigger than I am. So I cannot see four comfortably...is there gonna be another roll away or
20 they're gonna sleep on the floor. That's why my concern. I mean I didn't have a ruler handy
21 last night, I got my tape measure and I measured this one-eighth for a foot and came out with
22 only 13 and the picture really shows a small, small room. So we could limit the number of
23 guests.
24

25 Mr. Carnicelli: Christine.
26

27 Ms. Thevenard: Yeah, I'd love to address that. I mean, this is a house my husband and I, we
28 have had for the last 25 plus years and we don't want it...we want it well taken care of not, not
29 ruined so we're really not targeting to rent to large groups. I think there's always an exception to
30 that that but we're not looking for large groups. So, and that goes along with having a lower
31 impact on the neighborhood. I mean, our house is old, I don't think it could support that many
32 people. And you know the way I look at it there's three bedrooms and there's gonna be like
33 three queen beds, maybe one of the queen beds might be a king in the bigger bedrooms so it
34 will be two queens and a king and so I don't see more than four to six people or maybe even
35 three people.
36

37 Mr. Carnicelli: Bunk beds. No bunk beds then.
38

39 Ms. Thevenard: No, no, no.
40

41 Mr. Carnicelli: Okay.
42

43 Mr. Thompson: This property, are you on sewer or on septic or cesspool?
44

45 Ms. Thevenard: Oh everyone's on sewer.
46

47 Mr. Thompson: Sewer, okay.

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Ms. Thevenard: Yeah, we all mandatory probably 23 years ago had to hook up.

Mr. Thompson: Thank you.

Ms. Pali: Chair?

Mr. Carnicelli: Commissioner Pali.

Ms. Pali: I would really like to see the language up to six people. She's stated that several times and I feel like it would be my duty as the person who was opposing as far as traffic and mitigating that I feel like that's a really responsible thing and so I would like to see that language in there.

Mr. Carnicelli: Got you. Okay. So, Director do you have a scribbled out new version here for us as you do?

Ms. McLean: I think so. Condition 5 could read, that the B&B Home Permit is limited to three bedrooms and shall be rented to one group with a single rental agreement, and that language is taken from 19.65. The owners/proprietors live in the main dwelling, the total number of guests shall be limited to a total of six.

Mr. Carnicelli: Would you like that as a friendly amendment to your main motion?

Ms. La Costa: I would say not more than six.

Mr. Carnicelli: Not more than six. Are you then...

Ms. McLean: I'll read it through again.

Mr. Carnicelli: Okay.

Ms. McLean: That the B&B Home Permit is limited to three bedrooms and shall be rented to one group with a single rental agreement. The owners/proprietors live in the main dwelling. The total number of guests shall be limited to no more than six.

Mr. Carnicelli: Are you okay with that amendment?

Ms. La Costa: I'm am okay with the amendment.

Mr. Carnicelli: As the second, are you okay with that amendment?

Mr. Thompson: Yes.

Mr. Carnicelli: Okay, so we have that friendly amendment to, to the conditions then. Thank you, Christine. Any further discussion on the motion? Okay, Director.

1 Ms. McLean: The motion is to approve subject to the conditions in the staff report with the
2 amendment to Condition 5 about being rented to a single group and with no more than six
3 guests at a time.

4
5 Mr. Carnicelli: All those in favor please raise your hand. That is six. Unanimous.
6 Congratulations Christine. Do your community well. Appreciate your time.

7
8 **It was moved by Ms. La Costa, seconded by Mr. Thompson, then unanimously**

9
10 **VOTED: To Approve the Bed and Breakfast Home Permit as Recommended**
11 **by the Department with Amendment to Condition No. 5 rooms being**
12 **rented to a single group and no more than six guests at a time.**

13
14 **(Assenting – P. D. La Costa, D. Thompson, K. Freitas, K. Pali,**
15 **K. Robinson, C. Tackett)**

16 **(Excused – S. Castro, T. Gomes)**

17
18
19 Mr. Carnicelli: Director.

20
21 Ms. McLean: Thank you Chair. Next we have a Proposed Resolution Agreement for alleged
22 Special Management Area Violations, and before you is a proposed agreement between the
23 County and Shelly A. Glass Trust for an addition to upper floor deck and master bedroom
24 extension, rear stairway, conversion of lower floor into three storage rooms and garage
25 (breakaway walls), and swimming pool and spa within the Special Management Area and Flood
26 Zone VE without first receiving SMA, Setback, and Flood Development determinations or
27 permits for improvements on property located at 595 Linekona Place at TMK: 3-4-028:084 in
28 Wailuku, and we have our Administrative Planning Officer, Jacky Takakura and Zoning
29 Inspector Gail Davis in the audience if there are questions for them.

30
31 **C. REVIEW OF PROPOSED RESOLUTION AGREEMENT FOR ALLEGED SPECIAL**
32 **MANAGEMENT AREA VIOLATION**

33
34 **Proposed Resolution Agreement between the COUNTY OF MAUI and**
35 **SHELLY A. GLASS TRUST for an addition to upper floor deck and master**
36 **bedroom extension, rear stairway, conversion of lower floor into three**
37 **storage rooms and garage (breakaway walls), and swimming pool and spa**
38 **within the Special Management Area and Flood Zone VE (high risk) without**
39 **first receiving SMA, Setback, and Flood Development determinations or**
40 **permits for such improvements on property located at 595 Linekona Place,**
41 **TMK: (2) 3-4-028:084, Wailuku, Island of Maui. SMA Notice of Violation:**
42 **NOV 2017/0041; Setback Notice of Violation: 2017/0040; Flood Notice of**
43 **Violation: NOV 2014/0004.**

44
45 **AN EXECUTIVE SESSION MAY BE CALLED IN ORDER FOR THE COMMISSION TO**
46 **CONSULT WITH ITS ATTORNEY ON QUESTIONS AND ISSUES PERTAINING TO**

1 **THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES, AND**
2 **LIABILITIES PURSUANT TO SEC. 92-5(a)(4), HRS.**

3
4 **The Commission may take final action on the proposed Settlement**
5 **Agreement pursuant to the provisions of Section 12-202-23(d)(3) of the**
6 **Maui Planning Commission's Special Management Area Rules and Section**
7 **12-203-17 of the Shoreline Rules for the Maui Planning Commission.**
8

9 Mr. Carnicelli: Great. Thank you. So at this point in time we'll go ahead and open up the floor
10 for public testimony. Is there anybody that would like to come forward and speak to this item?
11 Please come forward.

12
13 Ms. Trisha Egge: Hi, so--

14
15 Mr. Carnicelli: Okay, so just so you know you have up to three minutes and I just need to ask
16 you if you will be truthful.

17
18 Ms. Egge: I will be.

19
20 Mr. Carnicelli: Okay. You have up to three minutes. Please identify yourself.

21
22 Ms. Egge: My name's Trisha Egge. I am resolving these issues on behalf of my parents. The
23 only comment is everything described was permitted. There was some things they did after-the-
24 fact in those areas that we later removed and rectified, but the storage room, the breakaway
25 walls there were SMA Permits and building permits. So that first statement just seems a little
26 misinterpreted. It seems like there was no permits for the project, but it was just certain things
27 that were done later that weren't conforming that we rectified.

28
29 Mr. Carnicelli: Got it. Thank you so much. Is there any questions for the testifier? Seeing
30 none, thank you very much.

31
32 Ms. Egge: Thank you so much. Have a great day.

33
34 Mr. Carnicelli: Is there anybody else that would like to come forward and testify on this
35 particular item? Seeing none, then without objection we'll go ahead and close public testimony.
36 Questions, comments from the Commission? Commissioner Robinson.

37
38 Mr. Robinson: Can we hear the story from the County please on why there is this violation?
39

40 Ms. Jacky Takakura: Good morning Commission.

41
42 Commission Members: Good morning.

43
44 Ms. Takakura: I'm Jacky Takakura, I'm the Administrative Planning Officer with the Zoning
45 Division and I have with me Gail Davis, she's a Zoning Inspector II, with the Zoning Division.
46 And this came about in 2016 we had FEMA personnel here and they were out as part of their
47 flood audit and identified this property as having potential violations and so the Department

1 investigated and they found the various things going on that is mentioned in the report and
2 there's some pictures. Some of those things are in this...this is a flood zone that is VE which is
3 coastal high hazard area, this is in Paukukalo not very far from the shoreline so it would be high
4 VE, high hazard area.

5
6 The area was supposed to be enclosed with breakaway walls on the bottom floor and
7 constructed on a gravel pad and in accordance with the approved building permit plans which
8 were submitted and had been approved in 2009. The Department did send a request for
9 inspection but we were never able to inspect the property. We sent via Certified Mail you know
10 letters with the Notices of Warnings and the Notices of Violations. The mail would be returned
11 so they were personally delivered. Staff also observed concrete floors, wooden wall and gate,
12 lanai, an above ground pool and a shed that were in the setback. So there was just a array of
13 things that were going on that eventually they did get resolved so that's a good thing.

14
15 In communication with the Department and the family this fines were brought back down to what
16 they initially were and that would be \$10,000 for the SMA, and \$2,000 each...or \$2,000 for the
17 flood and the setback NOVs, \$1,000 each, \$1,000 for the flood and \$1,000 for the setback. So
18 the problems have been resolved so that's a good thing. We just would like to get this
19 settlement agreement cleared and so we can close this out. And I have to apologize, I started
20 in April of this year so I wasn't there in 2016, ... as involved, but Gail would know quite a little bit
21 more if you have specific questions about the property and so forth. You have any questions?

22
23 Mr. Carnicelli: Any questions for Gail? I have...or go ahead.

24
25 Mr. Robinson: No, you go head.

26
27 Mr. Carnicelli: No, no, go ahead Commissioner Robinson.

28
29 Mr. Robinson: Is, can, can the inspector explain what was the permit that they're supposed to
30 build? I see where it says there's concrete floors so was a pier post type of house that was
31 approved and instead they went to a slab?

32
33 Ms. Gail Davis: I'm not real sure about—

34
35 Mr. Carnicelli: Gail, just identify yourself.

36
37 Ms. Davis: I'm Gail Davis, Zoning Inspector, Department of Planning. That part I'm not real
38 sure. What we mostly enforced was the use of the structure, the addition of the office on the
39 bottom and then through Pictometry we saw that there's a above ground pool which was that
40 was against what the plan stated and there was some other items that we saw were installed
41 through Pictometry that did not have a permit.

42
43 Mr. Robinson: So they went and got a permit they just did more than the permit was for?

44
45 Ms. Davis: Yeah, they deviated from the plans originally. They added some stuff and they
46 changed the use to, you know, something they weren't supposed to.

47

1 Mr. Carnicelli: So the pool was above ground though?

2
3 Ms. Davis: Yeah.

4
5 Mr. Carnicelli: Oh, okay. It wasn't like they dug a hole.

6
7 Ms. Davis: Yeah, it could be a small circular in-ground pool, but it was built up and it was in the
8 setback.

9
10 Mr. Carnicelli: Got you. Director.

11
12 Ms. McLean: I was just going to add it's because this is in a flood zone and a Flood
13 Development Permit is required it's you have to be very precise with what's permitted and
14 what's allowed. I don't know if the concrete pad would be permissible. It's possible that it could
15 have been but that's not what was permitted. The breakaway walls are a requirement. The
16 solid walls would not have been permissible.

17
18 Mr. Robinson: Another question?

19
20 Mr. Carnicelli: Go ahead.

21
22 Mr. Robinson: This is for the applicant. Did you guys have this work done by a contractor?

23
24 Ms. Egge: It was done by contractors but it is slab on the plans and it was inspected by the
25 County. The slab is...and Gail has the plans.

26
27 Mr. Robinson: Okay.

