

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
FEBRUARY 28, 2008**

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, 1:37 p.m., Thursday, February 28, 2008, 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. APPEALS

- 1. PAUL R. MANCINI, ESQ. of MANCINI, WELCH & GEIGER representing HIOLANI RANCH, LLC, appealing the Director of the Department of Public Works and Environmental Management's decision to not recognize separate lots within TMK: (2) 3-2-007:001 located off of Kahekili Highway in the vicinity of Waihe`e Elementary School, Waihe`e, Wailuku, Maui, Hawai`i. (BVA20060006)**

- a. Hearing Officer E. John McConnell's Report**

Chairman Randall Endo: Would Mr. Cerizo like to read the first item on our agenda?

Mr. Francis Cerizo read the agenda item into the record.

Mr. Cerizo: Today we're supposed to have a Hearing Officer's report, but he's not here today, and Mr. Mancini will be bringing up a proposal.

Chairman Endo: Okay, before that, why don't we open up for public testimony. Anyone in the public here want to testify? Seeing none, we'll now close public testimony. Mr. Mancini, you had a proposal on--?

Mr. Paul Mancini: First, on Judge McConnell, when I got notice that the hearing was here, I was concerned to make sure he had notice. And I called his office and he wasn't there. And I left a message that -- wanted to make sure he had noticed -- noted the hearing is today -- would be here. And I got a call back from him in Wisconsin. I didn't speak to him. It went to my voicemail. And he said that he would not be there. He's in Wisconsin -- isn't coming back 'til next week. He indicated that he had given the staff notice that he'd be away this week so not to post it this week. He was a little embarrassed and concerned. He didn't want people to think he was inattentive or unconcerned about it. And he told me he felt bad, but again, that was a message I received. I never talked to him. So I thought we ought to put that on the record--he's not here.

With a little bit of a background for this, of course, we've had a hearing before this Board before in appointing the Hearings Officer. We've had the contested case. We've taken the evidence. The parties has submitted proposed findings in a brief to Judge McConnell, and he's rendered his proposed findings. Under the rules of ten days from his proposed findings, any party wishing to file exceptions to it were obligated to file exceptions. No exceptions were filed. A party supporting, who would be myself, has a right to file a memo in support ten days after the exceptions. No exceptions being filed, it never triggered my ability to file a memo in support. So I was kind of left in limbo, but Ms. Lovell did tell me at a certain point that she would not be filing exceptions to it.

Ms. Lovell and I have discussed the fact of the hearing and her fact that she's not filing exceptions, and that she only had one concern with regard to it – maybe more than one, but the one concern was the last paragraph on page 16 where it says:

The Director's determination is reversed and the County of Maui is ordered to acknowledge as lots of record those LCAs that are part of lot B-2, TMK: 2-3-2-007:001 subject to the orders of the Second Circuit Court in the quiet title actions.

She was not clear what that "subject to the orders of the Second Circuit Court" meant – what McConnell – what Judge McConnell meant by it. I had my own idea what it meant, but there are a number of alternatives the Board can take today. You could adopt the findings. You could defer it 'til Judge McConnell comes and ask him questions, if you have questions of Judge McConnell. You could prepare – adopt it and prepare your own proposed findings. I think what Ms. Lovell and I might like you to do is to avoid a long term process here is to go – proceed forward, adopt it, prepare your findings, serve the findings, and then when it's served on us, Judge McConnell would be available, then, to answer any questions you have. That's to move the matter along. In the interim, Ms. Lovell and I are just going to try to work out an agreement that would possibly solve all of the problems. So you may not even have to then issue those findings. Did I state it correctly, Jane?

Ms. Lovell: No, not quite. Good afternoon. Jane Lovell, Deputy Corporation Counsel appearing on behalf of the Director of Public Works. As Mr. Mancini indicated, and as you may recall from when this matter was before you previously, this whole thing started with a request for separate lot determination on a piece of property belonging to Mr. Mancini's client in the vicinity of the Waihe'e Elementary School. Mr. Mancini's client, Mr. Winn, purchased the property several years after it had been subdivided, and there had been, in fact, several previous subdivisions before that. After he purchased the property, he requested his other attorney, Mr. Leuteneker, to determine how many separate lots he had. And what triggered this appeal was that the Director issued a letter saying that in the last – or in the series of subdivisions, including the last subdivision of the property that any separate lots as separate lots were extinguished in

th subdivision so that the property now consisted of one, big lot. Now, the problem with that is there were breaks in title in – on the property. And there are now not one, but two quiet title actions proceeding through the Circuit Court. The County is a party in one of those quiet title actions, but for some reason, was not named or served in the other quiet title action. The present owner has been able to quiet title on a certain portion of the property, but has not yet been able to quiet title on other portions. He may be able to, or perhaps, he might not.

