

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
JULY 12, 2007**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Randall Endo at approximately, 1:36 p.m., Thursday, July 12, 2007, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

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

**B. PUBLIC HEARING**

- 1. KSD HAWAI'I representing Kenneth M. Rothman and Martin J. Mueller requesting a variance from Maui County Code §19.35.020 to allow two 864 square foot homes to exceed the maximum 600 square feet allowed for accessory dwellings, on Lots 3 and 4 of the Maha Wao Subdivision (DSA File No. 2.2889) located at 27 Maha Road, TMK: (2) 2-4-006:028, Makawao, Maui, Hawai'i. (BVAV 20070006)**

Chair Endo: Will the Planning Department staff please read the agenda item and state the purpose of this application?

Ms. Trisha Kapua`ala read the public hearing notice of the above-mentioned item into the record.

Chair Endo: Thank you, Trisha. Is there a video presentation?

Ms. Kapua`ala: Yes, sir. Thank you, Mr. Chair. So I'm standing on what is to be the proposed right-of-way of the subject property—the excavated to dedicate to the County to allow 24 feet. This is Lots 5 and 6. And those are the subject dwellings. Maha Road. And this 360-degree pan is to see the neighborhood: how many homes are on other properties. This is Miyake's baseyard and Makawao Avenue.

Now, I'm on the subject property in-between Lots 2 and 4. So these are the smaller dwellings about 500 – a little over 500 square feet each. And again, Maha Road, the street widening to be dedicated to the County.

That is one of the dwellings that is in question on Lot 4. That house is to remain at the same size. The third house is the second dwelling that is to remain – I mean, I'm sorry, that is the subject of this variance.

This is Lot 3, the house that is in question. As stated in the staff report, that little laundry room is – has a building permit in process. So that – the laundry room will be

removed. A portion of this carport will be removed. And that is to conform to Chapter 19.35, Accessory Dwellings.

The blue tape on the floor—that was laid out to show what the dwelling would look like if they had to demolish 264 square feet. So the living room would be virtually removed, and that wall would be removed to become the living room so you lose a bedroom.

This is Lot 4, the subject dwelling. So again, this also has a building permit in process where a portion of the carport is to be removed to be conforming of 240 square feet.

Lots 5 and 6. And this is inside. It's – this is – no, I'm sorry. This is the house that is to stay the same on Lot 4, and that's what the kitchen would look like. They're renovating.

And this is just a shot from the down the road. Part of the variance criteria is to prove uniqueness. So this property is similar in the fact that there are many dwellings on one property.

On Maha Road looking up to Makawao Ave. Thank you.

Chair Endo: At this time, we'd like to ask the applicant to please come to the podium and state their name.

Ms. Bonnie Ancog: Good afternoon. My name is Bonnie Ancog. I'm the controller for KSD Hawai'i. This is Ryder Swatek. He is our assistant construction manager, and also the manager for this project.

Chair Endo: Good afternoon. Are you amenable – agreeable to waiving the reading of the staff report?

Ms. Ancog: Yes.

Chair Endo: Okay. Would you like to make your presentation to the Board?

Ms. Ancog: Yes, I would.

Chair Endo: Okay. Proceed.

Ms. Ancog: Okay. As Trisha mentioned, the property is located at 27 Maha Road. It's on the corner of Makawao Avenue and Maha Road. The opposite corner houses Miyake Concrete and their baseyard, just to give you an idea again of where this property is located.

Okay. There are eight dwellings on this two-acre parcel. It's residentially-zoned. The

dwellings range in sizes from 546 square feet to 864 square feet. Five new homes ranging from 600 square feet to 1,104 square feet will be built on the upper portion of this property.

We are in the process of subdividing this parcel into nine lots. Three of the lots will be roadway lots, and the remaining six will house dwellings two to three buildings depending on their size.

We are also in the process of working with the County on a workforce housing agreement. And this would allow us to offer this property as an affordable housing project.

Lot 4 is approximately, 10,352 square feet. And Lot 3 is approximately, 13,322 square feet. There are two dwellings per lot. Each of the dwellings are 864 square feet in size. The County Code, however, considers one of these buildings too large. The County Code 19.35.020 basically reads that the maximum gross floor area for accessory dwellings dictates that the maximum gross floor area for a second dwelling on a lot ranging from 10,000 to 21,779 square feet cannot be more than 600 square feet. According to Condition 4B of our preliminary subdivision approval letter, we are required to remodel two of these 866 square foot dwellings to 600 square feet. Now, the previous owner has approved – the plans to reduce these two units from the 864 square feet to the 600 square feet.

The size of the homes were not the result of our application. The homes were built by a previous owner, and the subdivision was initiated by the most recent previous owner.

We also feel that this request has merit because of the acute need for affordable housing on Maui. Three-bedroom units are most desired by Maui families. By reducing the dwelling to 600 square feet, you would totally eliminate one of the bedrooms, and a substantial portion of the kitchen. Further, the homes were built in the 1960s and early 1970s, and their size has not been issue or concern to the neighboring properties. It has always been a part of the community.

Mr. Ryder Swatek: Good afternoon. The Department has suggested that the applicant could reconfigure this subject subdivision so that Lots 1 through 4 have one 864 square foot dwelling, and one of the smaller 500 to 600 square foot accessory dwellings. This recommendation was researched, however, and according to Section 19.08.040 of the County Code, Area Regulations, the minimum lot width for an R-3 zoned property is 75 feet – excuse me, 70 feet. The size of the lot does not allow for this minimum width.