28
29 Ms. Egge: So the concrete slab downstairs is part of the original 2009 building permit. It was
30 inspected by the County, it was approved. The issue was dry wall was put on the walls later,
31 you know things like that and then the pool in the backyard was a Kmart above ground pool and
32 it was within the setback you know so it was five feet from the wall. So you know they
33 inspected, we moved it to six feet from the wall and then they said you need a Flood
34 Development Permit and SMA for this Kmart above ground pool, so the third time you know we
35 tore it out. And the storage area was a kids playhouse, it was like three feet tall, my two-year-
36 old plays in it when he would go over there, you know like, but I guess playhouses isn't like a
37 term the County has so they called it storage and that was within the setback and those things,
38 but we, we did everything that was asked and we got it resolved and we're really hoping that the
39 Commission will approve this and end it today. It's been...(inaudible)...it's been a really long
40 three years.

41
42 Mr. Robinson: So I'm still trying to, I guess I need more coffee, but I'm still trying to understand.
43 So you had a permit to put something up—

44
45 Ms. Egge: Yeah.

46
47 Mr. Robinson: And the things that you weren't allowed to was your kid's shed and the pool.

1
2 Ms. Egge: The kid's pool they said they—they added drywall, so you can't add drywall to a
3 breakaway wall, right.

4
5 Mr. Robinson: I, I –

6
7 Ms. Egge: So drywall is not allowed--

8
9 Mr. Robinson: Okay.

10
11 Ms. Egge: -- on a breakaway wall. So we tore out the drywall. You know there was a desk—

12
13 Mr. Robinson: So, so, is it was it a licensed general contractor or just a contractor doing jobs
14 for you as on the side?

15
16 Ms. Egge: It was like my dad built it, he's a roofer and him and you know his workers you know
17 they built it and his friends basically. It wasn't a licensed contractor.

18
19 Mr. Robinson: I got you.

20
21 Ms. Egge: And I've been in the construction industry for 20 years on Maui. I'm the Executive
22 Chair of the Construction Industry of Maui for the past five years. I've gotten building permits for
23 20 years. I would never think that someone would need a Flood Development and SMA Permit
24 to put a Kmart pool in their backyard. Like some of the things it was shocking to me that regular
25 citizens wouldn't know and like throughout the process it was a learning on like both sides, you
26 know, and I think we definitely need more public education because none of the people on that
27 street know the law and that like if they put up a gate in their yard they're violating law and
28 subject to a \$100,000 initial fine.

29
30 Mr. Robinson: Well, thank you and that's what I was leaning towards.

31
32 Ms. Egge: Yeah.

33
34 Mr. Robinson: Contractors needs to know the law. They take tests, they're supposed to know
35 the law. People who aren't contractors, yeah, they might not and I've been always this we're
36 always going after the people who own the homes instead of the contractors who get paid to do
37 illegal work and you being part with the contractors and still not knowing it that's a concern with
38 our testing and I think that's something that we may need to look at but regardless is contractors
39 is supposed to find out, I mean—

40
41 Ms. Egge: Right.

42
43 Mr. Robinson: --I mean, you know if you're a professional and you get paid for something
44 regardless if it's for yourself or not and, and again that's what I was trying to get at and so you
45 know, I'm always after contractors. Thank you.

46
47 Ms. Egge: And I understand.

1
2 Mr. Robinson: Thank you. Thank you.

3
4 Ms. Egge: Thank you so much.

5
6 Mr. Carnicelli: Wait, wait, come on back, Trisha.

7
8 Mr. Thompson: Trisha, I have one question for you.

9
10 Ms. Egge: Absolutely.

11
12 Mr. Thompson: So how you never responded to the...their Certified Mail?

13
14 Ms. Egge: You know, they...my parents are in their 60s they travel a lot and then you know, I'm
15 not 100 percent sure why the mail didn't get to them and why it wasn't, wasn't picked up, but I
16 can tell you that you know we definitely take it seriously, you know we definitely apologize for
17 you know the wrongs that were done. It's been a really long road. It's the most difficult process
18 I've ever experienced in my entire life ever and it's not even my property. I don't live there. I
19 live Upcountry but it's been a, it's been a nightmare trying to resolve this and like how we got
20 here. We can go backwards, it's 2020 right? But we just want to go forward and hopefully
21 resolve this today.

22
23 Mr. Thompson: Thank you very much.

24
25 Ms. Egge: Thank you.

26
27 Mr. Carnicelli: Hang on. We should have done this when you testified.

28
29 Ms. Egge: That's okay.

30
31 Mr. Tackett: My question is for the Director. So, the breakaway walls was that the only
32 infringement, the drywall on the breakaway wall. Is that what made those walls unacceptable?

33
34 Ms. McLean: That's what made those walls unacceptable, the dry wall.

35
36 Mr. Tackett: The dry wall. And then the...how she described the playhouse is that how you
37 guys would determine a playhouse is a shed if you were to find one on the property like that is
38 that?

39
40 Ms. McLean: I don't know about the terminology maybe Gail can comment on that—

41
42 Mr. Tackett: Okay.

43
44 Ms. McLean: --but I don't believe that was permitted that was in the setback. So whatever it
45 would have been used for if it was in the setback—

46

- 1 Mr. Tackett: So if you were to put a playhouse, a child's playhouse in a setback that would
2 basically be against the rules although it would be obscure to find in the rule book probably.
3
- 4 Ms. McLean: Right. And I don't know that we would have undertaken this level of enforcement
5 if there hadn't been the flood violations. The flood violations are the most serious one like with
6 the above ground pool if it wasn't in the setback I don't know that we would have...how far we
7 would have gone with SMA because the flood violations are serious because we comply with
8 FEMA requirements for the County to participate and the National Flood Insurance Program and
9 so we have to maintain its really strict standard.
- 10
- 11 Mr. Tackett: Sure.
- 12
- 13 Ms. McLean: So that was what drove the enforcement.
- 14
- 15 Mr. Tackett: So the flood violation would be the drywall portion—
- 16
- 17 Ms. McLean: Correct.
- 18
- 19 Mr. Tackett: Everything else is, is, was, was brought to light because of that portion of it.
20
- 21 Ms. McLean: Any structure that would have required Flood Development Permit level review
22 was important for us to cite. So the pool and the playhouse and the drywall—
23
- 24 Mr. Tackett: And that's dependent on any kind of pool whether you get it from Kmart or—
25
- 26 Ms. McLean: Right, if it's in the flood zone, the idea being that if you have to have certain
27 construction standards like the breakaway construction so if there is the, the coastal surge and
28 things get knocked out, you want to, you want to protect the structures so you have the
29 breakaway walls so the structure remains intact but the walls breakaway and then you want to
30 determine how those other structures are built so that they are also built to the appropriate
31 standards should there be that surge. So it's to protect property and to protect human life.
32
- 33 Mr. Tackett: Okay.
- 34
- 35 Ms. McLean: So that's why it's such a, such a particular kind of review and she's correct that a
36 lot of people don't know this and you wouldn't, you wouldn't necessarily know if you're in the
37 flood zone and what...and there are different flood zones and different standards for each so
38 not a lot of people do know about that.
- 39
- 40 Mr. Tackett: And besides the drywall, the other things would probably not be a contractor exam
41 test question correct about that?
42
- 43 Ms. McLean: I don't know. I don't—
44
- 45 Mr. Robinson: ...(inaudible-not speaking into a mic)...Flood zone is flood zone.
- 46
- 47 Mr. Tackett: Well, well, my next question...my next question would be for Trish correct?

1
2 Ms. Egge: Yes, Trisha or Trish either.
3
4 Mr. Tackett: Trisha, yeah, yeah, so you guys what company do you work for?
5
6 Ms. Egge: I work for Maui Windows and Doors. I'm the Vice-President but I've worked for
7 commercial contractors on \$800 million projects down to—
8
9 Mr. Tackett: And this is your parent's house?
10
11 Ms. Egge: This is my parent's property yes. It's their house where they live and yeah, my dad
12 is a...he's a roofing superintendent, he has been on Maui for 40 years and you know they're –
13
14 Mr. Tackett: Is that, is that your parent's company?
15
16 Ms. Egge: No, it's not. It is not. So we don't hold contractor licenses but we both work for
17 different trades within the construction industry and I have one more thing to add, if we were
18 one house up we wouldn't be in the flood zone. One house up 'cause we're just the bottom
19 12 inches is in that 13-foot flood surge, so it's crazy that like you know the one house up on the
20 street and it wouldn't have been the same, same requirements you know and the same issues,
21 you know, and you just, you don't realize so...
22
23 Mr. Carnicelli: So when the tsunami comes you just hold up the map and you say stop.
24
25 Ms. Egge: Right, that's the plan.
26
27 Mr. Carnicelli: One quick question for you here while you're still going is Shelly Glass is your
28 mother?
29
30 Ms. Egge: She is my step-mom, my dad's wife.
31
32 Mr. Carnicelli: Step-mom and that is who is the Trustee then that signed.
33
34 Ms. Egge: She signed the document.
35
36 Mr. Carnicelli: She signed so I just clarity.
37
38 Ms. Egge: Yep.
39
40 Mr. Carnicelli: You're okay with this settlement agreement?
41
42 Ms. Egge: We are okay with the settlement agreement.
43
44 Mr. Carnicelli: Okay, and then you know for Jacky, Gail and the Director you guys are okay with
45 the settlement?
46
47 Ms. Takakura: Yes.

1
2 Mr. Carnicelli: Okay, so I just want to get clear that three years we landed here today, both
3 parties are okay with this? So I just anyways...any other questions from the Commission.
4 Commissioner La Costa.

5
6 Ms. La Costa: Thank you Chair. I just need some clarification. Trisha you said that the slab
7 was on the original building permit but I heard gravel so I'm a little confused as to what
8 permitted and what the...from where the issue comes on that.

9
10 Ms. McLean: I don't know what was permitted. I don't have reason to doubt the testifier. There
11 was reference to gravel rather than concrete, I don't know if Gail can comment on that?

12
13 Ms. Davis: I believe I thought I saw something about a breakaway slab, but I'm not sure if that
14 is such a thing or how that work.

15
16 Ms. Egge: It is a breakaway slab on the plans, that's how it was constructed and inspected by
17 the County in 2009. Some where in it says compacted gravel I think under the breakaway slab
18 and so that part of it was pulled and put in a violation but the break...you know it's a breakaway
19 slab, it was signed, inspected 2009, ten years ago, so...

20
21 Mr. Carnicelli: And just to reiterate, they're all of the, all of the mishegoss which was a violation
22 has all been cleared up.

23
24 Ms. Davis: That's correct.

25
26 Mr. Carnicelli: Okay. Anything that was bad is now okay.

27
28 Ms. Davis: Yes.

29
30 Mr. Carnicelli: Okay, thank you. Any other questions? Commissioner Tackett.

31
32 Mr. Tackett: No questions, no questions at this time.

33
34 Mr. Carnicelli: Okay.

35
36 Mr. Robinson: I have a comment.

37
38 Mr. Carnicelli: Commissioner Robinson.

39
40 Mr. Tackett: I also have a comment when you're done.

41
42 Mr. Robinson: And, and what it is it goes back to we want to help people you know comply,
43 right, it's, it's and we have, we've been here for years where these people who are
44 noncompliant seem to not pay any fines and people that are trying to get compliant are the ones
45 that actually you know pay their fines and this is where it gets to like you said, there's a special
46 area where this flooding and these rules are very you know, are very precise and it seems like
47 we have a lot of these SMA waterfronts that we have these challenges with and these flood

1 zones and I don't know if there can be an excerpt or something to where a permit that is, that
2 happens inside this certain area automatically triggers a second, a third disclaimer where the
3 whoever's pulling the permit has to understand that these laws are also and these, you know
4 these special laws are in these special area to help these contractors so that way we prevent
5 people from not knowing, you know 'cause what we want is compliance and so if it's a small
6 area, I mean, you know I'm not sure but it always, it always bothers me when, when
7 professionals don't even know the law that tells me that the law is either too hard to follow or it's
8 ambiguous and if there's some other way that we can do it or if it is clear, and they're not
9 following it then we should be fining the professionals you know who the homeowner is trusting
10 to pull a permit for them. You know it's at some point a profession has to take responsibility for
11 their profession and their association and if it is not them and it is policy and things like that then
12 we should help support you know the association to try to help them be more compliant so we
13 don't run into this.