So given these circumstances, this is the framework within which Judge McConnell had to work. He did hear the evidence. He issued his findings, and his conclusions, and his recommendation. And while the County presented arguments other than those that the Judge has adopted, we don't take serious issue with most of what he has done. However, we have some concerns that are more practical than illegal with respect to his last and ultimate paragraph about what we are supposed to do to remedy the situation. The last paragraph says: "The Director's determination is reversed," okay, "and the County of Maui is ordered to acknowledge as lots of record those LCAs that are part of Lot B-2 subject to the orders of the Second Circuit Court in the quiet title actions." Now, those quiet title actions are not yet completed. If it turned out that the court found that Mr. Winn has good title to all of the parcels, you know, that would be one thing. If he finds that other individuals have title, or a claim, or are entitled to a portion of some of those other properties, that would lead to different circumstances.

So it's unfortunate that Judge McConnell could not be here today, and that the scheduling, I guess it was just a snafu, but what I would suggest is rather than this Body adopting these findings and conclusions today, particularly when we can't ask Judge McConnell what he meant by that last sentence, what I propose is to get a meeting together between the Director of Public Works; Glenn Ueno, who is in charge of the subdivision process and who does the separate lot determinations; and Mr. Mancini and his client on Wednesday of this week. I understand that Mr. Winn should not be left waiting or left hanging on this, and that's certainly not our intention. If we can learn from Mr. Winn what he wants or needs out of all of this, in other words what configurations, how many lots and so forth, we may be able to come to some kind of agreement. And if we can, then I would advise the Director to merely withdraw his letter. And that would moot the whole thing. It would solve the whole thing. It wouldn't mean a lot of work for this Body. And we could just go forward. So that would be my proposal would be for you not to take any formal action today, but hopefully, the parties can resolve it in the next week or so. If we can do that, then we may be able to moot the whole appeal, unless my colleague, Michael Hopper, has a problem with that. Okay, thank you.

Chairman Endo: Okay, you want to say something, Mr. Mancini?

Mr. Mancini: Just a few comments on that – a couple of comments. The Director's determination is found on page 1 of Judge McConnell's. He cites the determination

there. And he cites – there was only one subdivision he based his record on rather than a series of subdivisions. The second issue: who owns these LCAs, I don't think is an issue. The issue is that they are lots of record, and they can't be destroyed by the subdivision process. Two, this is outside the record, but the quiet title actions are almost over. I think there's only three of the many lots that are in question. Everything else is pau in the Second Circuit Court. So I think when we get together with that record, that'll be clear.

My only request, a little different Jane's, is I hate to waste periods of time, if we can. You know, coming back each time gets to be expensive and it's going on for a long time. That's why I was asking the Commission or the Board if they could ahead and propose findings because we come next time, and there's nothing, and then we gotta go another month to propose findings, and then you argue on that. So I was just trying to move the process on by asking you to adopt it, and get findings, and not execute those, but at least have them ready for argument and for questions for McConnell so that we can move on if there's – nothing happens in the interim. That's the only difference between our request.

Chairman Endo: Mr. Mancini, I have a question for you.

Mr. Mancini: Sure.

Chairman Endo: I – this last paragraph, paragraph 2, the one that's sort of in question that says "subject to the orders of the Second Circuit Court in the quiet title actions," is that language that you proposed?

Mr. Mancini: Yes, it is. Yeah, it was my notion on that was that if the Second Circuit Court somehow found that—I think there were 24 LCAs involved here—if there are only 22, that Court has jurisdiction over the County. The County should acknowledge that. I don't think that's gonna happen, but right now, all we're saying is the Director's decision that these lots of record don't exist is reversed. They exist. But if it comes back later that there are only 22, the Second Circuit Court has jurisdiction over it. That has not happened, and I think that the record will show that the Second Circuit Court said that they all exist. It's just a question of who owns three now. That's the only question out there. But at the time we did this, there were more outstanding. So that was the intent of putting that in.

Chairman Endo: Oh, what about the fact that the Court can do whatever it wants anyway so it doesn't really matter? You don't need that sentence. If the Court were to order it, the Court would order it.

Mr. Mancini: Yeah, your statement is correct. This sentence is probably superfluous.

Chairman Endo: Yeah, so maybe we just strike that, and just adopt the findings.

Mr. Mancini: I have no problem.

Ms. Lovell: Actually, I – if I could speak to that?

Chairman Endo: Sure.