Let me explain this a little further with the other map here. If we were to subdivide the property accordingly – according to the Department's suggestion, we would be under the required lot width and would require a variance for this configuration. So in

essence, if we were to go with this suggestion and run the lots mauka-makai, so to speak, it would basically, require that – the lots would be too narrow to meet this code. So in essence, this is – you know, we would be back here asking for a variance on this very same issue.

Ms. Ancog: So basically, this second dwelling has a size limit of 600 square feet for that dwelling. However, the first dwelling, or the initial dwelling has no limit. The limit is based upon the setbacks and the boundary lines. So in reality, we kind of did a quick calculation on Lot 4, and that initial first dwelling could be increased to approximately, 3,000 square feet. So what we would like to propose is if could allow to have that second dwelling remain at the 864 square feet, and then do a – or restrict – limit the size of the initial dwelling to perhaps, 1,500 or 1,600 square feet.

This is the suggestive language that we would like to use in our deeds. And it was forwarded to Trisha, and I believe it should be in your packets, so I won't read it in its entirety, but it basically says that the second dwelling will remain at 864, and that would be its limit, and the initial dwelling would have a limit of 1,500 or 1,600 square feet.

Mr. Swatek: This is just a map showing kind of what Trisha talked about here. This gives an idea of where the site location is. The subject property there is outlined in red. And you can see Eddie Tam is off to the left there. Makawao Avenue running right to left. And we have Maha Road running down right next to Miyake Concrete right along the side of the property there, and of course, Makawao Elementary School. So you can see the density and the general neighborhood.

As discussed already, these are the two subject buildings that are in question for the variance, and the possible reduction, or not reduction of the square footage.

So as you can see, the current floor plan is pretty livable. We have off to the front there: the living room, and a generous-sized dining room, and a good-sized kitchen. It's a small house, yet its functional in its current state. So this would be the required floor plan of the reduced unit. And you can see how drastically that small amount of square footage eats into the living space, the kitchen, and of course, one of the bedrooms. Again, this shows – gives you a good visual idea of the lost floor space and lost livability.

This kind of just – this is another picture kind of what you saw with Trisha's video there, but this is the kitchen before the removal of cabinets. And keep in mind, these units here are – these photos were taken before we started our renovation. We have significant renovations ranging from replacing windows, cabinets, appliances, doors, flooring, paint, electrical, and plumbing. It's hugely extensive, so keep that in mind.

Again, this red line here indicates where—if the unit were to be reduced—a wall would

have to be constructed, and the portion off the right, what I call a dining room, would be totally lost. Again, this blue line indicates where a wall, or two, or three would have to be constructed. And again, this would push that kitchen into a relatively small space. And you can see what it would do to the living room too—drastically, reduce its size.

You can see this a partially renovated unit. And it – again, this blue line indicates where a wall would be constructed. And if a wall were to be put here, and the size were to be reduced, you can see, for example, the usability of this cabinet, this lazy susan, and the corner cabinet would be gone. That would have to be changed. You'd have to move the range and the refrigerator, and basically, turn this into a little, galley kitchenette instead of a functioning kind of family kitchen. The corner there, that's where a refrigerator would have to be fit in again. It just brings the usability and the size down drastically.

That wall that's the white wall there behind the blue line there with the blue tape is on the baseboard, that would be removed, and that area which is now a bedroom would become the living room. So again, you can see how much smaller it would be. Again, the space in front of the blue tape there would be the lost space of living room. And I apologize for the dirty floors, but that's construction.

And that's the whole of our presentation. Is there any questions for Bonnie or myself?

Ms. Ancog: We haven't done any advertising for this project at all, but when we started construction, there was a lot of curiosity in what we were doing. So people would come by and ask us. And when we told them that we're trying to do an affordable housing project, we had a lot of people who were interested. And so we started taking a – making a list. And at this point, we have about 30 buyers on the list, or potential buyers, people who are interested. And I've contacted some of these buyers. And they're all really interested in a larger living area. Eight hundred and sixty-four square feet is actually a small living area, but it's three bedrooms, and it means so much to these people to be able to have that extra bedroom for families. And they want to live there and stay there. And so that would make a huge difference for them just having that extra livable area. So we're hoping that we can get approved to have them remain at the 864 square feet. Thank you.

Chair Endo: Okay. If there are no objections by the Members, I'd now like to open up the meeting to public testimony, unless you have a burning that you'd like to ask right now of the applicant. Seeing no objections, let's begin public testimony. First off, we have John Anderson. Please speak into the mic.

Mr. John Anderson: Certainly. Good afternoon, Commissioners. My name is John Anderson. I am the executive director of Na Hale O Maui, our community land trust for affordable housing. And I'm here speaking in favor of granting this variance for quite a

number of reasons.

We've been looking at this project with KSD Hawai'i for a number of months now, and have received a lot of input from the community in terms of what they would like to see in terms of development of affordable housing. And this project is very creative and really an example of many positive aspects of smart growth. It is an in-fill project. It is not urban sprawl. It is being built within existing neighborhoods on an existing lot. It is on a transportation line. And a transportation-oriented design is very much a part of smart growth principles. It's a walkable community. Walk to shopping. So it's not car-dependent as so many subdivisions have been. It's a rehabilitation of existing substandard structures that were being rented at market rates despite their quite deplorable condition. So that alone is a real plus in favor of this rehabilitation to current standards making the quality of decent housing available for more families.

And as was touched upon in the presentation, the demand for three-bedroom, family homes, even small square footage is very high because it is just lacking in our community to have that – you know, three-bedrooms available for families. And the elimination of two of these bedrooms and two of these structures will probably eliminate two families being able to move into it as opposed to a single person or a couple. And we really have a lot of demand for families to get started in housing.

