

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
FEBRUARY 8, 2007**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Lance Holter at approximately 1:33 p.m., Thursday, February 8, 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. MARK STEPHEN COSSLETT requesting approval of a variance from Maui County Code, §18.16.060(C) to allow a subdivision with an approximate 200-foot long right-of-way (ROW) that is less than 24 feet, whereas a 24-foot ROW is required for property located at 1115 Po`okela Road, Makawao, Maui, Hawai`i; TMK: (2) 2-4-007:017. (BVAV 20060012)**

Chair Holter: Will the staff please read the notice of public hearing and the purpose of the application?

Ms. Trisha Kapua`ala read the notice of public hearing.

Ms. Kapua`ala: Before you today, sir, is the applicant, Mark Cosslett. Representing the Department of Public Works and Waste Management is Glen Ueno, civil engineer, for DSA Engineering. And the applicant has submitted some additional information for the record and it's before you. No video, just pictures, and I'd be happy to review them with you.

Chair Holter: Could you do that, please?

Ms. Kapua`ala: Sure. The first two pictures I'm standing on Po`okela Road. The first picture is on the street facing Olinda Road. Where the County car is on the side of the – in the grass area, that area is to be dedicated to become part of the 24-foot right-of-way, and that is the applicant's property.

The second picture is exactly 180 degrees the opposite direction. That road leads into Miner Place. To the right again is the applicant's property. That fence there is the property line.

The third picture, the applicant's property, we've got two main houses here. Mark, is one of them a cottage? Is that an ohana dwelling?

Mr. Mark Cosslett: No . . . (inaudible) . . .

Ms. Kapua`ala: Two main houses? Okay. Thank you.

The fourth picture, 180 degrees on the opposite direction. And the purpose of this picture is to show where the 24 feet right-of-way dedication will be. Where that concrete, masonry wall is, is where the end of Mr. Cosslett's property will be when the subdivision is finalized.

The fifth picture at the end of Mr. Cosslett's property showing you Po`okela Road. And just a little different angle here on the sixth picture showing Mr. Cosslett's property and the main houses.

The seventh picture, I'm standing on the portion of the road or the right-of-way that was never recorded. So as you can see, the property owner put their wall where their property line is supposed to end, but we come to this unusual situation, and the variance is here before you today because this was never recorded, and now there's a hardship for the applicant. And right where that Ford truck is right about to turn onto the right-of-way, there's a red, rock wall – I mean, I'm sorry, a concrete, masonry wall. And that is one the properties affected that cannot dedicate the 24 feet right-of-way.

So eighth picture is a little closer view of that red, concrete, masonry, rock wall, which the mail boxes are sitting on top of. Get all the ti leaves– So as you can see, if they were to dedicate this land, they would have no yard area between the house–

Ninth picture, same, closer angle. And the last picture is simply to show you the amount of dwellings that they have on the property. They have a total of five. Because they didn't subdivide, and just maxed out their dwelling potential, they were not required to do the right-of-way previous to this variance application. Thank you, Board.

Chair Holter: Yes, will the applicant please come forward? State your name and speak into the mic.

Mr. Cosslett: Mark Cosslett. I'm the applicant.

Chair Holter: And would you like to agree to the staff – waiving the report and proceed with your proposal?

Mr. Cosslett: Yes, please.

Chair Holter: And so you'll present your presentation, and then we'll ask some questions, and then we'll have a discussion.

Mr. Cosslett: Okay. First of all, I'd like to augment Trisha's comments and photos with a few of mine that I'll pass around. I just have one copy, but these photos are taken from the roof of the upper house on the property. And the comments that I have, they just kind of augment what Trisha said about where the property line will be after the road-widening strip. Essentially in these photos, they'll be behind the trees that you see and in line with the end of the concrete wall. And it also indicates – it gives the contrast of the development of my property versus the development of the neighborhood. If you see these, you'll kind of see that I have a very big area–undeveloped.

Also, referring to the location map prepared as part of the application, I did density calculations along Po`okela Road, and obviously, I'm the lowest density currently, with a lot size of 39,372 square feet and two houses on it. The highest density is the 1065 which was mentioned previously, which is developed to a density of 5,366 square feet per house. So the potential there for a road-widening strip is really nonexistent.

The hardship Trisha mentioned is due to a subdivision done in 1971 whereby the subdivider awarded Maui County a road-widening strip, but for some unknown reason, it was never recorded as such with the Bureau of Conveyances. I've got that subdivision plat that clearly shows the 12,000 – no, 1,200 square feet was intended to be dedicated to the County of Maui on that three-lot subdivision, and wasn't done so. I checked with the Bureau of Conveyances, and their records don't go back that far. I did, however, research the tax records for this three-lot subdivision and the tax records for that tax map key for that private roadway. And in fact, the tax records do show a 1,200 square foot dedicated to the County of Maui on the tax record, on the original – not the Maui County site tax record, but the actual document on file with the Maui County Property Tax Department.

So essentially, these are the two items in question whereby I consider it a hardship to not be able to subdivide. My proposed subdivision is in accordance with the zoning. And we have an average lot size of 11,588 square feet. The largest lot will be about 14,000 square feet, which is above average for a Po`okela Road residential. The average lot size currently, not including the cluster houses, is 9,668 square feet. So essentially, all of Po`okela Road residential zone is already developed to a – subdivided to an R-3 zoning or an R-1 zoning, which is higher density than mine.

Also, I'd like to point out Exhibit 2 in my application whereby I indicate the 24-foot right-of-way all the way to Makawao Avenue, and the 200 feet which has already been pointed out by Trisha. The 200 feet is comprised of 100 feet of 1065 Po`okela Road which previously mentioned would not be able to provide a road-widening strip due to the fact that they wouldn't have enough yard setback, and the three-lot subdivision entitled, "John DeCosta Lots" whereby a road-widening strip was provided, but never recorded.