Ms. Lovell: We – the County actually, I think, would oppose striking that sentence. And I think the reason being is that as we read the determination of Judge McConnell—and again he's not here to explain it—a little bit differently than Mr. Mancini. Because Judge McConnell's whole decision turned on the notion that the County should not have allowed the subdivision to go forward without clear evidence of clear title, therefore, the separate lots were not extinguished. However, the County looks at this last paragraph and says but if the Second Circuit Court finds that there is clear title, then it's a kind of a no harm, no foul situation. So who knows whether Judge McConnell meant what I think he means, what Mr. Mancini thinks he means, or something else entirely. But I do think that now that we have this decision, it has clarified for the County where the Judge is coming from. We recognize that there was some past history with respect to this land that was somewhat unfortunate and we're now very well motivated to work out a practical solution because unfortunately, if this original owner who subdivided were still the owner, we would probably undo the subdivision, but we can't really do that. It's passed through the land, has passed through now a couple of different owners, so that's just not a practical way for us to proceed. And of course, it wasn't our purpose, the County's purpose, and we would not be able to actually take away someone's right to their property if someone's titled to their property. We don't have jurisdiction to do that. Only the Court has jurisdiction to determine who has title. So this is a kind of a technical proceeding. It's a technical glitch. And we think really the best way to fix it is to just roll up our sleeves, and try to work out some kind of agreement as to how many lots the present owner wants, and what he's gonna do with them, and how he's gonna configure them, and then maybe this whole thing can go away. But we would – one of our reasons for not contesting these proposed findings was precisely because that last clause was in the last paragraph.

Chairman Endo: Ms. Lovell, if you don't mind, I'd like to ask you a question.

Ms. Lovell: Sure.

Chairman Endo: If – so are you saying that – okay, just hypothetically, if title was clear on all of these LCAs so there's no question as to who the owners were, and say they were all just one owner, the owner that, whatever, of the larger encompassing piece, then you read the decision to mean that then all the LCAs would've been consolidated, and that Judge McConnell would not have granted – would not have proposed this

decision as he's proposed it?

Ms. Lovell: Well, I think that's true, yeah. If you read the decision in its entirety, you see that Judge McConnell placed very great weight on the fact that the subdivision was approved without ironclad title in the subdivider, and that that was what caused the whole controversy in the first place.

Chairman Endo: Is there agreement on that, Mr. Mancini? Okay, I'd like to hear both sides just for context.

Ms. Lovell: Sure, of course not. I mean, of course.

Chairman Endo: Okay.

Mr. Mancini: I don't believe the title to the question – to the LCA is the question. The question was, do they exist as separate lots? And we had testimony at the hearing from—if you review the transcript—from Title Guaranty, and John Jovetski of Title Guaranty submitted a declaration most of which is contained on pages 11 and 12 as the correct procedures that should've been taken on the subdivision. If a land commission award exists, it is a lot of record. You need the consent of those owners to subdivide. There are many owners involved in them at the time this went through. And of course, you can't subdivide the property and consolidate them. The other issue, of course, it was always a condition on this subdivision that it be processed and not lose the LCAs on it. But I think the Judge's decision was the fact that it was wrong to say there were no LCAs. The title report shows that the LCAs there, they existed. The correct procedure would've been to exclude the LCAs from the subdivision which is the normal procedure. You just create exclusions 1 through 24 so they exist as they are. And if you don't have that exclusion, then you need the consent of all the owners to consolidate them. And there was no consent by owners to consolidate. I think it has to be a clear – the owners of the property have to clearly consent to the consolidation. One, all the owners weren't there. And the owner that represented the subdivider, Mr. Chumbley, made it clear, a hundred percent clear: we don't agree to consolidate any of these LCAs. So that's how we may differ on that. I guess we may agree upon the result. How he got there, we may differ.

Ms. Lovell: If I could just say one more . . . (inaudible) . . .

Chairman Endo: Sure.

Ms. Lovell: Not to drag this out too much, but you know, it turns out that Wailuku Agribusiness and Mr. Chumbley were not the actual subdividers. The property was in their name, but unfortunately, the actual subdivision process was carried out by the Department of Education who according to the evidence that was presented and is

reflected in Judge McConnell's proposed findings did not follow what Mr. Chumbley says were his instructions. So there is an unfortunate series of errors that happened, but the practical situation is that it's not easy now to go back and completely undo the subdivision. I mean, the school playground is on one of the subdivided parcels. So that is – that's just our practical concern. And in Judge McConnell's proposed findings in finding a Fact 34, 35, 36, 37, 40, 41, 42, and so forth, Judge McConnell goes through an analysis of what the County should have done with respect to making sure that there was clear title before proceeding with the subdivision. And the County actually doesn't contest that. We might've stated it a little differently than he did, but we don't really feel that we have the legal grounds to attack that. So then that being the case, as a practical matter, how do you remedy it? And that is where my practical side says sit down and work out some kind of agreement with the new landowner that both sides can live with.