Looking at this in the big picture, as it measures up to smart growth standards, a small increase in density is a fair trade for the positives of this. So I have to, once again, ask for your approval of this petition, and allow these structures to remain at 864 square feet, and configured as three-bedroom homes for our families. Thank you.

Chair Endo: Any questions for Mr. Anderson?

Mr. William Kamai: Mr. Anderson, you guys have that agreement signed already?

Mr. Anderson: We have a memorandum of understanding with KSD Hawai'i to work them in promoting these properties as community land trust properties, yes.

Chair Endo: Any further questions? Thank you, Mr. Anderson.

Mr. Anderson: Thank you.

Chair Endo: Our second testifier is JoAnn Ridao from the Mayor's Office.

Ms. JoAnn Ridao: Good afternoon, Commissioners. My name is JoAnn Ridao, and I'm the new Housing Commissioner in the Mayor's Office. And I'm here to also speak in favor, or ask you to grant this variance request. And I'll try not to touch on the things that John talked on, but – because he did such a good job.

First of all, this project is going to be in compliance with the new Workforce Housing Bill. So we're pretty excited about that because it shows that the bill is working.

The other thing that I wanted to address was that the project is working with the land trust. And that is very important to us because this would keep these properties in affordability, in perpetuity, which is very important for affordable housing.

John talked about the walking community being on the transportation lines. That is really important.

The other thing is, Trisha did a really good job at showing the surrounding community. And I'm very familiar with this area because I have a family member that lives right across the street in another condominiumized property, and it fits right in with the surrounding community. So it's, you know, an in-fill like John said. And I think the developer is doing a great job with this.

Again, the homes are being renovated. They were substandard homes that are now going to be put on the market in a renovated up-to-standard condition. So we'll be providing housing for those families that can afford these units.

And I also support the three-bedroom, family size because we need housing for those people that are families more – or there's a demand more for family housing. So I support that.

And I'd like to ask the Commissioners to consider the variance because of those reasons. Thank you.

Chair Endo: Any questions for Ms. Ridao? Thank you. Our third and final testifier is Alice Lee.

Ms. Alice Lee: Good afternoon, Chairman, and Members of the Committee. For those of – for the record, I should say, I do have some experience in housing as the former Director of Housing and Human and Concerns for the County of Maui for eight years, and for ten years as a Council Member specializing in affordable housing.

I'd like to say that our community, as you probably already know, has spoken very loudly and very clearly that there is a tremendous need for affordable housing. In fact, it is a top priority not only for this administration, but for all the previous administrations that I have been associated with, which go back five Mayors.

Unfortunately, affordable housing is probably one of the most expensive undertakings there is. It's very, very expensive because it requires a lot of subsidies. In fact, I can't think of one affordable housing project that didn't require a grant of land, a grant of

lease under market value, grant of many exemptions, grants of exceptions to fees and everything that you can think of. Because affordable housing is very, very expensive, there has to be special considerations or exemptions in order to have affordable housing.

I can't blame our staff for recommending denial of this application because it's part of their job to make sure that the code is enforced. However, I can give you a million reasons of why there have been many exemptions and exceptions in the past in order to provide affordable housing. And I really don't think that any of you should be worried about setting a precedent here because, again, there have been many, many exceptions given to many, many projects over the years not starting with the Board of Variances and Appeals, but with the County Council, the Mayors, and every single administration. So there is no precedent-setting decision to be made here.

Also, I'd like to mention, and you probably heard that the 864 square foot units were pre-existing. That's very important to remember. This is not something that the applicant is trying to do that didn't already – that wasn't already there.

So for all of these reasons and more, I urge you to please, please favorably approve this project and approve the variances requested. Thank you very much. Are there any questions?

Chair Endo: Are there any questions for Ms. Lee? Thank you.

Ms. Lee: Thank you.

Chair Endo: Is there anyone else who would like to testify? Come on up.

Mr. Tom Blackburn Rodriguez: My name is Tom Blackburn Rodriguez, and I have the honor of being president of the Hale O Maui Community Land Trust. I apologize for limping up to the podium, but I'm getting older now, and I fell down, and hurt myself. I think I'm going to be okay.

Thank you very much for allowing me to testify. I just have one brief comment to make and it is to key on to what Alice said. Affordable housing is expensive. That's correct. But we've seen the effects of what happens to the community, and we all know now it's more expensive not to build affordable housing because of the cost associated with not solving the problem.

And the other thing is it's going to require every one of us, people I don't even know yet in order to make this happen. It's going to pass through a lot of government reviews. A lot of people are going to talk about it. And when it all gets said and done, when these houses are ready for families to move into, and they'll be affordable in perpetuity for the



next family and the family after that, it will have been the result of literally, probably, hundreds of people taking a look at this project.

What's interesting for you to note is that probably, this government body may be the first one to actually have a look at an affordable housing project coming forward under the Workforce Housing Bill in partnership with the first community land trust to receive a nonprofit designation in the State of Hawai'i. So the precedent you're setting is not one in terms of decision-making because I think that's been clearly addressed. But it's a precedent of how we're going to move together as a team, and do all the things that have to be done, that's why they call it work, and work collaboratively, and work together in order to make projects like this happen.

It's a pleasure to be here before you. And I hope that you understand that you, too, are participating in the creation of affordable housing, and that you are going to be able to move this forward once step closer. I want to thank you for your service and thank you for the opportunity to testify. Aloha.

Chair Endo: Thanks. Any questions for Tom? No? Thank you, Tom.

Mr. Blackburn: I will sit down.

Chair Endo: All right. Is there anyone else in the public who wishes to testify? Seeing none, we will now close public testimony, and ask Trisha if there have been letters in support or opposition.

Ms. Kapua`ala: Three in support have been passed out. They are on the tables before you.