I'd also like to point out that I have four letters in favor from neighbors that are in favor of my subdivision. These are neighbors that are either directly across from or adjacent to my property. So I have the support of the immediate community. This represents four of six properties that are either across from, or immediately adjacent to mine. They were unable to attend, but in their absence, I asked if they would sign letters, and they did. And I have the originals here as well.

So in short, or in summary, essentially, I feel like I'm requesting the same rights and privileges as the rest of the neighborhood has already had. There's been two R-1 subdivisions that have happened on the – on my side of that bottleneck at 1065. So there's already been two subdivisions. I realize those were done in 1971; however, at that time, they did dedicate the road-widening strips.

Comments in regard to the DPWEM's statements, I'd like to point out that, in fact, if I provide the road-widening strip which if you look at that aerial photo – well, taken on top of my roof, the road width that I'll be providing will be a benefit to the community, and to the residents, and to the safety thereof because it will provide a much greater width along Po`okela Road there for emergency vehicles, for traffic.

I would like to point out also that most of the traffic flow along Po`okela Road is not due to local residents at this point. The traffic characteristics have changed such that most of the traffic flow is from people going through and bypassing Makawao Avenue. We get quite a bit of traffic flow there. So in that respect, I would be widening Po`okela Road with my road-widening strip by 20% of its length. And in that respect, there will only be one other property that doesn't provide road-widening from mine all the way to Makawao Avenue. And if that ever does, then we'll have the potential to provide sidewalks and other things mentioned here.

And also, the DPWEM mentioned Mole Road or Mole Place as being adjacent to mine. Both were, at the time, substandard 20-foot wide roads. If I provide the road-widening, the access in and out of there will be also enhanced because there'll be a greater road-widening in front of my property thereby a greater turn radius or sharper turns.

That's the extent of my comments, if I can answer any questions?

Chair Holter: Thank you. Are there any questions from the Board? Is there any discussion? Yes, Warren?

Mr. Warren Shibuya: Just a point of clarification here. So on this chart here that you have, "Form 2 - Location Map," it's a colored chart.

Mr. Cosslett: Yes.

Mr. Shibuya: Your subject property is your property, which is in yellow.

Mr. Cosslett: Yes.

Mr. Shibuya: And then there's an orange-colored one. And the orange-colored one is not what you own, but this is what's in question now whether we would – if we do allow for the 24-foot setback or easement, then that property in orange would be impacted too.

Mr. Cosslett: To clarify, on the location map, which I've taken a Google earth map and overlaid the County records with property lines, that Google earth map indicates density, and you can clearly see the lower density of my property. And the two properties indicated in orange are what are necessitating my application for a variance from the 24-foot road width. One of those two properties is a private roadway for the three-lot subdivision. And the second property is 1065 Po`okela Road that has five houses on it. It's unlikely that they will either subdivide or provide me with a road-widening strip. And I have contacted those owners to request such, but as mentioned by Trisha, they basically can't do it because of the setback that would be required if they did that.

So I'm not sure if I exactly answered your question, but whether or not they will be affected, no, I don't see them being affected by my subdivision. They're the ones that are affecting me more the other way around.

Mr. Shibuya: Because of the fact that they are at 20-foot level – I mean, width. And your subject project, you can go to 24 anyway.

Mr. Cosslett: Yes.

Mr. Shibuya: That's correct.

Mr. Cosslett: That's correct.

Mr. Shibuya: And the other parts have an impact because their structures are not set back properly, but then we would probably have to provide the variance if we do allow for the 24-foot easement.

Mr. Cosslett: I'm sorry. I don't understand the question.

Mr. Shibuya: Then we would have to address these other properties that would not be able to comply with the 24-foot easement.

Mr. Cosslett: Ultimately, to develop – like to put sidewalks in and to develop the road to

the full width, then the only one that would stand in the way of Maui County would be 1065 because Maui County already has a road-widening strip dedicated for the three-lot subdivision.

Mr. Shibuya: That's correct.

Mr. Cosslett: Yeah.

Mr. Shibuya: All the area there— And I use that road, too, by the way.

Mr. Cosslett: Okay.

Mr. Shibuya: Yeah, so I'm very familiar because we're trying to avoid using that Makawao Avenue intersection. It's a four-way stop. And sometimes you have to play chicken at that intersection, and/or ignore visual eye contacts so that you can have the right-of-way, but that's not the correct way of doing it.

Mr. Cosslett: Absolutely. So a lot of people go up around and up onto Po`okela to avoid that because it is a bit of a bottleneck down to the four-way stop.

Mr. Shibuya: That's correct. And so I understand that. And so I'm more supportive of the fact that, yes, this road should be at least 24 feet.

Mr. Cosslett: Yes, I agree. And my – I view my property as being one step closer to that. I'm providing Maui County with 20% of the length of Po`okela Road with road-widening. So that's one-fifth of the whole road I'm giving to the Maui County for future development.

Mr. Shibuya: Thank you.

Chair Holter: Any further comment? Yeah, Hari?

Mr. Harjinder Ajmani? Mr. Chair, I have a question about on this map, Mr. Cosslett, what is the – which strip of land is the one that County hasn't recorded properly, which was dedicated to the County but is not recorded?