Chairman Endo: I can see how your perspective would be that that might be a good way, but from my perspective, from the Board's perspective, I wonder if – you know, we spent all this money to pay for a Hearings Officer. Wouldn't be better to actually finish it up and have something in the record, an actual order from the BVA that would then have more value going forward to guide the County rather than just a settlement, and then everything disappears? Or do you think either way, it doesn't matter?

Ms. Lovell: Well, I don't know if it matters or not in that there may very well be other cases in which subdivisions have been improperly done without full and clear title. I think definitely going forward, the County particularly having learned from this case is gonna be a lot more strict about requiring people who come for a subdivision to prove they have clear title. And if they can't, they're not gonna get their subdivision. But – so, you know, this was a strange string of circumstances. There was the Department of Education apparently, not following Mr. Chumbley's instructions. There was a subdivision map that was prepared by – I don't know if it's discussed in the evidence or not, but there was a subdivision map that did come into evidence that did exclude all these separate lots, but unfortunately, that was not the subdivision map that was presented by the Department of Education to the County for approval. So, you know, whether this string of circumstances would come up again, I would hope not, but certainly, no promises.

Chairman Endo: Okay, Board, you folks have any questions? Warren?

Mr. Warren Shibuya: Mr. Chair, I do have some concerns here. And of course, I did want to make comment that perhaps maybe this case would be a good stepping stone or landmark case in which it would be for the County to take heed in terms of, as Ms. Lovell had mentioned, to use this as an example. And I just don't want to come down too heavy on the County, too. I just want fairness involved. And yet, we learn through our process and we refine our processes to be better in the years to come. And that's

the whole intent. And if we agree with what was proposed, then would this data or would this recommendation from the Hearings Officer vaporize? Would it be part of the record? I'm not too sure. Maybe counsel can guide me on this because I'm in favor of insuring because this is a key case, I would like to have this on the record, and that we can use this for lessons learned for the County, and we can go forward with it.

Chairman Endo: Well, this would be on the record as a proposed findings from the Hearings Officer.

Mr. Michael Hopper: Right, but if it's never actually adopted by the Board, it would really have no weight because you're under your discretion right now to modify that in any way that you so choose, or to, you know, to uphold it or not. You could have the parties – I don't know if they wanted to – if there was any interest in them agreeing to other language in the proposed findings and conclusions. It sounds like one party feels that they're adequate, and another feels that they are insufficient. But there would be the issue of – if you're concerned with a precedent, I'm not certain that a – you know, a proposed findings and conclusions without being adopted would necessarily carry much weight. Frankly, I'm not sure of how precedent would actually work before the Board because the Board changes, and there's obviously facts of different cases. I mean, knowing what the Judge's proposed findings would perhaps provide guidance to parties in the future, but I don't see how the proposed findings and conclusions would necessarily be very – of much weight if they're not adopted by the Board in the end. That's sort of my take on it because, you know, the – your rules are very clear that unless there's Board action, you can basically – it basically states that you may – you can even reopen the docket, take additional testimony, and may make other disposition of the case that is necessary under the circumstances. So without there actually being an adopted set, I'm not sure that you actually have anything that would necessarily provide much weight to future parties. That's sort of my take on it. It all depends on, you know, the parties in the future. I imagine the County now would, you know, obviously knows that if it – how to proceed, and the likelihood is if they don't this due diligence before subdivision, they would, you know, potentially have problems. But absent an actual adoption of the decision, I don't see how much weight you would actually have on those findings.

Chairman Endo: Other questions from the Board? Okay, so, at this point, we are – we can take action on the proposed findings. Or we could defer the whole thing to another meeting when Judge McConnell could be here. Or we could do–? Did you have one or two proposed courses of actions?

Mr. Mancini: The third one . . . (inaudible) . . .

Chairman Endo: Could you please speak into the mic?

Mr. Mancini: I'm sorry. I'm sorry. The third proposal that I had was that you adopt it, have your attorney convert it into a document from the Board. Right now, it's not a document from the Board. And then, distribute it to the parties at that time. And then when you're ready to come back to sign it that Judge McConnell could be here, and we could – anybody could voice any objections they had. At least then we have your document before us. Right now we don't have that.

Mr. Shibuya: And in the meantime, you'll be agreeing to meet with Mr. Ueno and Ms. Lovell, too, I guess.

Mr. Mancini: That's a correct statement, yes.

Mr. Shibuya: Right?

Mr. Mancini: Yes.

Mr. Shibuya: Yes. Thank you. And the meeting – the purpose of that meeting would be to identify separate lots so it determines separate lots? Is that—? And to refine—?