14
15 I think \$12,000 is a little excessive for a homeowner if it's just an over ground stuff like that. If
16 they're okay with it, I mean I'm fine with it, but you know I think you know if it's compliance is
17 what we look for if it cost our department because they weren't complying you know certain
18 amount of you know a few thousand dollars for mailings, things like that because that is your
19 job. But yeah, I would hate to try to do something and just make a mistake and be hit with
20 \$12,000. Thank you Chair.

21
22 Mr. Carnicelli: Thank you. Commissioner Tackett.

23
24 Mr. Tackett: I also when I listen to it and the fact that they did go out and get the permit and the
25 most...the majority of things seem to be something that is obscure. I think that, I think that
26 probably, probably putting drywall on the wall is wrong and I understand that there's probably
27 definitely rules for it and why it should be like that although I don't think drywall would stop a wall
28 from breaking away if that were what needed to happen. But still it was against the law and it's
29 not supposed to be done but I do think that \$12,000 is a lot of money and if it was a big shed, if
30 that was in the flood zone and if it was something more permanent that was in the flood zone
31 but seems like right now they're at \$12,000 for hanging probably about \$300 or \$400 worth of
32 drywall which I mean, and thank you for the job that you guys do like they did a good job, the
33 County did a good job, I'm just saying that that when I look at the picture of what was said from
34 both parties it just seems like a lot of money to me for, for the drywall. So you know I actually
35 know what company they...the parents work for. They actually work for one of the only roofing
36 companies that pay union wages to young youth in this community. Hardly anybody does
37 roofing and provides opportunity to local kids at the level that these people, who they work for,
38 for to do that that at...not that that weighs in here nor there but I do feel that for the drywall
39 which is definitely wrong that they should pay a penalty because, because it was wrong and
40 these ... the workers that were put in place to take care of this they did a good job it just seems
41 like an exorbitant amount to me for that particular offense. So that's where I, that's where I
42 stand on it.

43
44 Mr. Carnicelli: I guess here's the question that I have then. Is even though, and I appreciate
45 you saying what you did and Commissioner Tackett and Commissioner Robinson if there's an
46 appetite to amend the settlement agreement to a lower fine is that something that we can do
47 here? And I don't know if Mr. Hopper or the Director wants to try to take that question.

1
2 Mr. Hopper: Starting point is at the \$2,000 that's entirely within the Director's discretion to
3 approve so I'm not sure why that's...I understand why it's part of the agreement but that's not
4 something that the Commission is being asked to approve today. Although it's being asked to
5 approve the entire agreement. The \$2,000 for the flood zone violations is entirely within the
6 Director's purview. The \$10,000 SMA fine is with the Commission would generally be required
7 to review and approve. The way I read it I think that you would say approve or disapprove and if
8 you disapprove because the fines are too high, I think that's something that the Department can
9 renegotiate and come back to you if it would like.

10
11 We can look at this maybe in the future, but I don't know if the rules, the rules says that they
12 may negotiate the settlement agreement with the landowner or if appropriate the violator that
13 provides for cure of the violation set any fine and inspection of parcel by the enforcement
14 agency and the Department. The proposed settlement shall be forwarded to the Commission
15 for final action. So I think you'd need to probably negotiate a new proposed settlement between
16 the parties rather than do that here. So I think if the fines are excessive I think you would, you
17 know deny the settlement agreement then you can come back to the Commission for a future
18 day at this point because you had an agreement between the two parties and that was step one
19 and step two is to you for final action. So I think that's generally how I would read the rules in
20 that situation.

21
22 Mr. Carnicelli: Thank you. Director.

23
24 Ms. McLean: Thank you Chair. I would not recommend approval to the Mayor if the fines were
25 reduced and if you want to discuss that in detail, I'd ask that we go into the executive session.

26
27 Mr. Carnicelli: Gotcha. Commissioner La Costa.

28
29 Ms. La Costa: My comment is that the owner agreed to reduced accumulated initial and daily
30 fines of \$3,285,000 to only the initial fines of \$10,000 for SMA and \$2,000 for setback and flood.
31 So it went from \$3 million to \$12,000.

32
33 Mr. Carnicelli: Commissioner Tackett.

34
35 Mr. Tackett: Director, I guess wanted to know that the playhouse and the moveable pool and all
36 that stuff weighed into, and weighed into the fine, if you're saying that you would not approve it
37 and that you feel like this is fine and just I just wasn't sure because of the huge amount of
38 workload that you get when somebody comes up and testifies that yes, it's a, it's a playhouse
39 you know what I mean, with like...I thought a playhouse would be considered a temporary
40 structure and I thought that perhaps a temporary structure like that could...I would have no idea
41 if a bought a playhouse from Sears that I had to have the six-foot clearance from my wall, I just
42 wouldn't know and if it's a Sears above ground pool it doesn't seem like a lot, but if you're
43 saying that that you feel that that this has to be this way and that you would not recommend
44 approval under any other circumstances then I'm gonna go with what you say. It just seems
45 like, it seems like maybe the perception of it was different than what it really was when they had
46 an opportunity to voice what actually went down. So you're saying that you're...that that
47 \$10,000 you think is the right number for this situation.

1
2 Ms. McLean: I do. Thank you for the question. Because the Flood Development Permit
3 violations we consider to be quite serious.

4
5 Mr. Tackett: Okay, thank you. That was my question.

6
7 Mr. Carnicelli: Thanks. And for me I think you know kind of where this settles to, you know I
8 guess to use it, you know, no pun intended is you know we...there's fines in place and there's
9 reasons for this and so there's the deterrent, there's \$3 million. I don't think the Department
10 ever says you have to pay the whole whatever it is, 'cause we've gotten a few of these over the
11 years, right where it's just like okay, so part of it is a deterrent so if we say, oh it was, you know
12 just this or just that whatever it is, and then we say okay, let's just brush it under the rug, you
13 know what do we set as precedence and not. So in a way the fact that she's also saying before
14 we started talking about this she's saying yeah, you know what I'll pay the 12 and we want to be
15 pau today. We want to be just done. You know for us to say no and then go back and then
16 settling, you know the Director has got to try to renegotiate and say well, wait a second you
17 know, 'cause part of this is you know even though it might be a playhouse and an oops, we
18 have those rules in place for a reason and yeah, people need to know the difference between
19 VE Flood Zone and X and all those different things, but I think that you know the fact that all
20 parties are agreed on this right now, I guess I would, I would be okay with it too. So anything
21 further from any, any...Commissioner Freitas.

22
23 Mr. Freitas: I just have a comment.

24
25 Mr. Carnicelli: Sure.

26
27 Mr. Freitas: I agree. I don't think there was any bad intent on their part.

28
29 Mr. Carnicelli: Right no malice.

30
31 Mr. Freitas: And they fixed everything that they needed, and I think the fine that is in the
32 settlement is just, justified and fair and I would like to move to vote on this approve the
33 agreement.

34
35 Mr. Carnicelli: Okay, so we have a motion on the floor to approve, seconded...moved by
36 Commissioner Freitas, seconded by Commissioner La Costa. Do you want to...anybody want
37 to speak to the actual motion itself? Commissioner Robinson.

38
39 Mr. Robinson: I support the Director.

40
41 Mr. Carnicelli: All right. I support the Director. That's four words from Commissioner Robinson.
42 Anybody else?

43
44 Mr. Freitas: I just, I just want to say that for someone with the experience of building and
45 construction and permitting like this lady, Trisha has to go through all of this gosh I can just
46 imagine just someone that didn't know anything that this happened to them they would have
47 been a \$6 million fine and they would be pulling hairs and jumping off bridges so I commend

1 you for sticking to it and getting it done and I hope we can approve this today for you and your
2 family.

3

4 Mr. Carnicelli: Thank you. Anybody else like to speak to the motion?

5

6 Mr. Tackett: No, I have nothing more. Thank you.

7

8 Mr. Carnicelli: Okay, Director.

9

10 Ms. McLean: Thank you Chair. The motion is to approve the settlement agreement as
11 proposed.

12

13 Mr. Carnicelli: All those in favor please raise your hand. That is six ayes. A deep sigh of relief
14 for you Trisha.

15

16 Ms. Egge: Thanks sir. Thank you.

17

18 Mr. Carnicelli: It passes unanimously. Thank you very much. We'll get you the appropriate
19 signatures and you can just move on with your day and life I guess as it were.

20

21 **It was moved by Mr. Freitas, seconded by Ms. La Costa, then unanimously**

22

23 **VOTED: To Approve Resolution Agreement.**

24

25 **(Assenting – K. Freitas, P. D. La Costa, D. Thompson, K. Pali,**

26

K. Robinson, C. Tackett)

27

(Excused – S. Castro, T. Gomes)

28

29

30 **D. COMMUNICATIONS**

31

32 **1. MR. PAUL MANCINI, MANCINI, WELCH, & GEIGER, LLP, on behalf of**
33 **Waterfront Apartments (Kahului Town Center Student Housing Complex)**
34 **requesting an amendment to the Conditions of permit OSP 2005/0001 - a**
35 **reduction of 22 offsite parking stalls - located at 65 Kane Street, Kahului,**
36 **Island of Maui, TMK: (2) 3-7-005:033, (SM1 2005/0003) (OSP 2005/0001) (P.**
37 **Fasi)**

38

39 **Item is canceled. Commission action is not necessary. The off-site parking amendment**
40 **can be handled administratively.**

41

42

43 Mr. Carnicelli: Commissioners I actually have a request here just personally, I'm looking at the
44 agenda and we have orientation and then the Director's Report and then I believe, then we
45 have...oh, and then the new proposed notice, and so what I'm proposing to do is to move the
46 Director's Report, F, in front of E, because Commissioner Robinson does not need to be here
47 for E, he's done it four times already as far as doing the orientations and the training and

1 everything like that and so I would just request I guess if there are no objections that we go
2 ahead and move F in front. We'll take a brief recess after that, Commissioner Robinson will be
3 excused and then we can do our orientation. Any objections to that? Commissioner Pali.

4
5 Ms. Pali: ...(inaudible – not speaking into mic)....

6
7 Mr. Carnicelli: Yeah, no it's part of F.

8
9 Ms. Pali: Okay, good.

10
11 Mr. Carnicelli: That's part of F, yeah, so is we're just moving E to after F if you guys are okay
12 with it. Yeah, just going to move E behind F if you guys are okay with that. So do we actually
13 have to take a vote to change the agenda?

14
15 Mr. Hopper: You can see if there's no objections and if there are none, that's unanimous
16 consent.

17
18 Mr. Carnicelli: Okay, consent. No objections we have consent, so Director.

19
20 Mr. Hopper: Could I just ask has this item been on here before? Did, I can't recall if
21 Commissioner Pali or if the TIG had already reported back once?

22
23 Ms. McLean: Yes.

24
25 Mr. Hopper: Okay, so yeah now we can deliberate and discuss this item, but I just wanted that
26 for my reference.

27
28 Mr. Carnicelli: Thank you.

29
30
31 **By consensus of the Commission Item F was taken up before Item E.**

32
33
34 **F. DIRECTOR'S REPORT**

- 35
36 **1. REPORT OF THE TEMPORARY INVESTIGATIVE GROUP ON THE REVISED**
37 **FORMAT OF PUBLIC HEARING NOTICES. Commissioners P. Denise**
38 **La Costa and Kellie Pali will present their recommended text and formatting**
39 **changes to the public hearing notices that are mailed by applicants.**
40

41 Ms. McLean: The first item under Director's Report is the report from the Temporary
42 Investigative Group on the revised format of public hearing notices and
43 Commissioners La Costa and Pali worked on the revised format which is in your packets and so
44 we're happy to hear from them and then also any comments you might have.

45
46 Ms. La Costa: Go ahead.

47

1 Ms. Pali: Okay, so this actually just to be fair it was Commissioner Robinson who brought to our
2 attention that when he got a notice there might have been room for growth and an easier way
3 we could communicate to the public so when he brought that to our attention P. Denise and I
4 joined together and I think as you see the form in front of you because there was so much
5 information on this form we wanted to make sure that the biggest thing wasn't missed and that
6 was, what is it, where is it and when is it? And so after kind of messing with the current form
7 you can see your eyes should go to sort of the first big block kind of in the middle that's...it's
8 boxed out and kinda bolded and this is kinda the main point of the notice is a public hearing will
9 be held on this proposed development. The reason why it's not at the top is because we, we
10 had to follow a particular format for a notice of public hearing so they understand what's
11 happening.

