BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
APRIL 24, 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 1:30 p.m., Thursday, April 24, 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.)

Chairman Randall Endo: If there is no objection, I will act as the presiding pro-tem person conducting this meeting until the new officers are elected. Any objections? Seeing none. Before we do elections, I think we wanna just follow the agenda. So the first item is to introduce the two new members: Sandra Duvauchelle. Welcome.

Ms. Sandra Duvauchelle: Thank you.

Chairman Endo: And Kevin Tanaka. Welcome aboard. And your five-year clock will now begin.

B. ELECTION OF CHAIRPERSON AND VICE-CHAIRPERSON FOR THE 2008 - 2009 YEAR

Chairman Endo: Okay, so I think the way we should proceed – and if people have objections, they can state them now. I think what we'll do is we take nominations for Chair. And it doesn't need a second. I just brushed up on my rules–*Robert's Rules*. So anybody can make a nomination, and then we'll just have all the names out there. The first name that's nominated, we'll vote on that. If that person gets more than a majority, a majority or more, then we're done. If the person doesn't, then we move on to the next name and keep on going. I think that's pretty typical. Okay, any objections to that procedure? Seeing none. Okay. We'll take nominations.

After nominations duly made, the following were unanimously reelected:

Randall Endo to the Office of Chairperson
Warren Shibuya to the Office of Vice-Chairperson

Chairman Endo: Okay, that's it. All right. So now, should we go back and actually ask Sandra or Kevin if they wanted to say anything about themselves? Introduce themselves to the group?

Mr. Harjinder Ajmani: That would be nice.

Chairman Endo: I tell you what we'll do. We'll start from Kevin and we'll go all the way around, and we'll talk about ourselves so that you can get to know everybody. So go ahead, Kevin.

Mr. Kevin Tanaka: I'm Kevin Tanaka. I'm self-employed. Licensed landscape architect. Been on my own now for just over a year. Used to work for Chris Hart and Partners. Spent 11 years with that firm. That's it in a nutshell.

Mr. William Kamai: I'm Bill Kamai. I'm a carpenter. I came on the Board same time as Randy. I think we got about three years left, yeah?

Chairman Endo: This is the start of our third year, yeah.

Mr. Kamai: Start of our third year, yeah. Good committee.

Mr. Stephen Castro, Sr.: Steve Castro. Actually, my background is from hotel – Kapalua Bay Hotel 27 years. And this is my second term or starting of the second term. And like Bill said, it's a good committee.

Chairman Endo: My name is Randy Endo. I'm from Wailuku. I work at Maui Land and Pineapple Company. And this is the start of my third term.

Mr. Warren Shibuya: Hi. I'm Warren Shibuya. I'm retired from designing satellites and rockets for the government. And I look forward to continuing my volunteer efforts with this Board as well as with the GPAC. I'm with the General Plan Advisory Committee. Thank you.

Ms. Rachel Ball Phillips: Hi. I'm Rachel Phillips. I'm a real estate broker and a licensed general contractor. And this is my second year on the Board. And I really enjoyed working with you and look forward to this next year.

Ms. Duvauchelle: Hi. I'm Sandy Duvauchelle. I am a licensed general contractor and real estate agent. Prior to that, which is recent, I worked for Towne Realty of Hawai`i for several years as their development manager. And I'm happy to be here. Thank you.

Mr. Harjinder Ajmani: I'm Hari Ajmani. I'm a licensed mechanical engineer. I'm now retired. I live in Kula.

Chairman Endo: All right. Oh, I guess I would wanna just make a real brief remark seeing that I thought this past year went really well. We had some heated, interesting issues where people got really into it, but we all, at the same time, kept our decorum. You know, we tried to be friendly about it, not call each other names, or anything, you know, trying to keep our cool, and run an organized meeting. And we'll try to do the

same again this year. And it's a good group. Interesting stuff. Okay, so moving on. We will go to our Orientation Workshop with Trisha.