Chair Endo: So three in support and none in opposition?

Ms. Kapua`ala: None in opposition, yes.

Chair Endo: Okay. All right. So now can we have the Planning Department's recommendation?

Ms. Kapua`ala: Based on its analysis, the Department of Planning finds that:

1. There is no exceptional, unique, or unusual physical or geographical condition existing on the property which is not generally prevalent in the neighborhood or surrounding area;
2. Strict compliance with the applicable provisions of this title would not prevent reasonable use of the subject property; and

3. The conditions creating the hardship were the result of previous actions by the applicant.

So based on the foregoing findings of fact and conclusions of law, the applicant has not met all of the requirements for the granting of the subject variance. Therefore, the staff recommends DENIAL of the subject variance.

In consideration of the foregoing, the Department recommends that the Board of Variances and Appeals adopt the Department's staff and recommendation Reports prepared for the July 12, 2007 meeting, and authorize the Planning Director to transmit said findings of fact, conclusions of law, and decision and order on behalf of the Board of Variances and Appeals.

Chair Endo: Thank you, Trisha. Okay. At this time, Members, you can ask questions of the applicant or begin deliberation. Jim?

Mr. James Shefte: Yes, I have two questions. Those homes that are 864 square feet, currently, how big would the lots be once they're subdivided?

Ms. Ancog: Okay. After it's subdivided, Lot 3 would be 13,322 square feet. And Lot 4 would be 10,352 square feet.

Mr. Shefte: Okay. The second question: what do you anticipate the sales price of those homes once they go on the market to be? What is going to be your asking price?

Ms. Ancog: Well, I'll have Dave answer that for you.

Mr. David Goode: Good afternoon, Chairman, Members of the Board. My name is David Goode. I'm the president of KSD Hawai'i.

The prices will be dependent on the prevailing interest rate at the time, but our estimate is that they'll be from \$230,000 to about \$320,000 for these particular units. Thank you.

Ms. Rachel Ball Phillips: Could you briefly explain how the units will be kept affordable in perpetuity?

Mr. Goode: Dave Goode again. If we're able to partner with Na Hale O Maui, and that's our intention, we have some things we're still working out, their charter and their regulations under the IRS Code are such that the properties must be kept in affordability regime or numbers in perpetuity. They have enacted a sophisticated resale formula, a buyback, if you will, or moving onto the next party that allows for some equity growth in the unit. It allows for the owner of the unit to be compensated for improvements. And similarly, actually, would ding the owner, if he doesn't make improvements,

maintenance type improvements. It's a pretty sophisticated formula that has a track record on the Mainland of being successful. So it allows for equity growth. And what they found in the Mainland is that 75% of the people that get into properties like this eventually move out into a market unit. And so that just allows new families to come in, to grow, and to move on if they so desire.

Ms. Phillips: So the units will actually be purchased by people, or will it be a lease situation?

Mr. Goode: Essentially, it'll be a leasehold situation. The land trust would own the land. They'd create a leasehold interest similar to Hawaiian Homes and how they sold properties. And so the owners would own a home. They'd have the freedom to remain within that home and the property surrounding it.

Ms. Phillips: Thank you.

Chair Endo: Warren?

Mr. Warren Shibuya: I have a question in terms of the lot sizes. I think what was talked about in Lot 4 and Lot 3 I think was a total area of the property and the parcel. And I just wanted to clarify that you do have a house there, a home there, but what size is the home, plus what size is this unit? You're already talking 860 square feet. So what is the existing home, plus this unit?

Ms. Ancog: Both units on Lots 4 and Lot 3 are 864 square feet.

Mr. Shibuya: There is another structure on that lot also.

Ms. Ancog: Correct. There's two dwellings per lot.

Mr. Shibuya: That is correct.

Ms. Ancog: And each dwelling is 864 square feet.

Mr. Shibuya: Oh, both of them are the same?

Ms. Ancog: Correct.

Mr. Shibuya: Okay. And in terms of – because it is a condominium, the property that – the parcel that they're sitting on actually is divided ownership, would it not be?

Ms. Ancog: The property is common area.

Mr. Shibuya: It is a common area.

Ms. Ancog: The land.

Mr. Shibuya: Right. And so there is an open space between these structures?

Ms. Ancog: Yes.

Mr. Shibuya: And that's shared?

Ms. Ancog: Yes.

Mr. Shibuya: And then the care and the maintenance of this would be part of an owner agreement, or is it a condominium type of agreement?

Ms. Ancog: Condominium type of agreement.

Mr. Shibuya: And they are assessed—?

Ms. Ancog: Maintenance fees.

Mr. Shibuya: Maintenance fees to do this. And the maintenance fees, will they increase over a period of time?

Ms. Ancog: I'll have Dave Goode clarify.

Mr. Goode: Thanks, Bonnie. Dave Goode again. We haven't finished the condominium documents yet. So this is – say, is our intent. You take one of those lots, for instance, Lot 4. It's how many square feet? That one is 13,000 square feet? And there's two homes on it. We're essentially going to cut it in half. There'll be limited common area for each of those owners. So they'll have about 6,500 square feet of their property. It's their responsibility to maintain.

The common areas where they would put into a fee would be the private roadways. Other than that, everything else should be the domain of that individual owner.

Mr. Shibuya: Okay. I was just concerned that they might have some CC&R type rules or community rules that prohibit and/or limit the type of things that can be placed in these open spaces or community areas such as sheds, carports.

Mr. Goode: Yes, we will absolutely going to put restrictions as it relates to structures. But generally, vegetation would be as they desire, and certainly, no nuisance items. But our intent is to not be overly restrictive in terms of use, but in terms of structures, it

would be restricted. For instance, the one that's going to be the "ohana," it cannot change in size. That would be absolutely, restricted that they cannot go above the 864.