12
13 So one of their neighbors is applying for this permit which is sorta at the beginning of the letter
14 but the point that we wanna make sure you know is this is when you have an opportunity to
15 come and testify and what are the different ways we can testify. That was another very
16 important piece that Commissioner Robinson felt like the old form failed to address multiple
17 different ways to testify and...because in today's world with the families working multiple jobs
18 and kids in schools and different things they couldn't always physically be here and so you can
19 see here at the bottom of the middle section you have public testimony and we've kinda tried to
20 highlight this and you can clearly see how you can give public testimony either via U.S. mail so
21 those are the ones who still want to handwrite or type letters and mail them in or you can now
22 submit it email. I think we all appreciate and can confirm that an email response is really gonna
23 be more and helpful with timely manners because let's say they were away on vacation and
24 they've come home, they checked the mail and they notice the hearing's tomorrow but they no
25 longer have an opportunity mail in a response so the testimony email I think is gonna be really
26 good. And so if you guys wanna take a peek at this and look at it and see if we can either
27 recommend a few other revisions or if you think it's a good start moving forward.

28
29 I also just want to make a comment that we can use this format if we don't have other revisions
30 and in the next six months or a year as we get public feedback we can continue to evolve this
31 and so it's not ever set in stone but it's definitely a good start from the last form.

32
33 Mr. Freitas: This looks like it covers a few of the points that we mentioned in that other meeting,
34 but you know, the B where it says, description of proposed development, do you think that might
35 get little wordy and maybe need another line? What would be an example, B&B or what or what
36 example would be there that can make it simple or could it be long worded that you need more
37 space?

38
39 Ms. McLean: I think...I mean it's up to you folks if you give a couple lines an applicant could
40 very well use up the couple of lines, but it could just say 15-lot single family subdivision, it could
41 say a bed and breakfast permit, it could say a 200-room hotel and other improvements. So you
42 can make it as concise as—

43
44 Mr. Freitas: No, that should be enough.

45
46 Ms. McLean: --the space is available.

1
2 Mr. Freitas: I thought you had to give detail and like...I see the word, description so I'm thinking
3 you gotta get more, more detailed on that line, no?

4
5 Mr. Carnicelli: Twitter did not get better when it went from 144 characters to 288.

6
7 Mr. Robinson: Chair?

8
9 Mr. Carnicelli: Commissioner Robinson.

10
11 Mr. Robinson: So the question on A and B is that something that, that the applicant is gonna be
12 filling out and so that way when we receive this in the mail it's already saying what project we're
13 that we're talking about and what the public hearing's is for instead of the person that wants to
14 send testimony to fill out? So would it already be prefilled out by, by, by Michele requesting a
15 B&B at this address and then so when I get this in the mail it's already stating what it's for?

16
17 Ms. McLean: Typically when applicant submits an application they fill out the top portion and
18 the bottom portion and then the Planning Department fills out the public hearing information and
19 gives it back to the applicant for them to send it out.

20
21 Mr. Robinson: Okay.

22
23 Ms. McLean: And so if there's information in there that isn't accurate then it would get changed
24 or we'd look at it and say, oh you know that's misleading, you should say this instead. So when
25 someone receives this it's entirely filled out.

26
27 Mr. Robinson: Thank you Commissioner Pali and Commissioner La Costa, you know this is
28 something that I think is very important to make sure that everybody has an opportunity to be
29 heard and it also limits them from complaining about not knowing or not having a chance to be
30 heard which we also hear a lot of as a, you know as an excuse. It's, it's is I'd like to, I'd like to
31 clarify with Corp. Counsel on the testimony of email if we have to add emails received prior to
32 48 after or within 48 hours of stuff notice may not be used in, you know as whatever type of
33 legal form it is just to make sure because if people are trying to email it at 8:55, I mean I think
34 we gotta have some disclaimer if you do not get this by a certain amount of hours before a
35 public hearing you testimony may not be—

36
37 Ms. Pali: Submitted.

38
39 Mr. Robinson: --submitted or used and you know that ...(inaudible)...too is also going to be
40 from the discussion of the Chair as well on some type of testimony so I don't know what type of
41 legal, you know we should fill in that box just to make sure, but I think that that email I think a lot
42 of people can pick up their phone and rattle it off real quickly, you know, so hopefully they'll use
43 the sooner than later, but if we give them a drop dead date or so many hours before a hearing I
44 think that might help.

45

1 Ms. La Costa: We did talk about 24 hours before, that we received it 24 hours before so we had
2 time for review and then a lot of times in the morning of the meeting people drop off email
3 before the hearing so I don't know.

4
5 Mr. Robinson: Yeah, and I remember we discussed that but like what Carolyn says you know if
6 it drop on, you know if it drops at nighttime or it drops at 24 hours or there's a holiday or certain
7 things it's you know we should...maybe...I mean, we...say will not be but we could say may not
8 be, you know, may not be and if we put 48 hours people will, you know, they hopefully will get
9 this before 48 hours before the hearing, you know but may not and then when people send it 24
10 if we have time or not because, 'cause I for one don't have time to read testimony on Monday
11 night, you know dropping in after I've read everything and then try to read the testimony and
12 then go back and forth you know that's kind of...it's I'd like it to be prior. You know, I usually get
13 most of my reading done on the Sunday night instead of the Monday night, Monday night
14 football you know, but you know, but during the part of the year then you know it's only
15 basketball.

16
17 Mr. Carnicelli: Well you're one of the few teams that are still in the playoffs so, Mr. Hopper
18 would you like to comment on that please, not the 49ers but...

19
20 Ms. La Costa: Yeah, definitely not the 49ers.

21
22 Mr. Hopper: At least the Patriots are...nah, just joking, sorry. If there's a staff issue with getting
23 that...I don't know exactly the inner workings of how, how quickly staff can get emailed
24 testimony to the group. I know a lot of times we do get stuff here so I think it's pretty quick, but if
25 you want to have a disclaimer working with staff to maybe see hey when's a date where you're
26 confident you get that information to the full body and to as part of, you know, what's being
27 considered and when's the a timeframe where it might be possible, you know agree on that and
28 then say testimony received after this date or you know, maybe the County will make best
29 efforts to you know have the written testimony considered part of the record but it may not be
30 possible if the testimony is received you know after such and such a time frame.

31
32 Mr. Carnicelli: So there's not a like a legal cutoff though?

33
34 Mr. Hopper: Under...well there's...the laws I can think of are contested cases and the Sunshine
35 Law. Sunshine Law I think just says you have to receive all written and oral testimony, but I
36 think practically if you get written testimony you know that's late you may not be able to see it
37 and consider it and if someone objected to that they can, they could challenge the commission
38 on it for not having receiving their testimony. I don't know of any legal timeframe that says you
39 know I think it's basically a reasonable effort and if you know, the County got called on it they
40 may call staff to come and testify at a court hearing to say, hey this is when we got it, we did our
41 best, but as far as the notice is concerned at this point I think you can maybe talk to staff, see
42 when they would ideally like to receive things and then provide that notice with that time frame,
43 but I don't know of any statutory or in law timeframe whereby testimony has to be received
44 before a certain time or else it's just not considered.

45
46 Mr. Carnicelli: Okay.

1
2 Mr. Hopper: And I think I'd recommend you know doing, doing your best even though it's a
3 crunch on staff to get any written testimony at least as part of the record so you can consider it
4 just so no one can allege either a Sunshine Law violation or you know contested case violations
5 less of an issue if they're not a party, but still...
6
7 Mr. Carnicelli: Gotcha, gotcha, yeah you know, 'cause I think that staff does a great job, 'cause
8 I mean there's times I can remember like you know Livit showing up at 9 o'clock and saying I
9 just got these emails, you know, they're in her email box at 8:30 or something like that, so I
10 mean, I think staff does a really good job. So I don't know Director you know there's some kind
11 of language that we want to put in there to address kind of what...
12
13 Mr. Robinson: To ensure your testimony will be read we recommend that you, that you do all
14 emails within 48 hours or they may not be admissible or...(inaudible- not speaking into mic)...
15
16 Ms. Pali:....(inaudible)...wording.
17
18 Mr. Robinson: Ensure, may...
19
20 Ms. McLean: I would suggest that because we often have Monday holidays I would say one
21 business day to allow for a Monday holiday.
22
23 Mr. Robinson: Carolyn?
24
25 Ms. Takayama-Corden: It's on the agenda, last paragraph.
26
27 Ms. McLean: It's on the agenda, last paragraph...
28
29 Mr. Carnicelli: Yeah, here we go. Please advised that the applications...
30
31 Ms. Pali: Above.
32
33 Mr. Carnicelli: Oh, above that. Written testimony—
34
35 Ms. McLean: Should be received.
36
37 Unidentified Speaker: Two business days...to ensure distribution to the board.
38
39 Ms. McLean: Okay, so we can put that same language on this form.
40
41 Mr. Carnicelli: Yeah, let's not reinvent the wheel.
42
43 Ms. McLean: Testimony should be received by the Department at least two days before to
44 ensure distribution to the commission, okay.
45
46 Mr. Robinson: Yeah, so at least we're not arbitrary, right.

1
2 Mr. Carnicelli: Then my only comment to the form and especially if we're gonna add further text
3 is the way with which someone's eye travels on, you know, whether you open a webpage, you
4 open the newspaper, the way that your eye travels and the center block I think is really that
5 black box is kinda really the focus for people and I'm gonna just nitpick and say the font in that
6 is smaller than the font say below it and above it so inherently my bounces out of it initially. So
7 maybe that, that box a little bit bigger with the larger text or the larger font I guess I should say
8 and then maybe the stuff around it with the smaller font and I know although I know it's gonna
9 be handwritten in there and stuff like that, but that's...I'm just, and again this is like really over
10 editing and nitpicking but I'm just saying just for the sake of, and I'm really okay with it being like
11 this, just my two cents.

12
13 Ms. Pali: If I may, we talked about that and that's why the largest font aside from the fact that
14 you have notice of public hearing, aside from that top, a public hearing will be held on this
15 proposed development that sort of –

16
17 Mr. Carnicelli: Yeah, date, time, place.

18
19 Ms. Pali: Yeah, the reason why the font below is smaller because it's kinda like a side note
20 talking about how you can find more information about the particular hearing. So it's more like
21 of a road map is why we kind of reduced the font everywhere else and of course to fit it in, but
22 the big portion was a public hearing will be held on.

23
24 Mr. Carnicelli: Yeah. Okay. And again, I'm totally okay with it. Commissioner La Costa.

25
26 Ms. La Costa: Thanks. Listening to Kawika's comments where it says...

27
28 Mr. Carnicelli: Keaka.

29
30 Ms. La Costa: No.

31
32 Mr. Carnicelli: Oh, Kawika's comments, oh okay.

33
34 Ms. La Costa: Thank you. Where it says description of proposed development, perhaps
35 instead of that we could put check boxes and it could say STR, B&B, commercial, hotel, other,
36 and then that way people could checkmark it because sometimes you know the John Does
37 don't...description what do I put there for a description? So maybe making it more user-friendly
38 and just having check boxes rather than having someone have to write out what it is.

39
40 Mr. Robinson: Well, the applicants are the one that's filling out the box not the testifiers.

41
42 Ms. McLean: The applicant fills it out but then the Department reviews it before we send it to
43 them. So if it's not a good description then we correct it.

44
45 Ms. Pali: Okay, okay.

46

1 Mr. Carnicelli: Right. I think the less busy, the better. Any other comments? So did you...I
2 guess we're just gonna put the one—

3
4 Ms. McLean: Add the language from the agenda about the two business days. I'll put that up in
5 the public testimony box.

6
7 Mr. Carnicelli: In the box, yep.

8
9 Ms. McLean: And I'll see where, where we can make fonts larger and still fit it on the page.

10
11 Mr. Carnicelli: Yeah, again, that's yeah, minor. So do you actually need us to approve this or
12 you just say like okay, based on what we said today, you're just...we're going to pull the trigger,
13 this is the new form.