C. ORIENTATION WORKSHOP

1. **Sunshine Law**
2. **Ethics**
3. **Maui County Charter**
4. **Sexual Harassment Policy and Training**
5. **Rules of Practice and Procedure for the Board of Variances and Appeals**
6. **Area Variances**
7. **Use Variances**
8. **Appeals**
9. **Opinions**
10. **Chapter 91, Hawai`i Revised Statutes (HRS)**
11. **Chapter 92, HRS**
12. **Title 12 - Streets, Sidewalks and Public Places, Maui County Code (MCC)**
13. **Title 16 - Buildings and Construction, MCC**
14. **Title 18 - Subdivisions, MCC**
15. **Title 19 - Zoning, MCC**

Ms. Trisha Kapua`ala: Hi. I'm Trisha Kapua`ala. And I'm from the Zoning Administration and Enforcement Division. We're the Division that staff the Board, for you new members. We're gonna go a little out of order here. I'll be presenting and then James will follow and clean up anything I might mess. First of all, we have to go over the County Sexual Harassment Policy.

Mr. Aaron Shinmoto: Excuse me. This is probably a combination sexual harassment and discrimination training.

Ms. Kapua`ala: As of last year, the County Sexual Harassment Policy got incorporated into the Policy Against Discrimination. The County of Maui maintains a strict policy prohibiting unlawful discrimination, retaliation and harassment, including sexual harassment. As officers or agents of the County, members– I'm sorry. As officers or agents of the County, members of the County's boards and commissions are also covered by this policy. Harassment is a form of discrimination and is therefore prohibited.

The definition–sexual harassment means unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct, or visual display of a sexual nature

directed by an officer or an employee to another officer, employee, or a private individual. All personnel must refrain from the following: making unwelcome sexual advances, or request for sexual favors, making remarks of a sexual nature, using gender-based or sexually abusive language and sexual innuendoes, visually displaying materials of a sexual nature, physical contact of a sexual nature, and any other similar action. The County of Maui has a zero tolerance policy, and will not condone or tolerate sexual harassment in the workplace.

In filing a complaint, an individual who feels subject to sexual harassment should immediately make a complaint to his or her supervisor. For boards and commission members, you should make a complaint to your chairperson. If the chairperson is the alleged offender, the report should be made to the County's Equal Employment Opportunity Officer or EEO. The County's EEO Officer is the Director of Personnel Services.

Here are your options in filing a complaint: the Planning Director, Deputy Planning Director, Chairperson, Director of Personnel Services or the EEO Officer, Hawai`i Civil Rights Commission, Federal Equal Employment Opportunity Commission. And you are encouraged to first seek internal remedies before using outside agencies. A complaint may either be informal, which is verbal or written and unsigned; or formal, which is written and signed.

In investigating, it will be conducted in an unbiased, fair, and discrete manner. There will be all the appropriate safeguards to maintain confidentiality and protection from embarrassment that the law allows. An individual who is found after investigation to be an offender shall receive an appropriate warning or discipline. Any dsiciplinary action prior to implementation will be reviewed by the Director of Personnel Services and approved by the County's EEO Officer. There shall be no retaliation or discrimination against an individual who has made a complaint, conducted an investigation, or acted as a witness. Retaliatory conduct is illegal and constitutes a separate violation.

Sexual harassment is not the only kind of illegal harassment. Harassment based on sex, pregnancy, breast-feeding, race, color, religion, age, sexual orientation, marital status, national origin, arrest and court record, ancestry, or disability is also prohibited. And that concludes this presentation. Are there any questions? Thank goodness.

The next presentation should be very quick as well. In this quick workshop, we will cover area variances; use variances; and what you have authority over, which is Title 12, Title 16, Title 18, and Title 19.

First of all, use variances versus area variances. Area variances are generally considered to be a less serious deviation from the zoning requirements. The majority of the variances you see will be area variances. Area variances are based on practical

difficulty. Use variances are based on unnecessary hardship. And we'll go over these terms later. Use variances are generally subject to a higher level of scrutiny.