Mr. Shibuya: Right. And that's my concern, too, because once we provide this variance, then they're going to have add-ons and things of this nature, and I just don't want to address this again. I just want it to be addressed once. And if we do provide the variance, then we don't want to see it come back because of some other complaints related to this. Oh, by the way, how come this guy is putting up a work shed, or he needs a water heater, and now he's putting an appendage or adding another little add-on to this structure. These are little things that can be annoying, and yet I hate to see people have to go through this process again. And that's our biggest concern.

Mr. Goode: I understand your concern. And our intent is to give them a turnkey unit where everything is provided, so there shouldn't be a need to do that. If they desire to do that, they're either breaking the law, which is difficult to control, in general. However, the sooner we can work with Na Hale O Maui, and that's our intent, they're going to be overseeing this property forever. And so they will have control to make sure that those types of things don't happen. or if they do happen, they're immediately corrected.

Mr. Shibuya: Correct. And the quality of life that is afforded these people who are living in these areas, I'm very concerned about that too. If you make it too small, then their quality of life suffers too. And yet, if you make it large enough to accommodate them, then you actually lose your open space. And so I'm caught in-between the two unless these homes, I believe, or these lots have already been developed as stated. So it is existing and it's not like it's being a brand-new development.

Mr. Goode: Correct. These homes have been here 25, 30 years now. It's done well in the neighborhood.

Mr. Shibuya: And the new developments that you are planning to have also, the add-ons, will be complying, and will not have all these differences with the code, I assume?

Mr. Goode: One hundred percent compliance. You will not see us come in for a variance on those.

Mr. Shibuya: Thank you. I'm satisfied, Mr. Chair.

Chair Endo: Any other questions?

Mr. Kamai: Quick question for staff.

Chair Endo: Sure. Bill?

Mr. Kamai: When was the County Code, Section 19.35.020 adopted regarding the size of your accessory dwelling?

Ms. Kapua`ala: Chapter 19.35, which gives the provisions for accessory dwellings was adopted in 1982.

Mr. Kamai: Thank you. No more questions.

Chair Endo: Okay. Any further questions? Okay then, at this time, would somebody like to make a motion?

Mr. Kamai: Mr. Chair, I'd like to make a motion to grant this variance, and it's based on the following reasons: regarding Section 1 that the property in question has to show exceptional, unique, and unusual physical or geographical conditions existing on the subject property. With regards to what Trisha just answered regarding the adoption of County Code, Section 19.35 being adopted in 1982 that the four existing houses in question of 864 square feet was built in 1977 prior to the adoption of this code.

Regarding Section No. 2, strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property, with regards to no. 2, the norm would be to build a bigger, initial or primary dwelling, but again in this case, it existed prior to the adoption of the ordinance. And here we are asking them, the applicant, to tear it down, in essence, one of the houses that was there prior to 1982 because it was built in 1977.

And regarding no. 3 that the conditions creating hardship were not the result of the previous actions by the applicant, the hardship created would be by reducing the size of the existing lots that's been – or the houses in question that's been there for the last 30 years.

So it's based on those reasons that I ask the Committee Members to approve this variance.

Chair Endo: Bill, is your motion with or without the proposed condition that was in the e-mail of July 11<sup>th</sup>? The one where they agree to limiting the future expansion of the units, was that with or without?

Mr. Kamai: Yes.

Chair Endo: Including that condition? As a condition?

Mr. Kamai: Yes.

Chair Endo: Okay. So we have a motion. Is there a second?

Mr. Shibuya: I'll second.

Chair Endo: Okay.

Mr. Shibuya: But I'd like to add in the indemnification and holding the County of Maui harmless from any loss, liability, claim, demand arising from this variance. Bill, are you amenable to that kind of friendly amendment?

Mr. Kamai: Yes, Mr. Shibuya.

Mr. Shibuya: So the limit – the liability limit here would be for a one million dollar – a minimum of a one million dollar naming the County of Maui as an additional named insured within the 90 days from the date of transmitted decision and order. Is it still amendable, Mr.–?

Mr. Kamai: Yes.

Mr. Shibuya: I second the motion as amended.

Chair Endo: Okay. So–

Mr. Aaron Shinmoto: Excuse me, Mr. Chairman.

Chair Endo: Yes?

Mr. Shinmoto: Previous discussions with the applicants indicated that they may be requesting a reduction in the insurance because of the – it's not as bad as other variances you've heard. I don't know if that's still an argument that they want to present.

Chair Endo: Let's hear the applicant's position on that, then.

Mr. Goode: Thank you, Mr. Chairman. Thank you, Mr. Shinmoto, for reminding me. Since we've spoke, we've talked to our insurance folks, and essentially, it would be a rider to the existing policy that would be with the project. So we don't have any – we're not going to request any reductions.

Chair Endo: Mr. Shinmoto, this standard condition for indemnity with insurance requirements generally, is in perpetuity. So I wonder if the applicant would be interested in having a time-limited requirement?

Mr. Goode: We'd be happy with that, however the Board sees fit.

Mr. Shinmoto: Maybe you should ask our attorney for his wise counsel.

Chair Endo: Mr. Giroux?

Mr. James Giroux: I think if the Board wants to go that way, if you took a condition where the insurance would only be necessary for the time of the construction, and – so they wouldn't have to carry the insurance for the life of the variance in and of itself since you're only looking at an area variance which most likely will not rise too much liability in that these buildings already existed. If that's the direction you want to go, I think that's a reasonable request.