Ms. Lovell: Yeah, I think the purpose of the meeting is, first of all, just to find out what the present owner needs and wants. He may want 24 separate lots. He may have something specific in mind. He may only want, you know, two or three. Or maybe he wants some road easements or whatever. At this point, we just don't know what his intentions are. Perhaps he doesn't either, but we thought we could sit down and at least try to see if there was some way that we could have a practical resolution.

Mr. Shibuya: Perfect. Perfect. We're thinking on the same wavelength here. Thank you.

Chairman Endo: Yes, Hari?

Mr. Harjinder Ajmani: Yes, I'm a little bit confused about this whole process, but I want to see if you can – wonder if you can explain to me what's happening. I have two basic questions. One is that when Judge McConnell said "subject to the orders of the Second Circuit Court," if he was here I would've asked him what other possible action they can take, and what would be the implications of various actions he will take on this one. Maybe you can enlighten me on that?

Mr. Mancini: Obviously, I can't speak for Judge McConnell, but I think as the Chairman said, the Second Circuit Court has jurisdiction over these issues, so whatever they do, they do. And if somehow that order of the Second Circuit Court was inconsistent, it would have jurisdiction. I think that's the way I interpret it. I don't think there's any inconsistency what I now I know of the record of the Second Circuit Court, but when we

had the hearing, I believe there may have been ten LCAs that basically were still subject to the actions there. Now I understand there's only three left which haven't been – the title hasn't been determined. But I'm told the LCAs themselves have been determined to exist in the Second Circuit Court, but again, that's not in the record. Let me make that clear. That's not in the record now. That's what I've learned since I've got this.

Mr. Ajmani: . . . (inaudible) . . . the Second Circuit Court determines that one of the titles is – somebody who holds the LCA does have legal title, or he has some legal stay in this property, this subdivision, that has already happened, then there could be another course of action by this other type– Am I incorrect or–?

Mr. Mancini: No, the purpose of the action was to remove the LCAs from the subdivision so they weren't part of the subdivision, so they were excluded from the subdivision. That was the whole purpose. The County's action was to consolidate them. The County said these lots, the 24 lots, no longer exist. They were consolidated into Lot B-1 and B-2. That was what we objected to. We're saying that's not possible. These are separate lots owned by different people and they couldn't do that. The Judge agreed with that that you couldn't consolidate those into lots based upon the evidence. So those lots exist, and they were not consolidated.

Mr. Ajmani: But were they the ownership of Lot B-2?

Mr. Mancini: Well, the ownership of one lot goes to the State of Hawai'i. The State of Hawai'i, Department of Education, took one lot for developing their school playground. It's the second lot that we're talking about that has these LCAs.

Mr. Ajmani: So the first lot does not have any disputes?

Mr. Mancini: No, they – the second – the lot went to the State. Basically they got good title insurance or they wouldn't have taken it.

Mr. Ajmani: Thank you.

Mancini: You're welcome.

Chairman Endo: Well, I think from my perspective, since there are these issues that we've been discussing, and there's sort of an interesting – still a difference of opinion between the counsels on the point of whether or not the order would be the same even if they were no quiet title issue, to me, that raises the point – well, that's something we would ask Judge McConnell. So we should just defer, and then we should also ask the parties or somebody to convey our question to Judge McConnell so maybe he could prepare in advance before he comes to our meeting. Tell him that we would like him to clarify it and supplement his findings so that it'll be clearer for us. And then we can

make a ruling. That would – that's how I think we should do it.

Mr. Ajmani: I think I agree.

Mr. William Kamai: When is this ruling gonna be determined in the Second Circuit Court?

Ms. Lovell: As I mentioned, the County is in one action, but not in the other. And I don't know why Mr. Leuteneker divided it up into two lawsuits. But in the one where the County is still a party, we continue to get notice. And I think that is the action in which all of the titles have not yet been quieted. They've been kind of chipping away at them, you know, filing motions, and clearing title, you know, one parcel at a time. But it's still – all I can tell you, Commissioner, is that it's on – it's just ongoing. And these things take – can take a couple of years, unfortunately.

Chairman Endo: How long has it been going on so far?

Ms. Lovell: I think it's been a couple of years. And, you know, I think that's – it's difficult and expensive to clear title. And I think in the past perhaps the County's practices were maybe a little too loose in that regard. They would let people come in and subdivide without ironclad proof that there was consent of all of the parties. And I think that was one of Judge McConnell's major concerns. He didn't want a subdivision to somehow affect the rights of parties who had nothing to do with the subdivision who never agreed to the subdivision. At the end of the day, maybe there are no such parties. At the end of the day, maybe the Second Circuit Court will decide that the title is clear and that these claimants who have come in don't have a claim and, you know, that would be one circumstance. On the other hand, the court could determine that some of the claimants do have, you know, a good claim. And that's the point at which, gee, then we'd have to sort of undo the subdivision as to those people or whatever. I mean, clearly, we can't subdivide someone's property if they don't even know about it and don't consent to it. So that's kind of the underlying issue. And I would tend to agree that that is something to ask Judge McConnell about what he meant because as I read his proposed decision, he was very much influenced by the fact that there are claimants to some of these land titles who didn't get notice of the subdivision, didn't give their authority, and yet were affected by it. If that's not what he meant, then I'm reading his decision incorrectly. The County can live with his decision in that regard, if it means what we think it means, but if he had something else in mind, then I guess we should know about it, because then we might want to say, no, no, no, now we protest. Now, we aren't sure what you mean, or we don't agree with that, or we wanna take it to the next level.