Area variances–there's a Department of Corporation Counsel memo dated September 25th, 1997, and you all have a copy of them in your binders. 'Til today, we use this memo or this opinion to analyze use and area variances.

For area variances, it outlines five criteria to consider which balances the need, the harm, and the alternative solutions. So the five criteria–how substantial is the variance in relation to the requirement. If the variance is allowed, the effect of the increased population density thus produced on available government facilities; whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created; whether the difficulty can be obviated by some method feasible for the applicant to pursue other than a variance; and finally, whether in view of the manner in which the difficult arose, and consideration of all the above factors, the interest of justice will be served by allowing the variance.

Here are – here's an example of a setback variance. This structure is located less than two feet from the property line. Same property. And this dining area is located at the zero lot line within the setback. So again, area variances are less serious deviations. It requires less scrutiny than that of use variances. The greater the deviation, the more scrutiny should be given. And these considerations are not a substitute for the three criteria as mandated by County Code. These are just – this is just guidance. And we incorporate these things into our analyses. When you receive your staff report, then you can see.

So here we go, use variances. Again, it's another Department of Corporation Counsel memo dated the same. It outlines guidance for variances from the interim zoning district. However, the department applies this opinion to all zoning districts.

The Board should determine whether a denial of a variance would result in unnecessary hardship to the property owner. Unnecessary hardship is a higher standard than that of practical difficulty which we just went over. There are three elements of unnecessary hardship. First, the land cannot yield a reasonable return if used only for purposes allowed in that zone. Secondly, the plight of the owner is due to unique circumstances and not through general conditions of the neighborhood which may reflect unreasonableness of the zoning ordinance itself. And finally, the use to be authorized will not alter the essential character of the locality. We're gonna go through this further.

So first of all, cannot yield reasonable return. You must look at the permitted uses as mandated by the zoning ordinance. This criteria is met if none of the uses would allow the landowner to get a reasonable return. And what's reasonable return? It does not mean maximum return. It means that the zoning ordinance prevents reasonable use of

the land. So it would amount to either confiscation of property or regulatory taking due to the application of the zoning ordinance. It's the applicant or landowner's burden to prove reasonable return. And here are five types of evidence to be considered according to Corporation Counsel: purchase of the property; market value; expenses for maintenance; amount of mortgage; annual income. So as you can see, it's very difficult to prove justification for a use variance. Failure to sell the property for a permitted use after vigorous effort to sell is also evidence that the land will not bring reasonable return.

Finally, due to unique circumstances–focus must be on the features of the property rather than circumstances of the landowner or the applicant. Since variances run with the land, you must focus your justification for the granting of a variance due to uniqueness of the land. Personal situations of private landowners should not be a consideration.

And will not alter the character–important to prevent a use variance which results in an intrusive, incompatible use; considers the applicant's interests, but also protects the interest of the neighboring community. And an example of the one use variance that you saw which is Pacific Bio-Diesel operating in the interim district at the Central Maui Landfill, which got approved by Council while I was on maternity.

So Maui County Code Title 12, Title 16–Building and Construction, Title 18 for Subdivisions, and Title 19 for Zoning. Again, these are the Maui County Code Titles that the Board – that you have authority over in granting variances.

Title 12–this is a comprehensive list of every chapter within Title 12: cleaning and maintaining sidewalks; streets and highways; driveways; drainageways; street lighting; landscaping; on and on.

There are four considerations that must exist to justify the granting of a variance from Title 12. First, the exception or variance desired arises from a peculiar physical condition not ordinarily found in most districts or because of a peculiarity of a business. The exception or variance desired is not against the interest, safety, convenient, and general welfare of the public. . . . (inaudible) . . . a lot for the Department of Public Works Titles. The granting of the permit for the exception or variance do not adversely affect the rights of the adjacent property owners or tenants. And the strict application of the terms of this chapter will work unnecessary hardship or practical difficulty on the property owner or tenant.