Mr. Shibuya: My concern is actually that Lot No. 4—the unit facing Maha Road. It's cut very close to the easement there, and it's not a level cut. It's a drop to the road. And my concern is if there is some means in which we can mitigate children and/or adults getting injured because of this closeness, I'd like that reassurance.

Mr. Swatek: That cut that you saw in the pictures is part of the construction and road-widening process. But as part of the plans that we're implementing, there will be a retaining wall and also a fence that will be running along that cut to ensure that that exact point right there, children, or just for the general safety, that lot as well as the lower portion of the property as well. So that's in the works.

Mr. Shibuya: Now, the cut that you're putting a retaining wall, how high from the existing ground level and how high is the fence?

Mr. Swatek: I misunderstood the question. How high to the top of the fence?

Mr. Shibuya: The top of the fence from the existing grade level. And then now you're making a cut to the roadway. How high is that to the existing ground level?

Mr. Swatek: Off the top of my head, I couldn't say, but it's – because the road will be built up with a sidewalk there. So the cut that you see will be raised, essentially. So, you know, the cut that you see will be less.

Mr. Shibuya: Maybe three feet?

Mr. Swatek: Yeah, three feet, is my guess.

Mr. Shibuya: And then the fence would be—?

Mr. Swatek: Four feet.



Mr. Shibuya: Four feet above that?

Mr. Swatek: Yeah, above that.

Mr. Shibuya: Because it is an endangered area, would it not normally be – let's say, you protect children from getting into pools, which is a hazardous element, you would normally put a higher fence? I'm not advocating this, but I'm saying, would it not be more appropriate at this particular point that you have a little higher fence?

Mr. Swatek: If that's the Board's feeling, that could easily be amended. At this point and juncture, there's nothing written in stone in terms of the height of that fence.

Mr. Shibuya: Yeah, my concern is if we do have that height at a six-foot level, then I can see that we terminate this hold harmless agreement at completion of that fence.

Mr. Swatek: Yeah, that could easily be accomplished.

Mr. Shibuya: If that's agreeable with the maker of the motion as well as the other Board Members.

Mr. Kamai: Yes, it is.

Chair Endo: Okay. Well, I guess, just to discuss that insurance thing for one, quick second, just so we get – it always gets a little confusing when we think about it, but we're talking about liability arising out of this Board granting this variance to allow them to have a slightly larger dwelling unit. So whether or not somebody gets injured on the roadway, or up from their yard really is kind of a different question. I mean, how would a personal injury attorney say, well, you granted this variance so that's why that kid got hurt over there on the wall? It's kind of disconnected to me. I mean, unless you're saying there's no way children would be playing in this thing if we don't grant this variance, but I don't think that's true. And they're going to go forward either way. It's just going to be the difference between whether the homes are slightly smaller or not. So, to me, the risk is really minimal from this variance. And plus we're trying to assist in the creation of affordable housing, so to throw on extra insurance premiums and burdens upon the property to me seems like, is it really necessary, and should we try and be more—?

Mr. Shefte: I would agree with you, Mr. Chairman, in that Warren has identified one possible situation which could be dangerous. There could be 50 more in there that we haven't even thought of. And so if you identify one and then something else happens, well then somebody could say, gee, you could take care of this, what about that? So I think we should just look at this in an umbrella perspective rather than trying to nitpick it on the insurance question.

Mr. Shibuya: I was more concerned in the sense that if you enlarge the floor space, then you have greater opportunity for younger children to be present. And I did notice in the pictures that it was a cut and there was an imminent danger there for me, in this one particular instance. Now that you're loading this area with more affordable homes, you are going to have more imminent danger, and I think maybe I'm going to be arguing for retention of this no – hold harmless type of insurance.

Chair Endo: In that case, I think probably what we should do is, without trying to get too technical, let's make the original motion. I'll restate it. And then I'll ask Warren to make a motion to amend it with this condition so that we can vote on the two matters separately. Is that okay with everyone?

Mr. Shibuya: Well, we can just go ahead and vote on what we have right now.

Chair Endo: Okay, well, what is the motion, then?

Mr. Kamai: The motion is to approve this variance based on what was stated earlier regarding the three separate conditions.

Chair Endo: Okay. You stated your own findings, correct. And then you said it was with the condition that they proposed, the applicant proposed.

Mr. Kamai: Yes.

Chair Endo: And then, what is the motion with regard to insurance and indemnification? Is it with what Warren proposed or without? Let's what we need to settle.

Mr. Shibuya: Did you agree, Bill, if – or would you like to agree if we have the hold harmless agreement for one million dollars? That the County is not held in liable or there's any claim or demand arising from this variance that the County is not held liable for anything? That's my biggest concern, at this point.

Chair Endo: Yeah, so just so that we're all clear now. I don't want to get too bogged down. So you made the motion first, Bill, so you can say whatever you want. It's your motion to say. And we'll see if there's a second, and then we'll move on from there. So whatever you feel comfortable with, you tell us what you want your motion to be, Bill.

Mr. Kamai: That hold harmless agreement, as long as it's not – the cost is not passed on to the consumers.

Chair Endo: Okay. So basically, as stated by Warren, including the insurance provision?

Mr. Kamai: Yes.

Chair Endo: Okay. And, Warren, you second that?

Mr. Shibuya: I second it.

Chair Endo: Okay. So we have a motion. It's been seconded to grant the variance with the standard indemnity and insurance provision, and with the condition proposed by the applicant with regard to limiting future expansion of the dwelling units as stated in the July 11, 2007 e-mail. Is there discussion? No further discussion? Seeing none, all those in favor, please say aye. Okay, the Chair votes aye.