Mr. Cosslett: Let me show you another – I'll show you the subdivision plat. That makes it a little bit more clearly. It's in the application, but let me give you the original copy. So I just provided the subdivision plat of the John DeCosta lots where it indicates the 1,200-foot, road-widening strip to be dedicated to the County of Maui as Lot 15E. The County of Maui records aren't showing it as being presently part of the County road. However, it was dedicated at that time. My investigation with the Bureau of Conveyances don't reveal why it hasn't been conveyed at this time. But I think it has

been dedicated and it's ready to be conveyed at some future date. Does that answer your question?

Mr. Ajmani: Actually, I was trying to see how it really shows up on this map. So it's this portion here?

Mr. Cosslett: No. Yes, yes, sorry. Yeah, it's the portion that's along Po`okela Road. And then the private roadway still will belong to the owners of those three lots.

Mr. Ajmani: Okay.

Mr. Cosslett: And that's shown as, I think, Lot 15D in the approved subdivision plat.

Mr. Ajmani: Okay. So then am I correct that if this portion is already part of the County, the County strip, then only this portion that cannot be reasoned with only this length of the road?

Mr. Cosslett: Yes, you are correct. That will remain the only bottleneck on Po`okela Road in the direction of Miner.

Mr. Ajmani: I see. Okay. Thank you.

Mr. Cosslett: Yes.

Chair Holter: Yeah, I have a question here. You have four letters here in support of your subdivision and your variance.

Mr. Cosslett: Yes.

Chair Holter: And I would just ask if you could please on your aerial photo that you provided us, if you could just indicate where Mr. Mizoguchi lives?

Mr. Cosslett: Okay, that – Hiroshi is adjacent to the church directly across from my property.

Chair Holter: So it's to the left side of the church?

Mr. Cosslett: Yes, onto the left side of the church.

Chair Holter: Mr. Mizoguchi. And then Mr. Souza?

Mr. Cosslett: Louis, he's – as you're looking at it, immediately to the right sharing my property line is adjacent to me.

Chair Holter: The red roof?

Mr. Cosslett: Yes. He's the farthest left where it says "R-3 Zoned, Average Lot Size Calculated as 12,954 sq. ft."

Chair Holter: And then you have Ed Lindsey?

Mr. Cosslett: Yes.

Chair Holter: And where is his house located?

Mr. Cosslett: If you look at the three-lot subdivision on the left of my property, he's the middle lot there.

Chair Holter: Where 7,262 sq. ft. is?

Mr. Cosslett: Yes, right in there sharing my property line in the middle.

Chair Holter: And then you have Chad Wooley?

Mr. Cosslett: Yes.

Chair Holter: And where's his house?

Mr. Cosslett: And he's on – in the same three-lot subdivision directly on the road there.

Chair Holter: Is there any other comments from the Board? Okay. Do we have any other letters of support or opposition to this variance, staff?

Ms. Kapua`ala: No other letters other than what was included in your staff report.

Chair Holter: Okay. Are there any other questions from the Board? We'd like to hear from the County engineer if he has any comments on the project.

Mr. Glen Ueno: My only comment would be just to make it clear, this requirement that he's trying to get a variance from, it's for a 24 feet right-of-way that leads to the subdivision, not adjacent to it. So you know the requirement to provide the road-widening lot, it's a separate requirement. And that requirement he's meeting because he's providing a road-widening lot in front of his property, if you look at his map, just to clarify.

Mr. Shibuya: He is willing to provide that, right?

Mr. Ueno: Yeah, but it's a separate requirement. This requirement that he's trying to get a variance from is for the 24-foot right-of-way for just the access to the subdivision, not adjacent to his property.

Mr. Shibuya: The access you're talking about is from Miner Road. Is that the issue?

Mr. Ueno: Either side, on either side, because one side, I think if you look at that photo, the orange outline, I think that's the bottleneck where it doesn't have the 24 feet. And on the other side, it's just all the way up until – I think it's Olinda Road, yeah.

Mr. Shibuya: What are the options for the County to correct this easement problem? Because he is willing to do the 24 feet, and his access is the problem. So how – what are some of the remedies that the County can do to fix this?

Mr. Ueno: I don't think the County can do anything. Even the subdivider doesn't have control over the access portion. The only other way like he tried to do is ask those people who needs the 24-foot access to provide him the extra right-of-way he needs, but apparently, they said no.

Mr. Shibuya: Nobody wants to give up their land.

Mr. Ueno: Right, yeah, and he has no control over that.

Mr. Shibuya: Understand.

Chair Holter: I have a question: what happened when you asked the Po`okela Church about a – what did they say?

Mr. Cosslett: I addressed Po`okela Church. I spoke with the Pastor, Kimberly Fong, and showed her this whole application, and also the mediator who is Paul Ortell, I think. He's a moderator for the church. And their comments were that they had no opposition. So I asked them if they would sign a letter to that effect in absence of their presence here today. And it subsequently went before the board, and they said, well, we really don't want to go – get involved. They didn't feel like – they're really more oriented on Olinda Road than Po`okela Road. We barely – they're barely across from me, really. We probably share about ten feet of property line where they're across the street. And so their attitude was, well, we're not opposed, and we're certainly not going to indicate that we're opposed, but they weren't able, I think, probably due to the nature of being more of a business, so to speak, than an individual, they were unable to go on record in favor either. So that's where they stand.

Chair Holter: Thank you very much. Is there any further – yeah, Hari?

Mr. Ajmani: Yeah, I'm still a little bit confused about this length of road that will be substandard or less than 24 feet wide. So, are we just talking about this one R-3 zone, five-cluster home lot, the only lot that is creating an issue here?

Mr. Cosslett: That's the only lot that stands in the way of full access to Makawao Avenue from my property for 24-foot.

Mr. Ajmani: So it's only-- I don't know what the exact width of that is. We're talking about maybe 100 feet wide?