Another Department of Public Works' Title, which is Title 16, Building and Construction, which includes fire, housing, noncommercial signs, energy code, electrical code, plumbing code, building code, experimental and demonstration housing projects. What is excluded from your authority is Chapter 16.13, which goes – for commercial signs, which goes to Urban Design Review Board.

There are four considerations and the language is very similar: strict application would result in practical difficulty or unnecessary hardship; shall not be detrimental to public health, safety or welfare; the granting of the variance would not be injurious to the adjoining properties and the buildings thereon; and the granting would not – the variance would not be contrary to the purposes of this code and public interest.

Another Department of Corporation Counsel – I'm sorry – Department of Public Works' Title, which is Subdivisions, these are the chapters. Five conditions–these are the five conditions that must exist for the granting of a variance: that there are special geographic or physical circumstances affecting the property that are not common to all property in the area; that the variance is necessary for the preservation and enjoyment of a substantial right of the property – of the petitioner, and extraordinary hardship would result in the strict application – I'm sorry – strict compliance with the provisions of this title because of the special geographical or physical circumstances or conditions affecting the property. That the special geographical or physical circumstances or conditions affecting the property are not the result of previous actions pertaining to the subdivision. That the granting of a variance shall not be detrimental to the public health, safety, or welfare; or injurious to other property in the vicinity of said property. And finally, that the property has obtained appropriate zoning designation. And this only applies if the property is not in the interim district. Properties within the interim district cannot receive a variance in this way. You must follow interim zoning.

Anyways, Title 19–there are two articles. Article 1 is the interim zoning provision, and Article 2 is comprehensive zoning. By far, this is the most comprehensive title within Maui County Code. You have authority over open space, residential district, R-0 lot line, duplex district, apartment district, hotel, country town business, B-1, B-2, B-3, light industrial, heavy industrial districts, Maui Central Park, airport district, rural, agricultural, public/quasi-public, planned development, Kihei Research and Technology Park, civic improvement district which is in Napili, accessory dwelling, parking, timesharing. This is what has – where the current ruling on transient vacation rentals come from. Conditional permit; project district; historic district, which is in Lahaina. We also have one here in Wailuku where the Kaahumanu Church is and Bailey House Museum; flood hazard areas; bed and breakfasts; Lanai Project District; Koele; Manele; Kapalua; many Wailuku-Kahului project districts which is Maui Lani, Kehalani, Piihana by the mac. nut; adult entertainment activities which you must seek County Council for. Wailea 670–that just got added.

Here we go. The Board of Variances and Appeals shall comply with the General Plan and the community plan provisions of the County. The Board shall not grant an application for a variance which requests a use which does not conform to the applicable community plan designation for the subject property.

Within the interim zoning district, any action of the Board whether granting or denying

the relief applied for shall be referred to the County Council for its approval. And Council may override any action of the Board and either grant or deny relief, as the case may be, by an affirmative vote of at least five members.

Two conditions must exist to justify the granting of a variance from the interim zoning district: strict enforcement of any provision of this article would involve practical difficulty or unnecessary hardship; and desirable relief may be granted without being detrimental to the public interest, convenience, and welfare.

Comprehensive zoning provisions–in granting a variance from the comprehensive zoning ordinance, it must be due to the particular physical surroundings, shape, or topographical condition of the subject property, compliance to the provisions of this chapter would result in hardship to the owner which is not mere inconvenience or economic hardship to the applicant. So again, it must be due to the land and not circumstances of the applicant.

Here are the three conditions that must be exist to grant a variance, and you're very familiar with this. There are exceptional, unique, or unusual physical or geographical conditions existing on the subject property which is not generally prevalent in the neighborhood or surrounding area. And the use to be authorized by the variance will not alter the essential character of the neighborhood. That strict compliance with the applicable provisions of ths title would prevent reasonable use of the subject property. And finally, that the conditions creating a hardship were not the result of previous actions by the applicant.

Finally, appeals. So the Charter authorizes the Board to hear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, and building. And this also includes the Department of Water Supply. That means if there's an appeal to the Water Director or is it the Board of Water Supply that it comes to the Board–a variance and appeal, James?