14
15 Ms. McLean: Yes.

16
17 Mr. Carnicelli: Awesome. Okay.

18
19 Ms. McLean: And thank you all for making these so much better.

20
21 Mr. Carnicelli: So I guess moving onto next item on the agenda.

22
23
24 **2. SMA Minor Permit Report**

25
26 **This is for notification and review purposes. No action is anticipated.**

27
28 **3. SMA Exemptions Report**

29
30 **This is for notification and review purposes. No action is anticipated.**

31
32 Ms. McLean: Next we have the SMA Minor and Exemptions Reports. Are there any questions
33 on those?

34
35 Mr. Robinson: Chair.

36
37 Mr. Carnicelli: Commissioner Robinson.

38
39 Mr. Robinson: Chair, I'm wondering if we're able to get, to get a status report on what's
40 happening with the bus station and the only reason I'm saying that is because the 22 parking
41 stalls I know was sort of associated when I heard some...they're worried about us having to use
42 a different street and the stalls for the stuff and so is there a status on that, is that a, is there a
43 trail why or recommendation to do this, is there a...are we hurting this housing at all with our
44 recommendations on the bus station or the progress of that project?

45
46 Ms. McLean: The new transit hub?

47

1 Mr. Robinson: Yeah.

2

3 Ms. McLean: It's moving along.

4

5 Mr. Robinson: It's moving along. And with the one, Mr. Mancini that we canceled out that...is
6 that tied into that all or is that—

7

8 Mr. Hopper: This should be put on a future agenda I think for an update, correct?

9

10 Mr. Robinson: Well, it's on the agenda today, the 22 stalls.

11

12 Ms. McLean: Oh, the offsite parking on the parcel next to it.

13

14 Mr. Robinson: Yeah, yeah.

15

16 Mr. Hopper: For that one, oh.

17

18 Mr. Robinson: Is it connected or it's not connected?

19

20 Ms. McLean: It's not connected.

21

22 Mr. Robinson: Okay, thank you. Yeah, I just don't want to encumber a project that we
23 approved that we're moving forward by something...

24

25 Ms. McLean: Oh, yeah.

26

27 Mr. Robinson: Okay, thank you.

28

29 Mr. Freitas: I have a question on the Minor Project list what is West Jet? Is there a airline going
30 into Lahaina?

31

32 Ms. McLean: The applicant is the Sheraton, and this is just a guess and I can find out and I'll
33 email you to clarify what this project is, I'm guessing they're putting up a desk or something at
34 the Sheraton.

35

36 Mr. Freitas: Oh, West Jet airline maybe, okay.

37

38 Ms. McLean: That's my guess, but I can find that out and let you know.

39

40 Mr. Freitas: Looks like the description like we talked about earlier wasn't very clear when they
41 filled that out.

42

43 Mr. Carnicelli: Full circle back, nice work.

44

45 **4. Discussion of Future Maui Planning Commission Agendas**

46

47 **a. January 28, 2020 agenda items**

1
2 Ms. McLean: And next is the January 28th, the next meeting agenda you'll see that there's one
3 public hearing item, two communication items and unfinished business, the Grand Wailea and a
4 petition to intervene. Any questions on those?

5
6 Mr. Carnicelli: Commissioner Pali.

7
8 Ms. Pali: Are we able to add to the agenda or future agendas?

9
10 Mr. Carnicelli: Sure.

11
12 Ms. McLean: Yes.

13
14 Ms. Pali: Maybe discussion with the new year, maybe consideration of maybe defining
15 attendance, excused, unexcused, what that looks like, maybe tightening in the measurement so
16 we can be supported as we go about our lives in the community and try to balance these
17 positions here.

18
19 Mr. Carnicelli: As far as addressing it in our rules—

20
21 Ms. Pali: Like Code of Conduct or whatever.

22
23 Mr. Carnicelli: I think it would just be our rules the—

24
25 Ms. Pali: Our own.

26
27 Mr. Carnicelli: --the Planning Commission Rules, have rules about absences and not...and
28 things of that nature so we could throw that on a future agenda.

29
30 Ms. McLean: The Mayor's Office has also drafted a bill that would apply to all boards and
31 commissions that talks about attendance and what happens if there's poor attendance,
32 unexcused absences. So that's not to say you can't also amend your rules but there is also
33 that.

34
35 Ms. Pali: I think I would like more clarification on what is excused and what isn't excused and
36 timelines and then even consider like some non...some involuntary things.

37
38 Ms. McLean: Okay.

39
40 Mr. Carnicelli: Thank you. Anything else on the Director's Report? Okay, so at this point in
41 time what we'll do is we'll take a ten-minute recess and we'll come back for Mr. Hopper's
42 orientation and education. Recess.

43
44 A recess was called at 10:44 a.m., and the meeting was reconvened at 10:55 a.m.

45
46 Mr. Carnicelli: Aloha, the Maui Planning Commission of January 14, 2020 is now back in
47 session. Mr. Hopper.

1
2
3 **E. ORIENTATION WORKSHOP BY CORPORATION COUNSEL (M. Hopper)**
4

- 5 **1. Contested Cases and Petitions to Intervene**
- 6 **2. Conditions Requiring Rational Nexus**
- 7 **3. Conditions Requiring Rough Proportionality**
- 8 **4. The Sunshine Law**
- 9 **5. Ethics**

10
11 Mr. Hopper: Okay, I will try to get through this as quickly as possible but these are important
12 items. I was asked to do training on contested cases and petitions to intervene. The conditions
13 will be covered in a case law review. The Sunshine Law will be covered as a separate
14 presentation and ethics so that's actually four different presentations on important topics.
15

16 Now you're not expected to you know obviously memorize all of this stuff through here. This is
17 supposed to be a good general overview. You'll have me or another Deputy Corporation
18 Counsel at your meetings to advise you on these items as they come up, but these are
19 important things to know and if the commission doesn't do these things right then there's a
20 variety of things that can happen. Whatever you...whatever action you take could come back to
21 you. You could get permits automatically approved that you deny and things like that are
22 extremely frustrating and really I think affect the process so I think going through this, this
23 presentation understanding these items can really help to you know do board business the way
24 it's supposed to be done.
25

26 **1. Contested Cases and Petitions to Intervene**
27

28 The first item I'm going to talk about are contested cases and those are covered in
29 HRS Chapter 91. What's a contested case? That's the technical definition of contested case.
30 It's essentially whenever the commission is going to decide the legal rights of a party and
31 they're required to have a hearing before you. Under the Maui Planning Commission Rules
32 essentially all proceedings where you make the final decision on are considered contested
33 cases before the commission. So something like a bed and breakfast or short-term rental home
34 permit would generally be considered if you're the final authority a contested case. Something
35 like a legislation or a change in zoning that the Council has to take action on that's not
36 considered a contested case 'cause you're just making a recommendation to the County
37 Council.
38

39 And some case law, the E & J Lounge case in 2008 clarified that even if the only party to the
40 contested case is an applicant before the commission it's still considered a contested case if
41 their legal rights are being determined and there's a hearing required by law. And then SMA
42 Use Permit as an example is also considered a contested case if it's heard by a planning
43 commission which in Maui that would also be the case.
44

45 Requirements. If you have a contested case and generally speaking the Maui Planning
46 Commission can decide to hear the case itself or can appoint a hearings officer. Notice of
47 hearing to the parties is required. The parties need to be allowed to submit evidence. They

1 must be allowed cross examination and to provide rebuttal evidence. The party initiating the
2 proceeding shall have the burden of proof including the burden of producing evidence and the
3 burden of persuasion and the degree of or quantum of proof is preponderance of the evidence.
4 So an applicant has to show that they are...they more likely than not that they meet the criteria
5 of whatever application that they're, they're applying for. The commission must consider the
6 whole record or such portions thereof as may be cited by the parties and every decision and
7 order adverse to a party must be in writing and accompanied by findings of fact and conclusions
8 of law.

9
10 What facts you are relying on to make your decision, what facts are you relying on to make your
11 decision state those on the record. You'll often have a staff report with you, but I think the staff
12 in preparing decisions and orders really would like direction from you as to the basis for why
13 you're voting in the certain case so keep that in mind.

14
15 The record includes pleadings, motions, intermediate rulings, oral testimony, exhibits, offers of
16 proof, proposed findings and exceptions, report of hearings officer if appointed, and staff
17 memoranda that's your staff report which in most of your contested cases I think is going to be
18 your main source for your record. But no matters outside the record shall be considered by the
19 agency making the decision unless specifically provided. So you're limited to your record in
20 making your decision. If there's evidence that's not a part of the record you should not be
21 considering it in making your decision.

22
23 The Department asked me to go over petitions to intervene. They're covered in your rules.
24 Subchapter 3. Interventions may be filed in contested cases. So in any case where the
25 commission has the final decision making authority another party aside from the applicant may
26 file a petition to intervene. Yes?

27
28 Ms. McLean: Mike, can I make a comment? I just want to again remind the commissioners that
29 at your next meeting you will have a petition to intervene to consider and so that's part of the
30 reason we wanted to have this training today so that you can have a refresher or new
31 information for those who haven't had this before on considering petitions to intervene. Thanks
32 Mike.

33
34 Mr. Hopper: Sure. Again, it allows someone other than the applicant to participate in a
35 contested case and there's a couple of different situations. There's a shall be granted which is
36 intervention as a matter of right or may be granted which is intervention, permissive intervention
37 basically and a intervention must be granted to persons with a property interest in the land and
38 a person who can demonstrate they'll be so directly and immediately affected by the matter
39 before the commission that their interests is clearly distinguishable from that of the general
40 public. There's also permissive intervention. Your rules state that leave to grant intervention
41 status shall be freely granted but may be denied if, and there's a variety of criteria. Whether a
42 petition to intervene should be granted or denied is gonna depend on the facts of each petition.
43 I ...(inaudible)...go over every possible case but in your rules there are criteria for granting
44 petitions to intervene and you can, you know, review that criteria. Oftentimes an applicant may
45 have a position on a petition to intervene and obviously the petitioner would state in their filing
46 why they are entitled to intervene in general in a contested case.

1 There's an opportunity for judicial review after a contested case. So remember we said
2 generally or any adverse ruling of a...to a party should be accompanied by findings of fact and
3 conclusions of law. A judge can review your decision. Your findings of fact are reviewable for
4 clear error while your legal conclusions are freely reviewable. So what that generally means is
5 that a judge is not supposed to substitute their own judgment for your judgment. They'll look for
6 legal errors and if there's a clear factual error you made they may reverse based on that. But if
7 there's a record where there's substantial evidence that would allow you to come to the
8 conclusion that you did generally a court's not going to disturb that. Their job's not to be the
9 planning commission, their job's to review and make sure that you didn't do anything illegal
10 essentially.

11
12 Going outside the records, the record may be grounds for a reversal, for example, in judicial
13 review. There's been cases that if board members consult outside sources that's not part of the
14 general record where planning commission decisions have been overturned, and a lesson from
15 this is don't do your own investigations or consult your own sources in a contested case. If you,
16 if you need additional information that's relevant to the application and the law being applied
17 bring it up at the hearing or the meeting. You could picture this...when you're doing a contested
18 case it's sort of a mini trial, right? So you are, you are essentially jurors in a trial and there's
19 parties before you who are, who you're going to determine their legal rights. You know
20 generally if one juror went and did their own investigation of the case and none of the parties
21 were aware of that and you know the court wasn't aware of that that would be something that I
22 imagine if you were on trial you would be interested in knowing that a juror what evidence
23 they're considering, and so by the same token what evidence is being considered by you as
24 commissioners should be public, a matter of...well, not public necessarily but known to the
25 parties and clearly a matter of record.

26
27 And again, as referenced before your decision may be appealed to the Second, Second Circuit
28 and in that case the Second Circuit Court is limited to your record as well in reviewing so they're
29 limited to the same record that you are. And generally so you would make your decisions by
30 applying the applicable law to the facts of the application and considering the evidence in the
31 record. If you're going to have a different legal criteria for different permits so you know step 1
32 is know that legal criteria and step 2 is after you get your record, you know create the record
33 and then apply your facts to that law and see if the applicant meets or does not meet the criteria
34 in the application and make your decision based on that.