Mr. Cosslett: That's about 100 feet. And then once again, the subdivision done on the three-lot subdivision has, in fact, dedicated the road-widening strip, and it's indicated in the landscaping in Trisha's photos. The CMU wall is clearly set back on their property line which is -- that's actually 40 feet. Yes, what you're pointing to, yeah. So you can see the road-widening strip there. There's nothing in there. It's grass. But for whatever reason, it hasn't been conveyed to Maui County yet. It doesn't show as such in tax records, but there is a road-widening strip already there. So really the real "stick-in-the-mud" as far as the 24 feet access back to Makawao Avenue for me is 1065, yeah.

Mr. Ajmani: Okay. Thank you.

Mr. Cosslett: Yeah.

Chair Holter: Warren, do you have another question?

Mr. Shibuya: Yeah, a comment, actually. Maybe I can ask the County this one. I'm looking for remedies in terms of -- see, this individual is trying to comply with the 24 feet of width on the road. And yet at the same time, his access is not available. And he's indicated that the County's maps do not reflect that 24-foot roadway. Is that correct?

Mr. Ueno: No, I think the existing right-of-way along Po`okela, a lot of it is just 20 feet wide, right?

Mr. Shibuya: Yes.

Mr. Ueno: I don't think it has anything to do with those two road-widening lots.

Mr. Shibuya: So the question is, what remedies can we seek? Because if the maps don't indicate that these -- you have the 24-foot width there, then what is available for the County to pursue to ensure that the entire Po`okela Road is 24 feet?

Mr. Ueno: You mean if the County wanted to provide that?

Mr. Shibuya: Yes.

Mr. Ueno: They would have to condemn the properties along there to get the sufficient right-of-way width.

Mr. Shibuya: And what are we talking about now? What areas would be—?

Mr. Ueno: I'm not sure if that would be possible, too. If there's existing structures close to the boundary, it may not even be possible to condemn it.

Mr. Shibuya: I know. There's some garages there.

Mr. Ueno: Yeah, it might not be practical to do that.

Mr. Shibuya: Also, there's some utilities too.

Mr. Ueno: Right.

Mr. Shibuya: The placement of the utilities also indicates that they're within the 24-foot pavement area.

Mr. Ueno: Right.

Mr. Shibuya: So it's a catch-22 situation here. I'd like to grant the request that he can continue to have this 24-foot and develop his property. And hopefully we have the County to remedy this highway – the roadway width.

Mr. Ueno: Probably based on the existing situation, I don't think the County could do anything because of the proximity of the structures and so forth.

Mr. Shibuya: Understand. But if the structures were to be remodeled or developed, then they would not be permitted to do that if they were – if the maps were so indicated that you can't make any more improvements on these existing structures. Is that a possibility?

Mr. Ueno: I'm not sure.

Mr. Cosslett: I'd like to point out, if I may, at this time, I think what you're getting at is what's the potential for actually getting a 24-foot road through here on Po`okela Road. Am I right?

Mr. Shibuya: That's correct.

Mr. Cosslett: I'm only looking in one direction. First, I'd like to point that out. Looking at the other direction towards Olinda Road becomes more onerous because there are four lots there. And going in the direction of Miner Road, there's only one. However, I do see myself as 20% – providing 20% more towards that goal. I've got 20% of Po`okela Road frontage that I'm going to give to the County moving forward towards that goal. It doesn't make that goal a reality yet, but you're right. And future developments will have to comply with the new ordinance. Most of these properties were developed for that ordinance so it's in place. So we're 20% closer to that goal. And in fact, in the direction of Miner Road, there's only 100 feet that's in between us. That we could even— I don't know. I'm not an engineer or an engineer for the County, but I would anticipate you could even develop as far as my property with a sidewalk, with a road-widening. You know, you could improve at that point all the way up to my property and onto the far side. And that would be a great enhancement, I think, for the neighborhood and the community.

Mr. Shibuya: I agree.

Mr. Cosslett: Yeah.

Mr. Shibuya: Because there's concrete wall blocks on the opposite side of the road, and people, trying to be pedestrians, have to walk on the road.

Mr. Cosslett: Yes. And if I don't get a variance, then I can develop and landscape right up to my property line, which is right at those power poles, and it just makes things worse. I may or may not, but you saw where I placed my fence. That was just because I was getting people dropping trash on my yard. But my point is, that could be a concrete wall. In which case, it only exasperates the problem. But if I get the variance, it's guaranteed that won't be a concrete wall. It would get pushed back all the way to behind the utility pads that are shown in those photos.

Mr. Shibuya: That's correct. And it allows for you to do, if you want a concrete wall, then that would be fine.

Mr. Cosslett: But it'll be further back.

Mr. Shibuya: Further back from the road. That's correct.

Mr. Cosslett: And it would be safer.

Mr. Shibuya: It's safer and it has a sidewalk access possibility.

Mr. Cosslett: Possibility in the future, and maybe even a sidewalk just along my property.

Mr. Shibuya: Absolutely.

Mr. Cosslett: And a lot of people walk their dogs back and forth. I agree. I think it will enhance public safety.

Mr. Shibuya: And I appreciate you being very forthwith, and being helpful, and I think very positive in this case. And I'm very supportive of it. But I would like to levy some kind of requirement upon the County that any more improvements or developments in this area, we would need to make improvements to this roadway to ensure that it is 24 feet.

Mr. Cosslett: And I think that might come in time, over time, as other people redevelop properties along Po`okela Road. The new requirements would be met.

Mr. Shibuya: Well, I would like to draw the line in the sand at this point using this case as the case in which we can go forward with it to improve the area.

Mr. Cosslett: I can do what I can on my property.

Mr. Shibuya: That's correct.

Mr. Cosslett: I will do everything I can.