Mr. Giroux: You know they just passed the Water Board Rules which would mean that the water appeals would be going now to the Board, but I have to reread the rules. I haven't seen the latest draft, but my understanding was that the department– The thing is is that in this situation, it's a very fine line because we have also taken appeals from Fire Director's decisions that affect subdivisions which is a very tricky way to get into our jurisdiction, because it's the Fire Code rule that a subdivision may or may not be in accord with, yet it is affecting the ability of the Department of Public Works to sign off on a subdivision.

Ms. Kapua`ala: So the appeal is of the Public Works Director. However–

Mr. Giroux: Yeah, for failing to give a subdivision, but based on the failure of the applicant to not meet the Fire Code. So you'll see some very strange appeals and wonder why they're here. And part of my job is to screen to make sure that you do have jurisdiction. And if our department is called to represent the subdivision or the Public Works Department, that's something that they may raise as an issue on appeal as whether or not we have jurisdiction or not. And then we would try to analyze whether or not we would actually want to take jurisdiction–if there was some alternate form of litigation that could actually take care of that issue. So it becomes tricky in appeals because then we are – the issue of jurisdiction does come up. And, you know, I advise this Board. Another attorney from my department would advise the department. And then they would get a memo, and then we would discuss that memo because the applicant would either want us to have jurisdiction because an administrative appeal is much easier than to take it Circuit Court, because some departments may not actually have an administrative way of dealing with appeals, which means that the Circuit Court would actually be the first level of appeal, which then makes it a much more expensive litigation. And that's why the Water Department for a long time did not have an appeals method and there is no administrative remedy. So actually if you didn't get a water meter, and you thought you needed a water meter, and you thought you were in line, but you didn't get it, you would have to actually sue the County, go to the Circuit Court, and then the Judge would decide it. So now the Department has actually drafted rules that allow the Water Board to actually be the appellate authority. So–

Ms. Kapua`ala: Oh, okay. So not this Board?

Mr. Giroux: Well, depending on the nature of the appeal. So that's why we have to look at the Water Board Rules and find out what's the nature of the appeal.

Ms. Kapua`ala: Okay. Thank you, James. We'll have to cross that bridge when it happens. Here are the time periods that provide by law in appeals: for subdivisions, an applicant has 15 days to appeal from the date of the decision. And everything else is 30 days: streets, sidewalks, public places, building and construction, and zoning. The Board shall conduct a contested case pursuant to Subchapters 3, 4, 5 and now 10 of your BVA Rules. The Board may act as a hearing officer or appoint a hearing officer to conduct the contested case. And the BVA Rules provide the framework for the appeal procedures which briefly includes these things: notice of hearings, transcripts, testimony, cross examination, subpoenas, oaths, motions, discovery, settlement, evidence, transcripts, briefs, arguments, oral arguments. And these are the documents you're used to seeing here. You don't see the rest because the hearing officer takes those documents, but what you're used to seeing is recommendations from the hearing officer, exceptions to that report, support, documents to that report, decision and orders, and the rules also talk about appeals to Second Circuit Court.

So Subchapter 10 which was just added last year is governs appeals of notices of

violations. And the main thing about this subchapter is that the Board conducts the contested case. Discovery is not allowed. And the purpose of all of this is to truncate the contested case process to allow for a more efficient process.

The three standards of appeal, unlike variances, the Board must only find one. They need only find one of these criteria to grant an appeal: that the subject decision or order was based on an erroneous findings of fact, material – finding of material fact or erroneously applied to the law; that the subject decision or order was arbitrary or capricious in its application; and finally, that the decision or order was a manifest of abuse of discretion.

This is the appeal process: the Board grants or denies the appeal. The appeal – the aggrieved party may appeal to the Second Circuit Court. The Second Circuit Court may affirm, remand, or reverse the decision of this Board. And the aggrieved party may then appeal to the Supreme Court.

Mr. Giroux: Trish, do you want me to expand on the–?