35
36 A court and judicial review may affirm the decision. So say that it was...you know there were no
37 errors made so the decision stands, they remand the case with instructions for further
38 proceedings, so send it back to you to cure any errors that you made or it may reverse or modify
39 the decision and that can be done based on a variety of factors. Generally these are the
40 reasons a court could either send it back to you or reverse your decision. They're, they're, you
41 know generally speaking, you know, but essentially these are the numbers of reasons why a
42 court could overturn a decision that you made.

43
44 So things to remember when you're dealing with a contested case, you're exercising your
45 adjudicatory function. So you're essentially a quasi-judicial body, you're acting sort of as a
46 court, a trial court. You must remain impartial and not make conclusory remarks until all the
47 evidence has been received. This is very important. If you start to make conclusory remarks

1 before all the evidence is received a party may ask that you recuse yourself and you might not
2 be able to vote on this, on the item. So keep in mind you should consider that you're juror or a
3 judge in a case. You should listen to all the evidence and be fair to all the parties. Even if
4 you're thinking man, this person's really doing it wrong or I can't believe the person's arguing
5 this you've got to remain impartial and you know you can make your decision based on the
6 evidence but don't make any statements in the middle of the proceeding generally concluding
7 things before you've heard all the evidence. And again, your decision must be based on
8 evidence in the record and avoid obviously any statements that may be mistaken as an attack
9 on someone's race, sex, gender or religion. That's generally true of all proceedings but also in
10 contested cases. So are there any questions on the contested case portion of the presentation?

11

12 **2. Conditions Requiring Rational Nexus**

13 **3. Conditions Requiring Rough Proportionality**

14

15 Okay, moving on. The next item, they wanted to do, they wanted me to do specific items on a
16 rational nexus and rough proportionality. These are really two things that are part of a case law
17 review presentation because those essentially are deal with the constitutionality of conditions
18 that you may impose on permits. And so, I'm going to do a general case law review that covers
19 those two items, the next two items on your presentation.

20

21 What the takings clause of the Fifth Amendment of the United States Constitution is...can be
22 used as the basis to challenge conditions that you may impose on a permit that provision states
23 in part, nor shall private property be taken for public use without just compensation. So one of
24 the principal purposes of the takings clause is to bar the government from forcing some people
25 alone to bear public burdens which in all fairness and justice should be borne by the public as a
26 whole.

27

28 So you've may have heard these phrases, essential nexus or rational nexus and rough
29 proportionality. What does essential nexus mean? So in general when you do conditions you
30 need to have...the basis of that condition whether it's to dedicate property to the county or to
31 somehow to require that property owner to do something. The starting point is that there must
32 be a nexus between the type of permit someone is asking for and what condition you are
33 placing on the permit. So there's a variety of permits that you may need and they arise because
34 the law says you can't just do this thing, you need to get a permit to do this thing and as part of
35 that the reasoning for the County or the State to have that law in place is that we want to
36 mitigate some sort of impact this type of use is going to have and so when you're imposing a
37 condition it says, you can do this but you have to do X, Y, and Z. The X, Y, and Z has to be
38 something related to the original purpose of that law. For example, Special Management Area
39 Permit deals with...has a list of goals, objectives and policies that are required for that permit.

40

41 The Coastal Zone Management Act has a list of goals, objectives and policies. They don't deal
42 with every possible development issue. They deal specifically with things that deal with the
43 Special Management Area so coastal hazards, impacts to the environment on the coast, things
44 like. So conditions that you impose on an SMA Permit need to be related to those items. They
45 can't just be we want you to...you know, we want you to donate a million dollars to this
46 particular charity organization because I think they're a great charity organization. It has to be
47 related to the impact of the development and the purpose of the law that's being...for which the

1 permit's required. So the government's power to forbid particular land uses to advance some
2 legitimate ...(inaudible)...purpose includes the power to condition such use upon some
3 concession by the owner, even a concession of a property right so long as a condition furthers
4 the same governmental purpose advanced as justification for prohibiting the use. That's how
5 the Supreme Court said essentially what I just said. So if you're gonna condition a project you
6 gotta keep in mind what's the purpose of requiring the permit in the first place? You can't just
7 condition a project on anything that you want.

8
9 Also, there needs to be rough proportionality between the condition and the impact of the
10 development. So essentially you can't require...an example would be someone's building a
11 single-family home, they need an SMA Permit for that. You're gonna require them to construct
12 a four-lane highway that goes you know a very large distance. Well, that's...their building of the
13 home may have an impact on certain services but not to the degree that it would justify building
14 a large four-lane highway. So rough proportionality means that you can't impose a condition
15 that does more than impact the...more than mitigate the impact of the particular development
16 you're looking at. So that's another requirement as well.

17
18 So the Nolan and Dolan test, those come from the two Supreme Court cases that looked at this
19 issue, you need to have a legitimate state interest that's normally gonna be furthered by the
20 permit requirements, an essential nexus so the condition needs to be related to what the permit
21 is trying to require of the applicant and a rough proportionality. You condition has to be
22 proportional to the impact the development's going to have. So the SMA Law there's a listing of
23 goals, objectives and policies in 205A, those are examples of legitimate state interests for you to
24 review. So there's a variety of purposes of the Coastal Zone Management Act. So if you're
25 looking at SMA conditions these are the types of categories that you would look for, for
26 conditions and if they're outside of these categories you generally can't impose those as
27 conditions.

28
29 So when looking over your SMA permit review even if there's a substantial adverse impact for
30 an SMA Permit you are required to review and see if that impact can be minimized by
31 conditions. So generally if you look at an SMA permit application you are required to look at
32 and see if you can minimize the impacts by conditions. So there are even situations where the
33 commission is required to review and see if there's conditions that it can use short of denying
34 the permit before, you know, in order to mitigate the impacts of the development. And again,
35 the conditions have to be reasonable and further the policies and objectives of Chapter 205A.

36
37 We use SMA, as an example, this is true of all the different types of permits. So when you've
38 got a permit before you check out the staff report, in reading the staff report they're going to go
39 over citations of here's, here's the permit criteria. That will give you an idea of what the permit's
40 trying to deal with. A commission cannot...the commission can't delegate its duty so the
41 commission has to make findings ...(inaudible)...that will not violate the policies and objectives
42 of HRS 205A prior to issuing the SMA Permit. They can't delegate that duty to someone else.

43
44 Also, commission, the commission does have an affirmative duty to protect cultural resources,
45 it's obligated to protect the reasonable exercise of customary and traditionally exercised rights
46 of Native Hawaiians to the extent feasible. Those arise from case law. And so, in order to
47 protect these rights, the commission is required to make specific findings and conclusions as to

1 the identity and scope of any valued cultural, historical or natural resources in the area including
2 the extent to which traditional and customary Native Hawaiian rights are exercised in the area,
3 the extent to which those resources including traditional and customary Native Hawaiian rights
4 will be affected or impaired by the proposed action and the feasible action if any to be taken by
5 the commission to reasonably protect Native Hawaiian rights if they are found to exist. That's
6 from the Ka Pa`akai O Ka`Aina case which has been cited frequently in various permitting
7 processes.

8
9 And so that concludes my case law review. Again, you're not expected to memorize all these
10 things. If you get anything out of this I think it's important to, it's important to review the criteria
11 for the permit itself, and apply the facts to that permit criteria. And I still have SMA and
12 Sunshine Law...Sunshine Law and Ethics to go over but are there any questions on the
13 presentation so far? Yes.

14
15 Ms. Pali: So the part that I am curious about is you mentioned we can't condition for things that
16 are not sort of...you didn't use the word relevant but you mentioned that if they're doing the
17 special flood management then our conditions have to sort of be related to that. So with that
18 theme in mind just as an example there are already guidelines that they have to meet when they
19 apply that Planning goes through. But let's say we all have our own thing that we kind of like to
20 see that are not currently required in the process. Are then we at jeopardy if we try to get the
21 applicant to agree to take it as a condition even if it wasn't required initially? I feel like that's a
22 big gray area and...but the thing is the applicants, let's just if I can speak plainly they're so,
23 sometimes, desperate to get the approval, I think sometimes they're just gonna agree as much
24 as they can within their boundary because they want to get the approval. They may not realize
25 that they weren't required to make that representation. We think that the deal is done and then
26 later through legal counsel they circle back and go, wow I feel like I was sort of pressured to do
27 this extra condition when it was not related or not required. How does that affect us and what's
28 your counsel and direction for that?

29
30 Mr. Hopper: Well again, these will depend on the specific circumstances, but—

31
32 Ms. Pali: Sure.

33
34 Mr. Hopper: --an SMA Permit is not what you call a ministerial permit meaning you provide
35 certain things, the boxes are checked, the permit's granted. It's a discretionary permit. You are
36 to do an evaluation and you can check out your SMA Rules generally it says an SMA Permit
37 can't be granted if there may be an adverse environmental or ecological effect and that effect is
38 not mitigated by conditions. It's relatively broad language that does give the commission
39 discretion to decide to approve or deny the permit and assess the impacts that the proposed
40 action is going to have. That being said, if you do...if you deny a permit or condition a permit
41 those have to be done because the applicant has failed to meet the standards of the permit.
42 And so if you look at the application and see you know what I think what you're doing is going to
43 have a substantial adverse environmental or ecological effect and so I'm gonna deny the permit.
44 You can condition the project...and there's also a list of goals, objectives, and policies that they
45 have there that give you guidance on what the purpose is for. And if you look at that and see
46 your project is going to adversely affect X, Y, and Z here then that's...that gets into your basis
47 for denial of the permit. And so then you can bring up conditions saying, listen I think that you're

1 having this adverse environmental effect I propose you do these following conditions to mitigate
2 those impacts that you're having.

3
4 So whether it's done by...if somebody voluntarily agrees to something and then subsequently
5 brings a legal challenge to that, I think our office when we would represent the commission
6 would make the argument that you also agreed to this voluntarily and therefore you should have
7 waived any right to challenge the condition later. A court though may still review that and say
8 you know what this is a clearly unconstitutional condition and reverse anyway. So I can't
9 necessarily say just because someone voluntarily agrees to something that there's no possibility
10 of any judicial review later on. So the best guidance I can give is that the conditions that you
11 impose on projects still need to meet these requirements and need to be for an SMA Permit,
12 you need to review the goals, objectives and policies and see where your condition fits there.

13
14 Ms. Pali: Okay, let me...I'm sorry to interrupt just to cut to one more direct question then, let me
15 give an example, I'll do one that I like to champion. I'm not big on the credits, developers
16 currently under the guidelines I believe can just throw money into the affordable housing fund or
17 by credits or build an affordable housing project, right as a...to meet the conditions for that
18 piece. So just so that I'm doing my job properly and not breaking any rules I can't really
19 represent that I hope that they build a project or put money in versus credits because credits is
20 just making everyone else, you know, giving money back from projects from a long time ago
21 and it doesn't really meet our housing need now. I can't really impose my desire on what they
22 do, correct? I can probably try to see if I can get them to maybe agree to doing it a certain way
23 but I can't really make them believe that I'm a no vote if they don't do it my way because that's
24 not necessarily...that would be me imposing correct?

25
26 Mr. Hopper: Well, credits are a specific thing in the Maui County Code.

27
28 Ms. Pali: Yeah.

29
30 Mr. Hopper: So in order for those not to be allowed I think you would probably need an action
31 by the County Council --

32
33 Ms. Pali: Correct.

34
35 Mr. Hopper: -- on something like that in a given case. So again, it would all depend on the
36 permit that you're granting or not.

37
38 Ms. Pali: Okay.

39
40 Mr. Hopper: As far as SMA I don't think SMA in general is going to encompass affordable
41 housing conditions. That's not something you would generally see on an SMA permit. Where
42 you'd see affordable housing are maybe in change in zonings where you'd be a recommending
43 body and so the County Council would be under the same constitutional limits as you and if it
44 were going to deviate from the ordinance it would I think have some sort of justification for why
45 the ordinance that applies to everybody else is not appropriate for this particular project and you
46 would need to make that factual showing.