It was moved by Mr. Kamai, seconded by Mr. Shibuya, then

**VOTED: To grant the variance with the standard indemnity and insurance provision, and with the condition proposed by the applicant with regard to limiting future expansion of the dwelling units as stated in the July 11, 2007 e-mail.**

**(Assenting: W. Kamai, W. Shibuya, J. Shefte, R. Ball, and R. Endo.)**

**(Excused: K. Acks, H. Ajmani, S. Castro, Sr., and U. Schulz.)**

Chair Endo: **So the request is granted.** Thank you. Okay, five-minute recess.

(A recess was then taken at 2:35 p.m., and the meeting reconvened at 2:37 p.m.)

Chair Endo: Moving on to the next item on our agenda, we have the June 14, 2007 meeting minutes.

### **C. APPROVAL OF THE JUNE 14, 2007, MEETING MINUTES**

Chair Endo: The Chair would entertain a motion to approve these minutes.

Mr. Shibuya: Mr. Chair, I'd like to make an amendment to the minutes. I think Mr. Stephen Castro, Sr., is listed on page 7 as being excused. Stephen Castro, Sr., was actually present at that meeting. So if you can make that correction?

Chair Endo: Let's ask staff if they can check also. Does that sound correct, Tremaine?

Ms. Tremaine Balberdi: Yes.

Chair Endo: Okay. All right, with that correction, as corrected, the Chair would entertain a motion to approve the minutes.

Mr. Shibuya: I move to accept.

Mr. Shefte: Second.

Chair Endo: Okay. It's been moved and seconded to accept the minutes as revised per Warren. All those in favor, please say aye. Oppose?

It was moved by Mr. Shibuya, seconded by Mr. Shefte, then

**VOTED: To accept the minutes as revised per  
Vice-Chair Warren Shibuya.**

**(Assenting: W. Shibuya, J. Shefte, W. Kamai, R. Ball, and  
R. Endo.)**

**(Excused: K. Acks, H. Ajmani, S. Castro, Sr., and U. Schulz.)**

Chair Endo: **Motion is carried.** Moving on to the Director's Report and the status update on contested case hearings. Trisha?

#### **D. DIRECTOR'S REPORT**

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

Ms. Kapua`ala: Thank you. Did you receive a settlement agreement in your packet for MEDO LLC? That's the big one. So that one is thrown out, I guess, of court.

And other than that, we had a meeting with Glenn Kosaka for Hanohano LLC. And that was an appeal of the Director of Public Works' decision to expire a subdivision. And there were three appeals with that that was consolidated. And there so far has been a conflict because one of the key evidence – one of the key pieces of evidence is a decision or a Corp. Counsel opinion when Glenn Kosaka was Corp. Counsel, and now he's acting as hearings officer. So they – I let them know that the Board can now hear contested case hearings. And if it was a two, three-hour deal, maybe that's something that you'd like to defer back to the Board. If not, they're going to recommend a new hearings officer. So we're having a status conference next month, early next month, to see how we're going to proceed.

Chair Endo: I'm sorry, Trisha. Which one was this again? Or what was it about?

Ms. Kapua`ala: It's called Hanohano LLC. It's a Dowling project by Five Trees, Upcountry.

Chair Endo: And they were – is that the one about the interim zoning? No?

Ms. Kapua`ala: Yes. Yes, there's three appeals: one for the expiration of the subdivision, then they appealed. They reapplied, and then they were denied that – not denied the application, but they were written a letter to provide justification how they're going to satisfy the zoning requirement of not being able to satisfy – I mean, not be able to subdivide interim. And there was a third appeal for another letter regarding the expiration of the subdivision.

Mr. Giroux: Trish, with that case, was there also a lawsuit filed in Circuit Court regarding the, I guess, the consistency issue? Is that the same—?

Ms. Kapua`ala: It's not the same although the attorneys are the same: Benny D`Enbeau and Jim Geiger.

Chair Endo: Okay. All right.

Ms. Kapua`ala: That's it.

Chair Endo: Thank you. Moving on to the Hawai`i Congress of Planning Officials Conference set for September 26 through 28. I think – staff can discuss it or I can mention it.

## **2. Hawai`i Congress of Planning Officials Conference, September 26-28, Kona**

Mr. Shinmoto: What we'd like to do is we do have two slots available for the Board. Typically, it's the Chairman and the Vice-Chairman who attend. If they do not want to go, they can ask the other Board Members. However, you may not want to choose these others. It's up to the Board. But we need to know quickly in the sense that we need to take advantage of early registration, hotel, car rentals, airfare, these kinds of things. I don't know if all of you had a chance to read it. I know you don't have Members here, but if the Chairman and Vice-Chairman are going to go, they tell us today, then there's no further discussion.

Chair Endo: Is there anyone interested in going? You know, I typically go anyway. So I don't have to go as Chair.

Mr. Shinmoto: This is going to be on a Wednesday, Thursday, and Friday. Wednesday is our field trips. The actual conference is on a Thursday and a half day on Friday. It is

at the Hapuna Prince Hotel in Kona. And it'll be a typical – the County will give you a per diem. And I think typically, the breakfast, lunch, and dinners are paid for. And there'll be car rentals and airfare that the County will pay for also.

Mr. Shibuya: I would encourage those, if you want to go, I'll give up my slot for you, because I think it's very worthwhile. I gained a lot from my attending. And it would be nice for you to get to see the other side. So that's why I'm making that offer. Randy, of course, has an opportunity through another agency which provides for him. So his slot is available. So those of you–

Chair Endo: I see Jim sounds like he's interested.

Mr. Shefte; I'm interested, but I went last year. So I also would defer to others who want to go. It's fine with me.

Chair Endo: Rachel should go. It's her first year.

Ms. Ball: I'd be happy to go, if everyone's willing to–

Chair Endo: Okay. All right. We got one. We got Rachel.