Mr. Shibuya: And you've done all that you can and I appreciate that.

Mr. Cosslett: Okay.

Chair Holter: Kathleen?

Ms. Kathleen Acks: Yeah, I just have a question. The property in orange, which is the question of – are all of those dwellings permitted?

Mr. Cosslett: As far as I know they are. I haven't investigated 1065, but it would be my guess that those were built prior to current requirements for density and for water requirements. I think they're all on one meter, if I'm not mistaken. So five houses on 20,000 square feet isn't allowed for R-3 zoning now. So I can only assume that at some point in time it was, and it was developed for higher density than would be allowed now.

Chair Holter: Any further comment?

Ms. Acks: It just bothers me. I mean, it seems like they're getting by with questionable activity. I don't know how that can be checked. If those were not permitted, does that open up the possibility of saying this is not a permitted property? And at this point in

time, you have to fix it?

Mr. Cosslett: Yeah, I agree. It bothers me, too, when I see a property about half my size with five houses on it. However, I didn't feel like it was within my jurisdiction or really in my rights to investigate that any further. That would be up to the County.

Ms. Acks: So those properties were built you're saying prior to about 1970?

Mr. Cosslett: I think they're about the early 70s, if I'm not mistaken, yeah.

Ms. Acks: So at this point in time, they could not subdivide that property?

Mr. Cosslett: At this point in time if they did choose to subdivide, they would be subject to current zoning which would allow one house per 10,000 square feet. And so, of course, they have no incentive to do that because they have five houses right now. Having said that, the houses are all dilapidated. And at some point time I do believe the land value will increase the developed value of that property. Somebody will probably come around – along and subdivide it. So there is hope there.

Ms. Acks: How many properties are there? You've got a big orange rectangle.

Mr. Cosslett: Po`okela Church.

Ms. Acks: No, no, no.

Mr. Cosslett: No?

Ms. Acks: No, where it says, "R-3 Zoned - 5 Cluster Houses?"

Mr. Cosslett: Yes? Yes, okay, sorry.

Ms. Acks: And then next to it you have an orange kind of a L-shaped piece?

Mr. Cosslett: Yeah.

Ms. Acks: What's outside of that orange area that's bounded by white where it says, "R-1 Zoned - Calculated as . . . ?"

Mr. Cosslett: Those are single family homes with one house on each lot, R-1 zoned.

Ms. Acks: And those are the 7,262?

Mr. Cosslett: They average in lot size, yeah.

Ms. Acks: What is that orange L-shaped piece?

Mr. Cosslett: That's the private roadway that was created in order to subdivide those lots. And as such in the John DeCosta lots' final subdivision plat, it also shows a further detail which is a road-widening strip. When you do a three-lot subdivision like that, you need to do a private roadway to access your lots. And at the same time, you need to dedicate, if you don't have the road width, a road-widening strip, to the County of Maui. So basically, one of the two things happened. And the second didn't fall for whatever reason. Although as mentioned, the landscaping and the CMU wall of that first house indicates that they're clear that that is not their property.

Ms. Acks: So the front part of the L-shaped piece, could that be part of the roadway?

Mr. Cosslett: Absolutely. It would only need to be recorded as such.

Ms. Acks: So then the only problem would be at that R-3 zone cluster property?

Mr. Cosslett: Yes.

Ms. Acks: And the problem there is the house closest to the road would be too close to the road if they gave up the four--?

Mr. Cosslett: I believe so. That was Trisha's observation. Do you have comments?

Mr. Ueno: No.

Mr. Cosslett: Okay. I believe so. I haven't actually gone in his private property. It's their property. I haven't measured their setbacks, but it appears that that first house maybe too close. And certainly, they wouldn't be allowed five houses if they subdivided. So they really don't have an incentive--

Ms. Acks: I guess what I'm wondering is if they did the same thing you are, allowing that easement, so to speak, at least that would go more towards being a good neighbor than not doing that particular thing.

Mr. Cosslett: Yes. When I first bought the property, I approached them about doing that. And I approached them in a very neighborly fashion. And for whatever reason, I was treated in an adversarial way. I asked can we even meet and I'll discuss what I'm thinking of doing here. And they said, no, we don't want to meet with you. So I kind of hit a road block. I think I -- well, they were one of the-- I sent out requests prior to my application, which there's an affidavit of mailing in there. Every single property along Po`okela Road that could provide road-widening, including the church and all the others, I requested road-widening. I was declined by all and I didn't really necessarily expect

people to jump up and say, sure, but this one specifically, I tried harder on the onset and got just kind of the cold shoulder, so to speak.

Ms. Acks: I guess I'm just looking at this as something that looks like it's iffy in the first place. And I'm wondering if the County could approach them and say, there might be some potential problem and by dedicating that land over to allow the 24 feet – I don't know.

Mr. Cosslett: I think there might be something there. I see the real future in possibly making – improving all of Po`okela Road for the County. I see the future when the redevelopment comes because I think it will in time as these somewhat dilapidated properties becomes older, then somebody will come and probably redevelop it. And at that point in time, I think that would be the time to award it.

Chair Holter: Hari?

Mr. Ajmani: Yes, I have one other question about the same R-3 zoned, five-cluster property. I'm trying to compare your picture which shows some kind of structure right next to that orange boundary line. It's very close. And then there's a picture that Trish took. It shows the house a little bit set back away from the road. And there's this red wall that is indented, fire hydrant, and so on. Is this red wall–? What is the distance between this outside of the red wall to the other wall across the street?

Mr. Cosslett: Per Exhibit 2, page two, it's 21'-2". And there's a good photo of that in the application. That's really the narrow point. And if there's – there is a point that's most unsafe, so to speak, along the road, that would be it because there are CMU walls on both sides, and there's 21'-2". I have measured that.