1 Ms. Pali: Okay.

2

3 Mr. Hopper: But I'm trying to think of a case where you would even be involved in affordable
4 housing credits in a permit where you'd have the final authority to grant and I can't think of one
5 offhand maybe a State Special—

6

7 Ms. Pali: We had one recently.

8

9 Mr. Thompson: Yeah, the hotel, the—

10

11 Ms. Pali: The airport hotel.

12

13 Mr. Thompson: Yeah, and that was a 200-room and they would have to put up 50 affordable
14 workforce housing.

15

16 Mr. Hopper: Well, that was a EIS--

17

18 Mr. Thompson: Yeah, it was a EIS that wasn't SMA.

19

20 Mr. Hopper: --review. I don't think you actually reviewed or approved that project and I think
21 what they would need would be an SMA Permit from you. If they needed other permits that
22 dealt with affordable housing issues then maybe we would look at that, but as far as the SMA
23 component of that, again, you'd read the goals, objectives, and policies of the Special
24 Management Area Statute and see what that encompasses and they...the applicant and staff
25 should do a good job of going over those goals, objectives and seeing yes it meets these and
26 any condition we're recommending is...comes from those and in those listed I don't think you'll
27 see anything on affordable housing because remember the SMA Permit is not a general
28 development permit that's why you have an SMA it's drawn along the shoreline. So if there's a
29 general impact thing like affordable housing it's hard to argue that just because you're in the
30 shoreline that's a different effect than developments everywhere else. Affordable housing is
31 going to apply to subdivisions. So whether you're subdividing in a SMA or outside of an SMA
32 the argument is you're building buildings is going to have an impact on affordable housing so
33 then that's where your affordable housing requirements kick in. So if you're doing a subdivision
34 in the SMA or outside of the SMA generally your affordable housing requirements would be,
35 would be the same. Just 'cause you're in the SMA generally you wouldn't have an enhanced
36 affordable housing requirement. You may have enhanced protections for beach erosion and
37 things like that but—

38

39 Ms. Pali: I think the topic was that we have to be careful of not imposing conditions that are
40 relevant and that's I guess exactly my point. I think that if I'm being honest as we watch back on
41 a lot of other meetings we do sometimes go down little rabbit trails and so having this training
42 today definitely kind of brings back the focus that it could be dangerous to do that and that we
43 should stay on task is all.

44

45 Mr. Hopper: Yeah, I would agree with that, and again your, your criteria for the permit should be
46 the guidance for the conditions.

47

1 Ms. McLean: For SMA Permits in particular though SMA does look to assess potential socio
2 economic impacts and so that opens it up a tiny bit to get beyond just the coastal...the physical
3 coastal environment. But Mike's...counsel is still on point because that does tend to go too far
4 and that's not particular to Maui that happens statewide where you want to try to solve a related
5 problem or a problem that's not strictly within the SMA criteria. So if you do see us going down
6 rabbit trails is it then your assistance to like reign us back or do you just let it play out and then
7 just kind of have conversation with us later to just keep us on task. How is it that we can
8 continue to get your support if we feel, we're unaware that we're going down rabbit trails we
9 shouldn't be going down.

10
11 Mr. Hopper: I think would generally raise a caution and then maybe even ask for an executive
12 session—

13
14 Ms. Pali: Okay.

15
16 Mr. Hopper: --to discuss the potential problems with a condition and maybe how to fix them.

17
18 Ms. Pali: Okay.

19
20 Mr. Hopper: Or even just to clarify you know what part of the permit criteria are you looking at
21 here for this condition or what impact of the project are trying to mitigate rather than I think it
22 would be a good thing if you did this, that's not generally by itself.

23
24 Ms. Pali: Right.

25
26 Mr. Hopper: You know alone it would need to be based on the...on whatever, whatever...I
27 mean the government has and you have police powers to prohibit somebody from doing
28 something but you need a, you know, a basis for doing that and that's the whole reason
29 someone has to get a permit in the first place. And those are the same reasons that justify
30 denial would just justify why you would condition a project and require somebody to do
31 something.

32
33 Ms. Pali: Okay, thank you

34
35 **4. The Sunshine Law**

36
37 Mr. Hopper: Any other questions on the presentation so far? Okay, I'm going to move
38 on...what's next on the agenda? The Sunshine Law this is obviously a very important one and
39 one that is probably maybe most commonly used or referenced for boards and commissions.
40 The Sunshine Law is contained in Hawaii Revised Statutes, Chapter 92. What is it? It's the
41 Hawaii Open Meetings Law. It governs the manner in which all state and county boards must
42 conduct their business. The general policy and intent is to open the governmental process up to
43 public scrutiny, require you to conduct business as openly as possible. It's to be if a court is
44 reviewing an action is to be liberally construed in favor of open meetings and the exceptions to it
45 are to be constrictly construed against closed meetings. And absence of specific statutory
46 exception board business cannot be discussed in secret.

47

1 So you are required to have open meetings. What does this mean? Every meeting of the board
2 is open to the public and all persons are permitted to attend. So your meetings are public. All
3 interested persons shall have the opportunity to submit views, data, arguments in writing or in
4 writing on any agenda item. All interested persons shall have the opportunity to present oral
5 testimony on any agenda item and the board may make reasonable...you can have reasonable
6 time limits. The County Council often does three minutes and I think you do that as well, but
7 you can place time limits on oral testimony.

8
9 Meeting notice is required, it's mandatory. Written public notice must be posted on the County's
10 website at least six calendar days before a meeting. A list of that notice also known as your
11 agenda must list the items to be considered at the meeting and must include the date, time and
12 place of the meeting. And this is very important, once the agenda timeframe has lapsed, no
13 additions are allowed unless a two-thirds vote of all members to which the board is entitled is
14 taken, but no items shall be added if it is of reasonably major importance and action thereon will
15 affect a significant number of persons. That's the wording from the Sunshine Law. I think it's
16 intentionally vague to allow someone to come in later and argue that hey this was important to
17 me. So in general we recommend that if you have an item that you want on the agenda that
18 you at the end of the meeting say I'd like this on the next agenda rather than amending an
19 agenda to add it to the specific meeting because there are risks involved in that.

20
21 Minutes must be taken of the meeting. They must at a minimum state the date, time and place
22 of the meeting. Members of the board are...they're recorded as present or absent. The
23 substance of all matters, proposed, taken or discussed or decided and a record of any votes
24 taken. Any other information requested to be noted by the members, and a public record of the
25 minutes have to be available within 30 days of the meeting. Generally, you take, well not you,
26 the clerical staff takes verbatim minutes of your meetings and so all of this is contained in there.
27 That's an option and that certainly simplifies things.

28
29 What is a meeting? A meeting means the convening of a board for which a quorum is required
30 in order to make a decision or deliberate toward a decision upon a matter over which the board
31 has supervision. A quorum of members in your case since the planning commission is entitled
32 to nine members is five members, and that's a majority of which you are entitled. You also need
33 that same majority to of which you are entitled to take action on an item. So, you need five
34 votes to take action on an item. That's regardless of how many people show up to the meeting.
35 So if you have nine members show up to the meeting you need five votes to take action. If you
36 have five members to a meeting you need five votes to take action so keep that in mind.

37
38 More than two members of a board cannot gather to discuss board business. There's some
39 exceptions to this but two of you can discuss board business outside of a meeting, more than
40 two of you cannot discuss board business outside of a meeting. One exception is if you are
41 attending, if you are attending another meeting like a community association meeting you can
42 attend that, less than a quorum can attend that, those members are required to report back to
43 the body at the next meeting and that meeting can't be organized for the sole purpose of having
44 planning commission members attend. So if you go to, I don't know, a community association
45 meeting or a County Council meeting or something like that, less than a quorum of you can
46 attend that but you have to report back to this body at that...at their next meeting, more than a

1 quorum can't. So once you have five members, if you show up in a room where they're
2 discussing board business someone's gotta leave that meeting, that's a problem.

3
4 Now what is board business? The definition is matters over which the board has supervision
5 control, jurisdiction or advisory power and are before or reasonably expected to come before the
6 board. So this...the Sunshine Law doesn't prohibit you from talking to other members on any
7 topic. So if you were going to discuss the NFL playoffs or whatever else you don't have
8 supervision or control over that so you can discuss that freely no matter...all of you can get
9 together and discuss that, but in general board business is defined this. You know, be careful.
10 You...planning commission deals with a variety of items and generally don't discuss land use
11 and other items with more than two of you.

12
13 There's some exceptions, one of them is we had an item on our agenda today, an investigative
14 exception, two or more but less than a quorum can be assigned to investigate an item. I'm not
15 going to go over all the details here, but basically they have to be assigned to investigate an
16 item at one meeting, report back to you at another meeting and at that meeting you can't
17 deliberate or take action and then at a third meeting you can deliberate and take action on the
18 item. This takes at least three meetings to happen so it can be burdensome and if you can do
19 these items before the full body that's usually better, but if you needed members to investigate
20 something like the precise wording of a document or maybe amending your rules and to work
21 out all the wording of your rules the investigative group once it's created can do meetings
22 outside of your regularly scheduled meetings, doesn't have to post agendas, can do their own
23 investigation and then report back to you. So that's an option.

24
25 Another exception to the Sunshine Law is an executive meeting. This is a meeting that's closed
26 to the public. A vote has to be taken at an open meeting of two-thirds of the members present
27 and Hawaii Revised Statutes, Sections 92.4 and 92.5 apply. They go over the reasons you
28 could have a closed meeting. One example is to consult with the board's attorney on
29 questions and issues pertaining to the board's powers, duties, privileges, immunities, and
30 liabilities.

31
32 Contested cases are also an exception. In contested cases the planning commission does not
33 have to follow the Sunshine Law. The Sunshine Law is not applicable to contested cases.

34
35 Ms. McLean: Mike, can we ask a confirming question on executive session.

36
37 Mr. Hopper: Sure.

38
39 Ms. McLean: You said two-thirds of the members present, so if it's a day where there are only
40 six members here then four can vote to go into executive session even though that's not the
41 quorum of the body?

42
43 Mr. Hopper: No, you still, you still need minimum action for a majority vote. So you'd need five.

44
45 Ms. McLean: Okay.

46

1 Mr. Hopper: The two-thirds of the members present is only going to come in when you're above
2 five but maybe below nine and I don't know exactly when that would come in, but you still need
3 a vote of five members to do anything including go into executive session.

4
5 Ms. McLean: Okay, thank you.

6
7 Mr. Hopper: Sorry, I should have clarified that. Now there's some consequences if you don't
8 follow the Sunshine Law just like with contested cases other items, any item that you deal with
9 where if you violate the Sunshine Law a court could void your action. So the action you take
10 could be undone essentially and someone can file a lawsuit to say you planning commission
11 didn't follow the Sunshine Law so we want to undo the vote that you took. Also, there are
12 various penalties that apply. And important thing is that if a person willfully violates the
13 Sunshine Law they can be guilty of a misdemeanor so that's a criminal penalty. So if you
14 intentionally violate the Sunshine Law there can be criminal penalties. So that can be taken
15 very seriously that's something to keep in mind but in general don't discuss board business
16 outside of a board meeting and follow the Sunshine Law that's always a good tip. So any
17 questions.

18
19 Mr. Carnicelli: I got one Michael, just clarification so something that we make a
20 recommendation on goes up to the eighth floor, it's a County Council meeting and just so
21 happens three of us show up, no can?

22
23 Mr. Hopper: You can. I think you'd have to report back at your next meeting on what you did at
24 the Council.

25
26 Mr. Carnicelli: So even if we sit separately, like we don't even talk about anything, but we're at
27 a meeting in which we made a recommendation to the County Council and the County Council
28 is making...you know they're making their...they're the deciding body, they're making a decision
29 and three of us are just stilling in...or five of us are sitting in separate areas of the room, don't
30 even talk to each other about, you know the penguins and we gotta report back or is it a
31 violation like where...

32
33 Mr. Hopper: If you have more than five and board business is being discussed in that room,
34 that's considered a meeting where board business is being discussed.

35
36 Mr. Carnicelli: So if there's less than five of us it's different then. So if there's four of us there
37 then it's okay?