Chairman Endo: Yes, Kathleen?

Ms. Kathleen Acks: Do we have any time constraints on making a decision?

Chairman Endo: Corporation Counsel?

Mr. Hopper: I don't see any post hearing time constraints where there's time periods for filing exceptions which apparently have lapsed. And I can take another second look at it, but it basically states that if no statement or exceptions is filed as herein provided, which is the case, the Board will proceed to reverse, modify, or adopt the recommendations of the Hearing Officer. So that's what I see, and they don't attach a date to that. I'll take another quick look here and see if there's anything else, but that's the provision I think we're under, and I don't think there's a period of time. I think if the parties stipulate to do this, though, then I think any time period that would exist, if there is any, that we wouldn't have any problem as long as the parties stipulated to continue in this fashion.

Ms. Lovell: My understanding from another case, which you may be thinking of, is that in a contested case, the time limits do not apply that would apply to other matter such as a variance. There's that – you know, if you don't proceed in a timely fashion on – to decide a variance, then it's deemed approved, but that – or a permit. I'm not even sure a variance is a good thing, but some kind of building permit or something like that, it will be deemed approved if it's not acted on promptly, but there's a specific exemption in, I think, it's 91-14 or 91-13.5 for contested cases, and this was a contested case.

Ms. Acks: Okay.

Mr. Shibuya: Mr. Chair, I'm of the opinion, and maybe you can tell me how – or shoot me down in terms of this proposal: I would like to accept the Hearings Officer's findings of fact. And just to accept, not necessarily approve it, but accept it, and also begin as a Board, serve the findings to all parties, and then allow the parties to start meeting with Mr. Winn, and Mr. Ueno, Mr. Mancini, and Ms. Lovell to meet, and to come to some agreement and understanding as to how Mr. Winn would like to proceed. And during that time, I think we would have a better feel so when Mr. – Judge McConnell returns that we'll have a better fix as to where we proceed. I think this is a better way to go.

Chairman Endo: I'm gonna let Hari ask a question in a second, but just to say two cents on that: I'm not sure that there's a distinction – or you would have to define by what you mean by "accept" as opposed to "adopt." Adopt has a clear, legal meaning. We're adopting the findings either as is or modified to – did you say "accept"?

Mr. Shibuya: Yes.

Chairman Endo: To accept it, I'm not sure that doesn't have any particular box to fit in under the rules.

Mr. Hopper: I'm sort of unclear. If you're going to wait for further clarification of the

decision why you would take action to either adopt or accept. I'm not – I know that Mr. Mancini had mentioned that type of action. I'm not sure exactly how that would assist in moving the case along if the final wording of the findings and conclusions would change. I would, you know, want you to be cautioned about using that language and having any sort of perception that this is the final decision because clearly, that's not your intention. I mean, it's not your intention if you plan on the wording to change. So I'm not exactly sure where you would be. You're almost talking about parliamentary rules at this point. Adopting would mean that, yes, you find this as your, you know, as your findings and conclusions. You know, accepting them, I'm not sure if there's really much of a distinction in between that. So, I mean, you could defer subject to further, you know, wording unless Mr. Mancini has an alternative proposal or, you know, maybe a compelling reason why he would want you to take action today to help speed the process along on how that would assist.

Mr. Shibuya: Well, I'm more in – since I brought up the word “accepting,” I was more in terms of receiving, accepting as receiving the Judge McConnell's decision and findings, not so much as this Board approving it. When you accept it, it's just to receive it, and you publish it, and you share it with all the parties not so much as adopting it. Adopting it would have the implication of being approved. This Board would not be approving it by any means of–

Mr. Hopper: The decision has been filed with the Board and it's available to all parties. I mean, technically, it is part of the public record although not a final decision at this point. Is there something–? Unless there's an issue that I'm missing here, but I believe it's been filed. And the only other action you would need to take now is whether to adopt it or to alter it in some manner.

Chairman Endo: Okay, Member Ajmani?