Mr. Ajmani: So if this red wall is 21'-2", if this is made continuous with the indented portion, then will it clear 24 feet clearance?

Mr. Cosslett: That's a good question. I honestly don't know. And it raised the question – and I don't know the County codes as well as anybody here probably, but when I saw that fire hydrant there indented, it raised the question in my mind, okay, was that once or it still Maui County property? Or are fire hydrants placed on private property because the fire hydrant is clearly indented there?

Mr. Ajmani: You know what I'm saying? Is that–? You know that, for example, if this red wall that is shown on Trisha's picture, this is more than a couple of feet inside. And it looks like there's plenty space between this wall and the house, and that will make it 24 feet. See this picture?

Mr. Cosslett: Yes.

Mr. Ajmani: So I think there is an indentation over here that – where the fire hydrant is. If this wall is moved here, it will give you 24 feet and–

Mr. Shibuya: That is correct. And in Exhibit 2 on page two, you can see it from a different angle. And it appears that, yes, they could. It looks like an encroachment by that owner.

Mr. Ajmani: That's right.

Mr. Shibuya: Already. There is an encroachment that exists. So that needs to be remedied.

Mr. Ajmani: That's what I think too.

Mr. Shibuya: Yes. And that's why I asked the County what kind of remedies can we have to ensure that Po`okela Road can be maintained with the 24-foot. It has that capability. It appears as though, but it just needs to be enforced. And I applaud the Appellant here coming in with a variance. It's only the access because of these kinds of problems. It's problems that he did not create. And he's willing to go the 24 feet.

Mr. Ajmani: So do you have any knowledge when this red wall was built?

Mr. Cosslett: I can only say it was built at the same time as the houses, but I don't know that for sure.

Chair Holter: Uwe, do you have a question?

Mr. Uwe Schulz: Yeah, I suppose we cannot make – if we give approval to this application, we cannot make a condition that this wall be painted a different color?

Chair Holter: Is that a complaint to the Zoning Department?

Mr. Ajmani: My question is that how can we determine whether this wall is built on the County property or not? Is there some way to find that out, staff?

Mr. Aaron Shinmoto: I guess the Board could make a request to the Public Works Department. They have a survey crew to actually go out and survey, but that's not a high priority item for them. It's going to be as time permits.

Mr. Ajmani: I think to me that's the simplest solution. If we can find that out, that will make it very clear whether we have an issue here or not.

Mr. Shibuya: Yeah, I'm of the opinion that we can go ahead and approve the variance

with the condition that – and also the County’s responsibility of surveying and ensuring that they have this access.

Chair Holter: That there are no encroachments in the County property?

Mr. Shibuya: That’s correct.

Mr. Cosslett: I agree. However, I do believe that property is encroaching, so that probably won’t get me that far. I don’t– I can show you why. If I can show you another exhibit? It’s not submitted, but just casually.

Ms. Acks: Did you say you felt they were encroaching or were not encroaching?

Mr. Cosslett: I think they are.

Ms. Acks; You think they are.

Mr. Cosslett: And I’ll show you why.

Chair Holter: Just a moment. Just a moment. Trish? Can you speak into the mic., please, your mic.? It’s in your hand right there. Turn it on.

Mr. Cosslett: Sorry. So if you look at this map which is from old County records, you see my property clearly sticks out into the road. And you can see how this road-widening strip that was dedicated lines up with a 24-foot road, and you can see how this sticks out. So my anticipation without – in absence of a survey is that this will not – this will still encroach. They do, in fact, by virtue of not ever subdividing, own that all the way out to there.

Chair Holter: So are you saying that the road-widening strip includes all of the frontage of that entire parcel?

Mr. Cosslett: It would need to, yes, the whole frontage.

Chair Holter: Do you think the old road-widening strip that was dedicated included that?

Mr. Cosslett: No.

Chair Holter: Just this parcel?

Mr. Cosslett: Because this was for a three-lot subdivision. They included – these three lots have nothing to do with this.

Chair Holter: Okay.

Mr. Shibuya: The space for this easement is available on this one.

Chair Holter: Yeah, that was the parcel that wasn't – that was asked for in the subdivision, but had never apparently, been dedicated–this area here.

Mr. Cosslett: And that's indicated in this photo. It's got 33 feet from the CMU wall opposite. So I think my guess is that if we did survey it that we would find out that, in fact, they are not encroaching with that wall.

Mr. Shibuya: And it's just the 1065 Po`okela Road address?

Mr. Cosslett: Correct.

Mr. Shibuya: The problem there is because they have the CMU wall there. And it just makes everything so restricted – constricted, if you want to call it that. And that's where the problem is in terms of access.

Mr. Cosslett: Agreed.

Mr. Ajmani: I think looking at this Exhibit 2, it appears to me that this red wall that is near the road on the far end of this picture and where the trash can is, it's sort of indented in. And perhaps the indented wall might be the actual property line.

Mr. Shibuya: I agree.

Mr. Ajmani: So if that is the case then there will be easily 24 feet possible for the roadway there. Although the fire hydrant may a little stick into it, but I think it still will be better than what we have now.

So I think I have two questions here. One is that, if the County does find out that this wall is encroached, what are the County's options in terms of enforcement of that and whether they have the kind of budget to fix this encroachment if there is one or not?

Mr. Shinmoto: That issue is handled by a different department and a different division from Mr. Ueno here. So we're not able to answer that question.

Mr. Ajmani: Okay, then I'll just break this two things into one is that if the County were asked to check the encroachment, and the encroachment were found to be existing there, would you be willing to pay the expense of demolishing the wall, and putting the wall back, or can that be done?