38
39 Mr. Hopper: It's okay, and in fact you can testify, you just have to report back at your next
40 meeting. This was an issue that happened some years ago that got discussed with OIP and
41 with the County Council where there were nonvoting members of committees, they were
42 members, they weren't considered nonvoting members of the committee, they were just
43 considered Councilmembers that weren't on committees and they would sometimes show up
44 and attend meetings and they were told by OIP that you merely being in that room could be
45 problematic. We kind of disagreed with that because we thought the Sunshine Law deals with
46 discussing board business, it doesn't, it doesn't deal with being in a room when board business
47 is being discussed. But they had issues with that and so that's when the exception can in that

1 said that more than two, more than two but less than a quorum may attend a meeting where
2 board business is being discussed provided it's not organized specifically for them and it's less
3 than a quorum and they can discuss board business at that meeting. So they assume that if
4 you're in that room you are going to discuss board business and if there's more than four of you
5 they generally would see that as oh, that's a problem because there's more than four of you
6 attending a meeting where board business is being discussed, that could be interpreted as a
7 meeting of the planning commission because you have a quorum so you should post an agenda
8 and take public testimony for your items. So that's essentially where we're at. Now again it
9 depends on if board business is being discussed. So if you're at a Council meeting and there's
10 no items where planning commission business is up, you can attend that meeting and testify on
11 you know other items that aren't planning commission items, but again this deals with board
12 business specifically.

13

14 Mr. Carnicelli: Got it. Thank you.

15

16 Mr. Hopper: Any other questions on the Sunshine Law or others? Again, this is something that
17 that's why you have legal counsel meetings, we'll help you navigate those issues, but just to
18 understand if sometimes and you can't discuss things or if things have to be canceled from the
19 agenda 'cause of notice or other things, it's because of a state law that is intended to open up
20 meetings to the public. Yes?

21

22 Ms. La Costa: Question please. So we discuss a project, it goes to the Council, we refer it to
23 the Council, it's in our neighborhood we want to testify, identify ourselves, planning
24 commissioner, testify, then do we have to come back and report at the next meeting that we
25 were there and testified?

26

27 Mr. Hopper: I think if it's...I think generally if it's less...if it's two members I think that's arguably
28 a permitted interaction already 'cause two members can discuss board business outside of a
29 meeting unrestricted. I think once you get to three people that's a problem. So if you just go
30 and you're the only planning commissioner there, I don't see that as a reporting back
31 requirement. I can double check on that but I think it's once you get beyond two because two
32 can discuss board business unrestricted outside of a meeting anyway. So I think that's already
33 a permitted interaction.

34

35 Mr. Carnicelli: One other thing too that I think if I could just have you just chime in on is since
36 it's you know okay, two of us can do this but I can't go talk to Kawika one on one and then go
37 talk to Dale one on one, and then go talk you know...

38

39 Mr. Hopper: That's correct. Once you've discussed board business with one member you
40 should avoid discussing it with other members, they want to avoid that game of telephone sort
41 of where you know oh, well, you know commissioner such and such said this, what do you think
42 about that? And they think that kinda is tries to get around the purpose of the Sunshine Law
43 which is the general purpose is you do your discussion of board business at these meetings
44 with the cameras on and so everybody can see what you're doing and that's that. If you need
45 more info on an application like a site visit or something rather than you know having a few of
46 you go yourself, say you'd like a site visit and you can vote to do that and have a site visit at that
47 place as a group that also deals with contested case issues and other things. But the general

1 intent is that they want, they want you to be accountable to the public by the public being able to
2 see what you're doing and the basis upon which you're making your decision. And some of the
3 things don't seem like it's all that consistent with that like why do they care if there's two of you
4 sitting at a planning commission meeting which is a publicly noticed meeting separately but
5 it's...it goes...that's what the law requires so sometimes it's just we all do what the law requires.
6

7 **5. Ethics**

8
9 Mr. Hopper: And then the last presentation I had was ethics. The County Code of Ethics is in
10 the Maui County Charter, Article 10. It applies to you as commission members in the same way
11 it does as County employees. So because you are an officer of the County in your capacity as
12 a planning commissioner you are subject to the Code of Ethics.
13

14 Prohibitions. Cannot accept gifts or engage in a business transaction or activity or have a
15 financial interest to which may tend to impair independence of judgment in the performance of
16 your official duty. You cannot fail to disclose a financial interest in a project.
17

18 Potential penalties for failing this could be a fine or you could be removed from your position.
19 You got a specific rule on this 12-201-25, whenever a conflict of interest or other ethical
20 question is raised by anyone regarding any member of the commission the affected member
21 shall promptly make a full disclosure of the circumstances to the commission. If the commission
22 member has a financial interest in any matter that may be affected by an action of the
23 commission that member shall be disqualified from voting and all actions relating to such
24 matters.
25

26 If there's any doubt get an advisory opinion from the Board of Ethics. They have a variety of
27 opinions already you can review, but if you've got a question on an issue you can ask the Board
28 of Ethics for an opinion. They've got 45 days from receipt to give you an opinion, and if you
29 obtain an advisory opinion from the board and acts accordingly or in accordance with the
30 opinions of the board in general the officer shall not be held liable for violating any of the
31 provisions of this article. That's why if you got an ethics question, going to Board of Ethics can
32 be a useful tool they can tell you, you can vote, you can't vote or you know, what you should do,
33 you should disclosure your interests, say you think you can be impartial despite whatever
34 conflict you have, and vote you know, notwithstanding that.
35

36 So again, ethics is something that's very fact dependent. If you feel like you can't be impartial
37 for a project or if you got a financial interest that can be a variety of things you should consider
38 disclosure or recusal from voting on that item and again, that will come up on a case by case
39 basis. It's never a bad idea even if you don't think it's preventing you from being objective to
40 just disclose the issue and let that known to the board that you know, I know such and such
41 personally but you know it won't affect my, won't affect my vote in this case or something like
42 that. So are there any questions on the Code of Ethics? No? Okay, that's all that I have.
43

44 Any questions on any of the other presentations, I'm happy to –
45

46 Mr. Carnicelli: I just want another clarification 'cause I know this is...there's...anyways, when
47 you have a conflict and you're gonna recuse yourself, talking about the ethical part, there's the

1 recusal of the vote and then there's the recusal of the discussion, right? So as I understand it
2 okay, I can still...let's say if there's something I'm going to recuse myself on, I can participate in
3 discussion and then recuse myself from the vote, I mean so, I mean to me there's the I test and
4 the legal test and so I mean if you could just sort of I guess discuss that.

5
6 Mr. Hopper: Well, I'm not sure why you would want to remain in discussion if you're not going to
7 vote and a concern could be raised if a member recuses themselves but participates heavily in
8 the discussion to the point where they're influencing the rest of the commission—

9
10 Mr. Carnicelli: Right.

11
12 Mr. Hopper: Trying to say go this way, go this way that could be raised as a concern. So
13 maybe if the person is going to participate in discussion to give information or something like
14 that you know and so you know, again, the Board of Ethics may say that in a certain case but I
15 think you would want to be careful. If you're established that you have a conflict and don't want
16 to vote you know then it may be a good idea to just recuse yourself from that item in general or
17 at the very least avoid trying to influence the rest of the commission members and the
18 commission with your discussion because if someone raises that as an issue in the future a
19 court may look at that and say, you know what this was a...it might not be an ethics issue per se
20 and that they violated the Code of Ethics but your decision as far as whether it be upheld by a
21 judge may be...may come into question potentially in those situations.

22
23 Mr. Carnicelli: Great. Thank you Michael. Any other questions for him?

24
25 Ms. Pali: To piggyback on that, it sounds like you still kind of rely on us to make that decision.
26 At what point do you make that decision for us?

27
28 Mr. Hopper: I am really not the commission, not the Board of Ethics. I don't know that we
29 would have the authority to require you to recuse yourself from an item. I think we could maybe
30 even go into an executive session and say hey look I think if this person vote their vote's not
31 gonna count, they may be challenge...you know poisoning this entire proceeding, you know,
32 generally it's up to the member to recuse themselves. What might happen though is that a...there
33 could be a court proceeding afterwards where the...a court says, your vote's overturned
34 because this person voted or because this person participated and so you know it does become
35 my job at that point I think to say, I think your jeopardizing this, at least go to the Board of Ethics
36 to get an opinion, but ultimately I do believe it's up to the member to...if they get a Board of
37 Ethics opinion telling them to recuse themselves and they don't, well they can be removed from
38 office and they can be subject to fines if there's a clear violation in those cases so...

39
40 Ms. Pali: Wonder if we can kinda just take a cleaner stance to say we just all choose to just
41 stay away from the problems instead of dragging everybody through a potential court case and
42 being at risk for it to go full circle. Wouldn't it just be safer to go I may have a potential conflict
43 so maybe it's just best that I recuse myself from both discussion and vote? It just seems like
44 that might be the cleanest the way but it doesn't sound like that's necessarily...

45
46 Mr. Hopper: Well, we also want you to be voting commission members as much as possible so
47 that's why the Board of Ethics can help in case.

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Ms. Pali: Okay.

Mr. Hopper: Maybe you would say, all right I'm going to request an opinion and they may say no conflict. There's been cases where I thought hey there's a potential conflict, a member asked and the Board had said no there's not a conflict here or you can vote under the certain circumstances. I'd rather have that than you know, but I mean there might be cases where hey, is this an issue, oh no that's not an issue Board of Ethics has already looked at that.

Ms. Pali: Okay.

Mr. Hopper: Or I don't really think this is an issue. Like if you know someone personally and you're their friend or something but you feel like you, you can be impartial on the vote you can be honest with yourself in those cases, but that's not something that will necessarily mean you recuse yourself. If you know something ridiculous like you own an interest in the property or something that's getting the permit, you know that's a problem.

Mr. Carnicelli: Thank you Michael. I think all of us agree to error on the side of caution.

Mr. Freitas: Question about that.

Mr. Carnicelli: Yeah, go ahead.

Mr. Freitas: What if you start off thinking you'll be okay, then you start hearing things and go, eh, eh, I better not. Is it kinda of lot eh, you too late, you're in it?

Mr. Hopper: No, I don't think so. I think before the vote, any time before the vote if you say, oh I think I have a conflict I'm going to recuse myself based...you cannot abstain from a vote just generally speaking that's not something you can do but if you got a conflict you can say I'm gonna recuse myself because of this conflict and explain what that it is. So, that's, that's you know it's not...you're not forced to violate the Code of Ethics you know just 'cause you've gone far enough. Now there would maybe be a concern if you participated a lot and you know realize oh, I got a conflict. So it's good to look at these things early. Hopefully if you see an application you can go over it and see, oh who are the owners, what's the situation and figure that out before, before the meeting that's helpful, but your point's taken you hopefully would identify a conflict as early as possible.

Mr. Carnicelli: Yeah, and some...I mean commissioners have gotten an advisory opinion from the Board of Ethics ahead of time on different things, if you see something coming, you know of something so that's fine too.

Mr. Hopper: Yeah, commissioners, councilmembers, a variety of people can get those opinions.

Mr. Carnicelli: Thank you Michael. Any other questions? Thank you Mr. Hopper, I appreciate it. As always, appreciate your opinion. So if there's nothing else then I guess our next meeting will be January 28th. We will all see you then, so we are now adjourned. Thank you.

1 **G. NEXT REGULAR MEETING DATE: JANUARY 28, 2020**

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3 **H. ADJOURNMENT**

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5 The meeting was adjourned at 11:48 a.m.

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Respectfully Submitted by,

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CAROLYN TAKAYAMA-CORDEN
Secretary to Boards and Commissions II

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14 **RECORD OF ATTENDANCE**

15 **Present**

16 Lawrence Carnicelli, Chair

17 Kawika Freitas

18 P Denise La Costa

19 Kellie Pali

20 Keaka Robinson (excused at 10:43 a.m.)

21 Christian Tackett, Vice Chair

22 Dale Thompson

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24 **Excused**

25 Stephen Castro

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27 **Absent**

28 Tina Gomes

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30 **Others**

31 Michele McLean, Director, Department of Planning

32 Michael Hopper, Deputy Corporation Counsel, Department of the Corporation Counsel

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