Mr. Ajmani: Thank you. I have a question for Ms. Lovell. Ms. Lovell, you mentioned that you were trying to work out some kind of agreement with the owner and Mr. Mancini and so on. And I'm puzzled by the – that an agreement could be possible. It would be like how many lots there's gonna be after this? Or these easements and lots can be used . . . (inaudible) . . . again or–?

Ms. Lovell: Yes, something along those lines. You see at this point, we don't really know what the landowner's intention for his property is. Perhaps he doesn't know either, in which case we'll both be in the dark. But if he says, look, I need – I have this proposal in mind, and I need ten lots, or I need 25 lots, or I need a road here, or I intend to further subdivide, or I don't intend to further subdivide, if he wants to leave it in ag, which it is now, there would be only certain lot potential that he would have because of our ag ordinance. If his intention is to come in and try to urbanize the property, then, you know, he would be able to do other things. So at this point really I'm trying to work

out a practical solution to this conundrum because we cannot practically undo the subdivision which under other circumstances I think maybe would've been the better way to go. We don't even know where we are until we sit down and have that conversation. Now, if the landowner doesn't have a clear idea yet what he wants to do, then I guess that solution I'm proposing isn't going to work, but he might. He might have a very clear road map in mind of what his intentions are for the property. And in that case, maybe we can say, okay, you need ten lots. We can recognize these ten lots. And, you know, then we'll have a resolution.

Mr. Ajmani: So I think – my thinking on this is that that could have some implication in what Judge McConnell has to say about it, and how much the Second Circuit Court will agree to what the County and the new owner may come to agree with and so on. So I think, in my opinion, I think we should – I would prefer this to be – the whole matter to be discussed in front of Judge McConnell before we do something.

Chairman Endo: Kathleen?

Ms. Acks: Yeah, I would agree. I would prefer deferring. I think there's too many unanswered questions and some things that are still ambiguous. And I think making a decision today and then having to do undo the decision is very, very difficult. I'd rather defer it until we hear how Judge McConnell felt so that there's no ambiguity or confusion.

Chairman Endo: Okay, any motions?

Ms. Acks: I'll move to defer.

Mr. Ajmani: Second.

Chairman Endo: Okay, it's been moved and seconded to defer this matter. Discussion?

Mr. Ajmani: Yeah, I think I want to add one comment is that I think this will also give us the benefit of having some information as to what you have discussed and what kind of things County and the other counsels are looking into. So we'll have more information to work on.

Ms. Acks: And I did have the impression that conversation's continuing and so on and so forth. So I don't think a decision today to defer is gonna stop that conversation from continuing. And it might even invite more rapid conversation if we defer.

Chairman Endo: Okay. Further discussion? The parties wanna comment on any of the dates, or should we just defer in general? You guys can work out a date with the Planning staff.

Mr. Mancini: What I'd suggest with regard to a date is we check with Judge McConnell so we don't have that problem once again. And we let the staff of the Board know when he's available 'cause that--

Chairman Endo: Yeah, we'll consider the motion to be that, if there's no objection. Seeing none, that's sort of the motion as clarified. Any further discussion? Seeing none, all those in favor of the motion, please say aye. Oppose?

It was moved by Ms. Acks, seconded by Mr. Ajmani, then unanimously

VOTED: To defer action on this matter as clarified.

**(Assenting: K. Acks, H. Ajmani, W. Kamai, S. Castro, Sr., and
W. Shibuya.)**

(Excused: R. Ball Phillips, U. Schulz, and J. Shefte.)

Chairman Endo: **Okay, the motion is approved unanimously and we will defer this matter.**

Mr. Mancini: Randy, one question. Earlier you said you'd like Judge McConnell to respond to those questions. I was wondering whether you still did want him to do that in writing because I'd pass that on to him.

Chairman Endo: I think writing would be preferable, but if he doesn't have time, you know, he can just talk to it at the meeting.

Mr. Mancini: The two questions that I have written down here, I just want to clarify and make sure that they're clear in my mind. One is, what did he mean by "subject to the Second Circuit Court" in the last paragraph? The other one was if the ownership of the LCAs were clear, they're all clear, would that have made a difference in his decision? Did I state that correctly?

Chairman Endo: Yep.

Mr. Mancini: Thank you. Thank you for you time.

Chairman Endo: Okay, thank you. All right, any more items today, Mr. Cerizo?