Ms. Acks: I don't think that's fair.

Mr. Shibuya: Yeah, I think the owner of 1065 should be responsible for breaking it down or making it correct, not the proposed variance applicant. The variance applicant has provided the 24-foot easement, I think, is more than sufficient.

Mr. Ajmani: I agree with that, but I think the thing is, if that doesn't happen, then there's no 24 feet for the entire roadway. And they could easily delay it if the County has to do it. So I don't know how that fits into your plans.

Mr. Cosslett: Essentially, that's why I'm here today. That's why I'm asking for the variance. If I thought I could prove the 24 feet with a survey, I would do it, and then we'd be done. We wouldn't be having the hearing. So it doesn't accomplish much to do that and make it contingent upon a survey.

Mr. Ajmani: Okay.

Ms. Acks: Would there be a way of taking a look at the County requesting that that be taken care of in lieu of the potential of having the property condemned? I mean, if you think that the property might be condemned, you might be willing to be a little bit more willing to do the right thing.

Mr. Shibuya: That's correct.

Chair Holter: I think the Board could issue a request that the County look into the encroachment. And then it's up to the Zoning Department issuing a notice, but I think it's not involved with his variance. So I think we want to separate his variance request from our Board's request.

Mr. Ajmani: I agree.

Chair Holter: Uwe?

Mr. Schulz: Yeah, I just have a comment with what Warren was saying. The cluster lots, which is not conforming to the present zoning, there's no chance in hell that it will ever be changed and produced in numbers because you can circumvent the process by condominiumizing the five homes. And then you have the same as you have a subdivision. So we should not count on it that when the homes are too old, they're going to be thrown down, and then they will be rebuilt to conform to the current code. That will not happen because why would you have two homes instead of five, and income from two homes instead of five homes? And the way it's being circumvented everywhere, Launiupoko and so on, you just have two homes and that's it. And then you condominiumize and sell one off, and you don't subdivide.

Mr. Cosslett: Can I comment on that? I believe Mr. Schulz's comments to be incorrect. My understanding of the CPR process, like I said I'm no expert, but my understanding is it doesn't allow you to build a greater density or more dwellings than is allowed for the zoning, which in this case would be one house per 10,000 square feet or two houses. And before they could CPR that property even as existing, they would have to meet the requirements of the zoning. So therefore, they can't CPR. If they rebuilt, they could rebuild two houses per the zoning, and then CPR that, but they couldn't build five.

Mr. Shibuya: I'd like to hear from Member Kamai, if he can. Do you have any comments? I don't want to put you on the spot, Bill, but—

Mr. William Kamai: Too bad, you already are. Question, Trisha, the 1065, how wide is the road from that orange CMU wall to the other property across the street?

Ms. Kapua`ala: I cannot say other than I noticed in the variance application, Section 2 – I'm sorry, Section 3, the second page, he has those four pictures.

Mr. Kamai: Okay. Because I'm looking at the regulations restricting us giving approval for his variance. And in my opinion, he meets two of the five already because of the special geographic circumstances, and the comments made by Public Works regarding no. 1 where they acknowledged that it is – that the circumstances affecting or lack of minimum right-of-way is unique to a few lots, and his being one of them.

The second being no. 3, special circumstances or conditions affecting the property are not the result of previous actions pertaining to the subdivision. And again, their comments regarding no. 3, they do acknowledge again, "Therefore, the roadway system in the immediate area was not a result of a previous subdivision action on this property."

Now regarding no. 4 about the granting of a variance shall not be detrimental to the public's health, safety, or welfare, or injurious to other property in the vicinity of said property, it is what it is with 1065. And it's nothing to no fault of him or anybody on that road for that matter because of the condition of the road width regarding Lot 1065.

And you said you're going to dedicate your entire frontage to 24 feet?

Mr. Cosslett: That's correct.

Mr. Kamai: That's good enough for me, as far as three out of five reasons for granting this variance.

Chair Holter: All right. So seeing that there's no members of the public present, and we've had a good discussion here, can we have the staff's recommendation?

Mr. Ueno: We have none.

Chair Holter: All right. Any further discussion or would you like to entertain a motion?

Mr. Shibuya: I'd like to make a motion.

Chair Holter: Yes, Warren? And one idea about this motion is we should make sure that we discuss the insurance.

Ms. Kapua`ala: And also, Board members, to add on to what you . . . (inaudible) . . . that you would have to justify the remaining three criteria which Public Works adversely – or no comments – did not comment on. You have to prove all five. And we have to produce a decision and order.

Mr. Shibuya: Okay. I'd like to make a motion that we go ahead and approve this variance request. That the access route, the individual is – the developer here is proposing to have the 24 feet access roadway width available. He's providing that. And that also, that the County review other properties along Po`okela Road including 1065 to insure that the correct width is obtained or maintained for the public safety. In terms of the hold harmless agreement, it is not the problem of the variance applicant, so therefore, I'd like to waive the hold harmless one million-dollar type of insurance.

Chair Holter: Okay. So we need to go through the three, four, five – you have five criteria here now, Trish? Sorry.

Mr. Shinmoto: Mr. Shibuya's condition on the County look at the right-of-way and all that, that may be – should be a separate request because you don't want to tie it into this variance and it becomes a condition of the variance. And if it doesn't get done, he doesn't have a variance, if you so choose to approve.

Mr. Shibuya: Okay. I withdraw that portion, but I would like to put it as a comment later on, though.

Mr. Shinmoto: No, we can do that as a separate letter.