Mr. Shefte: If he wants to go, go ahead.

Mr. Kamai: No, I cannot go.

Chair Endo: You cannot go?

Mr. Kamai: I would like to go, but–

Mr. Shibuya: You go?

Mr. Shefte: Yeah.

Mr. Shibuya: Okay.

Chair Endo: Okay. So we got Jim and Rachel.

Mr. Shinmoto: We still have some time, so if you want to discuss with the other Board Members–

Chair Endo: No, they snooze, they lose. That's it.

Mr. Shinmoto: Yeah, we've got to do it sometime in early August which is coming up

soon, and the next meeting may not make it.

Mr. Shibuya: That's correct.

Chair Endo: Yeah, let's just do it already.

Mr. Shibuya: I'll make a commitment here, and get going. Okay? Thank you.

Chair Endo: So Rachel and Jim will be our delegates. We'll expect a three-hour report presentation when you come back.

Mr. Shinmoto: We may have extra slots as other people, other board members – this is basically, for the Planning Commissions. So if they don't go, or staff can't go, there may be other slots for the Board Members to go also. But for now, the two.

Chair Endo: Okay.

Mr. Shibuya: All right. And if interested, I'd like to go, too, but–

Mr. Shinmoto: We'll make you guys the first alternate.

Mr. Shibuya: Okay, first alternate. Okay.

Mr. Shinmoto: In relation to this, because the Board – because the meeting – there is a BVA meeting that week. Now, we don't know how many of you will be present. If two of you go, three of you go, how many go, we may not have a quorum. But in the event we do not have the meeting, and in the event that we don't have a Vice-Chair and Chair here at that meeting, what we'd like to entertain, and maybe not at this meeting, however, maybe having a special meeting, an additional meeting, between – maybe on September the 20<sup>th</sup>? On September the 20<sup>th</sup> because we do have some cases that we're having a problem scheduling because it's kind of full now. And if we skip this meeting, they have to go into October. But I think it takes – I think just the Chairman can declare the meeting?

Chair Endo: Mr. Giroux, can the Chair set the meeting schedule?

Mr. Shinmoto: This is on – maybe James can look at 12-801.10F. The Chairman or the majority of the Board can set a meeting. And September 13<sup>th</sup> is Moloka'i. So right after that trip, the following week is what we're looking at to have a meeting. And then we may have another one during the Planning Conference meeting week.

Mr. Giroux: Aaron, are you looking at 12-801.10C, General meeting?

Mr. Shinmoto: F.

Mr. Giroux: It says the Chairperson, the Director, or a majority of the Board Members. So the Director is the Planning Director, right?

Mr. Shinmoto: Correct.

Mr. Giroux: So if staff wants to—

Mr. Shinmoto: But we like to bring it in front the Board to have them make the decision rather than our Director.

Chair Endo: Did you say—? Who's going to Moloka'i? Not us? The Planning Department?

Mr. Shinmoto: No, you are going – this Board goes to Moloka'i the week before the 20<sup>th</sup>.

Chair Endo: Oh, okay, September 13?

Mr. Shinmoto: 13. And this special meeting is on the 20<sup>th</sup> if – it looks like we're going to have a case, but it might be a minor – one of these hearings officer cases. And then the following week is the Planning Conference, and we may also have cases for that too. But in the event we don't have Members here because of the conference or whatever, we want to have an opportunity to have this special meeting set up already so we can have cases held on that time. And we do can do the same: this room, 1:30, same place, same time.

Mr. Shibuya: I'm agreeable with that.

Mr. Shinmoto: So it would be, again, in this case, the Chairman or the majority of the Board here.

Chair Endo: Okay. How's everybody feel about that schedule? Okay. So – sorry, I was just looking at my calendar. So we'll set a special meeting on September 20, the Thursday?

Mr. Shinmoto: 1:30.

Chair Endo: 1:30. Okay. Let's do that. And then does that mean we're already going to cancel the 27<sup>th</sup> for sure?

Mr. Shinmoto: That may be held also, yeah, but we want the 20<sup>th</sup> set up in case – we have the HCPO Conference, if we can send more people there, then we may not have a



quorum to go to that meeting. That's why we want to have this special meeting in case that happens.

Mr. Giroux: Aaron, also that week, the same week as their conference, we have the Municipal Attorneys Conference, so we may not have any Corp. Counsel in town.

Mr. Shinmoto: Maybe it's better we—

Chair Endo: And it's also fair weekend.

Mr. Shinmoto: Maybe we won't have a meeting on the 27<sup>th</sup>.

Chair Endo: County Fair is 27, 28, 29, 30.

Mr. Shinmoto: We'll just go with the 20<sup>th</sup> and we won't have a meeting on the 27<sup>th</sup>.

Mr. Shibuya: That's right. We just reschedule.

Mr. Shinmoto: Okay. That's good.

Chair Endo: It's not calendared, the 27<sup>th</sup>, then. We cancel the 27<sup>th</sup>.

Mr. Shibuya: Right. It's firm.

Mr. Shinmoto: Okay.

Mr. Shibuya: Let's keep it firm.

Chair Endo: Okay, seeing no objections, we'll do it that way—our consensus. Is there any other business? Otherwise, our next meeting is July 26<sup>th</sup>. And we are adjourned. Thank you, everyone.

**E. NEXT MEETING DATE: July 26, 2007**

**F. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at approximately, 2:50 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairperson  
Warren Shibuya, Vice-Chairperson  
William Kamai  
Rachel Ball Phillips  
James Shefte

**Members Excused:**

Kathleen Acks  
Harjinder Ajmani  
Uwe Schulz  
Stephen Castro, Sr.

**Others:**

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