- 2. TOM W. WELCH of MANCINI, WELCH & GEIGER representing DAVID Y. S. KONG, WINONA K. KONG and NONA LANI COTTAGES LLG appealing the Planning Director's order to cease operation of a transient vacation rental for property located at 455 South Kihei**

Road, Kihei, Maui, Hawai`i. (BVAA 20070011)

- a. **Appellee Jeffrey S. Hunt, Department of Planning, County of Maui's Motion to Dismiss Appeal; Memorandum in Support of Motion; Exhibits A-C; Certificate of Service**
- b. **Appellee Jeffrey S. Hunt, Director, Department of Planning, County of Maui's Appeal Hearing Memorandum; Certificate of Service**
- c. **Appellee Planning Director, County of Maui's Exhibit List; Exhibit A to L; Certificate of Service**
- d. **Appellants' Memorandum in Opposition to Appellee's Motion to Dismiss Appeal; Certificate of Service**
- e. **Appellants' Demand for Disclosure Under Rule 12-801-98; Certificate of Service**
- f. **Appellant's Memorandum of Law; Exhibit "A"; Exhibit "B"**
- g. **Certificate of Service re: Appellants' Memorandum of Law**
- h. **Appellants' Preliminary Exhibit List**
- i. **Appellants' Certificate of Service re: Appellants' Preliminary Exhibit List**

Mr. Cerizo read the agenda item into the record.

Mr. Cerizo: I had a call from the – from our Corporation Counsel, Ms. Johnston, and indicated that they are working with a settlement on this case, and asked for the case to be deferred to a later date. So until we hear from her in writing, yeah, as far as a later date, I think we'll just pass it 'til – well, we'll wait for their response in writing. So right now, it's indefinitely deferred.

Chairman Endo: And we're okay on deadlines on that one and everything, right?

Mr. Cerizo: This is an appeal. It's a contested case so–

Chairman Endo: Okay. Just for my information, though, in general, if we had gone forward with that one, did we – I don't remember seeing it before like in advance, maybe I was not at that prior meeting, but did we like know how many witnesses roughly, so we could gauge timing and how long it would take?

Mr. Cerizo: Yeah, I believe the – in the – all the documents– Let's see. No, I don't see it's shown here on the list. We just had an exhibit list and– No.

Chairman Endo: They didn't informally tell you anything, then, about how long it would take to present their cases or anything?

Mr. Cerizo: No.

Chairman Endo: You might wanna try and add that as an informal procedural item. That way we can kinda plan our meetings, you know, 'cause sometimes those things could get really long.

Mr. Cerizo: Right. Okay.

Chairman Endo: Okay. So we don't have to take action, though? That's done?

Mr. Cerizo: Yeah. So this is just a – they're requesting for a deferral.

Chairman Endo: Okay.

Mr. Shibuya: Do we need a motion to accept?

Chairman Endo: I don't think we even need a motion, do we? Do we need a motion? Okay. Yeah, it's deferred by defacto. Yeah. So the next item?

C. APPROVAL OF THE JANUARY 24, 2008 MEETING MINUTES

Chairman Endo: Okay, so we have the January 24, 2008 minutes. Everybody's gotten those and had a chance to review them.

Ms. Acks: I'll move to adopt.

Mr. Shibuya: Second.

Chairman Endo: Okay, it's been moved and seconded to adopt the January 24, 2008 meeting minutes. Any discussion? Seeing none, all those in favor, please say aye. Oppose?

It was moved by Ms. Acks, seconded by Mr. Shibuya, then unanimously

VOTED: To adopt the January 24, 2008 meeting minutes.

**(Assenting: K. Acks, H. Ajmani, W. Kamai, S. Castro, Sr., and
W. Shibuya.)**

(Excused: R. Ball Phillips, U. Schulz, and J. Shefte.)

Chairman Endo: **Okay, motion is carried. The minutes are adopted.**

D. NEXT MEETING DATE: March 13, 2008

Chairman Endo: Our next meeting is March 13?

Mr. Cerizo: Yes.

Chairman Endo: Okay. All right, any further announcements or business? Any of the members?

Mr. Cerizo: Trisha had a baby girl on the 19th and almost ten pounds. Nine pounds, almost ten. Nine pounds, 15 ounces, I believe. 1:30 in the morning.

Chairman Endo: Can we pass a resolution congratulating her?

Ms. Acks: I'll second. What's the baby's name? Oh, no, I guess—

Mr. Cerizo: Yeah, that's one of those long names. I believe it's Mishka or something like that. Mishalei? Yeah, it's a hard name to pronounce.

Mr. Stephen Castro, Sr.: When did she give birth?

Mr. Cerizo: On the 19th, 1:30 in the morning.

Chairman Endo: Okay, so now she's excused for not getting Judge McConnell's call. Okay, any further announcements or business of the Board? No? Okay, then, we are adjourned. Thank you, everybody.

E. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:28 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Warren Shibuya, Vice-Chairman
Stephen Castro, Sr.
William Kamai
Kathleen Acks
Harjinder Ajmani

Members Excused:

Rachel Ball Phillips
Uwe Schulz
James Shefte

Others:

Francis Cerizo, Staff Planner
Michael Hopper, Deputy Corporation Counsel