Mr. Shibuya: Okay. As a separate letter, that would be fine. Then in terms of preserving let's say no. 1, special geographical or physical circumstances are such that they are not common to all of the property areas, and is not something that the owner, the applicant, has created. These variances actually preserves for public safety and is not a hardship that was developed by the applicant. These hardships created appears as though of lack of enforcement or compliance with the ordinances that we have today. Anything else?

Chair Holter: Do we have a second?

Ms. Acks: I'll second.

Chair Holter: All right. And you covered that he didn't create this?

Mr. Shibuya: He did not create this.

Chair Holter: And it's a hardship for him to have to abide by the criteria?

Mr. Shibuya: It is a hardship for the applicant because he does not control the properties and/or the decisions of the other property owners.

Chair Holter: All right. Is there any Board discussion other than the color of the wall? All right. All those in favor of granting the variance, signify by raising your right hand.

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

VOTED: To approve the variance as discussed.

**(Assenting: W. Shibuya, K. Acks, W. Kamai, U. Schulz, and
H. Ajmani.)**

(Excused: R. Endo and S. Kamai.)

Chair Holter: We have five in favor and none against. **The variance is granted.**

Mr. Cosslett: Thank you. Thank you very much for your time.

Chair Holter: And now we have a discussion about asking the Board to – the staff to seek the – if there's actually encroachments on Po`okela Road as per Hari's request. Is that okay, Hari?

Mr. Ajmani: That's okay, yeah.

Chair Holter: And then, Uwe, I'd like to ask you to go up there tonight and paint it.

Ms. Acks: Wait a minute. Don't leave that paint color open-ended. It could get worse.

Chair Holter: How about a nice tan or green color? All right. Variance granted.

Mr. Shibuya: Staff has–

Mr. Shinmoto: I think if I recall from advice from our Corp. Counsel on previous discussions that this may require a motion from the Board to ask us to do the—

Mr. James Giroux: The letter.

Chair Holter: Yes. All right. So maybe we can – yeah, all right, let's make a motion from the Board to transmit the request from the Board to look at the – see what the encroachments are on Po`okela Road. Do we have a first?

Mr. Schulz: Yes.

Chair Holter: A second?

Mr. Ajmani: Second.

Chair Holter: Hari's second it. All right. All those in favor?

It was moved by Mr. Schulz, seconded by Mr. Ajmani, then unanimously

VOTED: To transmit the request from the Board to see what the encroachments are on Po`okela Road.

(Assenting: U. Schulz, H. Ajmani, W. Kamai, K. Acks, and W. Shibuya.)

(Excused: R. Endo and S. Alapa.)

Chair Holter: It's **unanimous** again. Week after week, unanimous. All right. So the variance on this matter is concluded.

C. COMMUNICATIONS

- 1. Discussion on sending a letter to the County Council regarding parking in Lahaina.**

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

Chair Holter: Now, I want to move into an executive meeting about this phantom parking letter that I wrote.

(The Board then went into an executive session at approximately, 2:38 p.m., and reconvened into the regular meeting at approximately, 2:48 p.m.)

D. DIRECTOR'S REPORT

1. Resignation of Board Member Shirley Alapa

Chair Holter: So we have a resignation of Shirley Alapa from Moloka`i for personal reasons.

2. Status Update on BVA's Contested Cases

Chair Holter: And now we have a status update of our cases. Is there a report on the existing cases?

Mr. Shibuya: Yes, she has it out here.

Chair Holter: Is there any discussion?

Mr. Shibuya: I do have a question on the no. 2 item, the Liloa Village Appeal. And under B it says:

Status: The Department of Planning, on behalf of the Board of Variances and Appeals, requested legal services from the Department of Corporation Counsel to represent the Board on this matter.

Did you identify Mr. Giroux, our counsel, to be our representative?

Ms. Kapua`ala: Yes.

Mr. Giroux: Trisha, was there any communication from our office as far as what they're going to do about this?

Ms. Kapua`ala: No, we haven't been assigned yet.

Mr. Giroux: Because like I stated before, I don't think they're looking at me as to do any kind of litigation, I guess, because of the way the office has been bifurcated between litigation and administration, or advice and counsel, as they like to call us. I think the last thing that I heard was that if we were going to get an attorney, it would most likely – because our head litigator is representing the Parks Department in this case that they would be looking for outside counsel to represent us to avoid any types of conflicts of interest and stuff. But I would be, as part of my duties, would be interfacing with that attorney, and trying to help out as far as making sure that your guys' position was put

forward as strong as possible.

Ms. Kapua`ala: You mean Corp. Counsel would find a private practice attorney?

Mr. Giroux: I think that was the last discussion that I heard about it. I think we need to follow up with the department to make sure that there is some movement in order to make sure that deadlines are met and filings are made.

Mr. Ajmani: I think whatever little I know about the legal proceedings, I think that is the normal way of doing things. So I think I would let the Corporate Counsel really handle this to the best of their ability instead of making any suggestions on the procedures.

Mr. Shibuya; I withdraw my request to paint the wall red.

E. NEXT MEETING DATE: February 22, 2007

Chair Holter: All right. So our next meeting, is this the Lana`i meeting?

Ms. Tremaine Balberdi: Yes.

Chair Holter: Who's going to the Lana`i meeting? Okay. All right. Meeting adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:52 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Lance Holter, Chairman
Warren Shibuya, Vice-Chairman
William Kamai
Kathleen Acks

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Harjinder Ajmani
Uwe Schulz

Members Excused:

Randall Endo
James Shefte

Others:

Aaron Shinmoto, Planning Program Administrator
Francis Cerizo, Planning Department Staff
Trisha Kapua`ala, Planning Department Staff
James Giroux, Deputy Corporation Counsel
Glen Ueno, Development Services Administration, Department of Public Works and
Waste Management