Ms. Kapua`ala: Of course. Sure, James.

Mr. Giroux: Let's go back to the – where it has the standards, three standards. I just wanted to touch on this because this is really important when you guys come to your fact-finding and conclusions of law that you look at the three standards. And in your discussion, you should really have these in front of you as far as a clear discussion on what level of error that if you're gonna find that a Director was in error that you look at the standard. And in your discussion kinda – you don't have to have a consensus, but at least there should be a feeling that you're within one of these ballparks. And you can be – you know, you could have like two people think that it's Standard 1, and three people think it's Standard 2, and another person thinks it's Standard 3, but this discussion really needs to be on the record because if there's an appeal from our decision, the Judge looks at our findings of facts and conclusions of law, and tries to say that, well, was this discussion had with the members? Was there something in the record that shows that it was based on this determination?

And I just want to touch on no. 1. It says that the "Subject decision or order was based on an erroneous finding of a material fact or erroneously applied to the law." And that's kind of a lot of words, but if you – something – somebody's appealing a Director's decision, okay? And then the Director have had to have made that decision based on a fact, okay? So when you're listening to the evidence, you gotta think, well, what fact was he looking at? Now, if the applicant shows you that, okay, the Director made this decision–Decision A. And it was based on this fact. And he can show you that that fact is completely erroneous. It doesn't exist. He made a decision based on the fact that the car was red. Ladies and gentlemen, I have a picture of the car–blue car. Get it?

He's wrong. He's completely wrong. He made his findings based on a material fact. He's completely wrong, folks. Now, if he can show you that, then it's based on Standard 1. Or that he erroneous applied – or erroneous applied to the law. Now in that sense that the Director says, I'm making this decision because the law says I have to da, da, da, da, da. And the applicant shows you well, no, I mean, if you read the law, it says you can do A, B, or C, and you just decided to do A. And so the law actually says you can do this, but you're telling us you can't do it. So you've misread the law. You missed – you've interpreted the law, and you're applying the law wrong. So those are the types of arguments that you have to then distinguish. Now you have to figure out, well, what's the law. What laws are they looking at? Are they looking at the Fire Code? Are they looking at the Zoning Code? Are they looking at–? What is the Director using as his reason why he denied something? And if he's clearly misapplying the law, then it's your duty to overturn it. If the applicant fails to show that, then you say, well, we're gonna deny your appeal, and we're gonna affirm the decision of the Director.

So we go to Standard No. 2. It says "That the subject decision or order was arbitrary or capricious in its application." And this is a tough one because usually Directors have to have rules when they– You know, you submit a plan or something. And now, this plan, they look under maybe their code, Title 19, and then all of a sudden, it starts getting real murky. You gotta have this, this, this, this, and this, but it doesn't say that in the code. And I think we see that a little too much in this town. You, well, you gotta have the Size 8 pipe. What do you mean? Well, you know, because it would be better, you know. And so all of a sudden you start realizing this Director has made a decision that's a little bit arbitrary. You know, why are you requiring an 8-inch pipe as opposed to a 6-inch, or a 12-inch, or a 15-inch? Oh, well, we just thought it would be better. Oh, is that so? That's when you start– When you're thinking this decision is based on willy nilly, my preference, well, where – what in your rules – can you show us in your rules where it shows it has to be this way? Can you show us in the code where it has to be this way? Can you show us any other section of the law that says it has to be this way? If not, are you just making up this rule as you look at plans? Then you start thinking it's arbitrary and capricious because there's no set standard. You don't do this every time. It's not written. And nobody in the public can follow it or make their plans in accordance to what you want because they don't know what you want until you look at it, and then you make up something that says that's what you want. That starts becoming very arbitrary, very capricious. And if the applicant can show you that, then the Director's gonna have a problem. And you get into illegal rule-making. You know, sometimes the department will say, well, it's our policy. As soon as you hear the word "policy," your ears gotta – and say, okay, is it a written policy? And did that written policy go through a public review because it's affecting the public? So if it didn't, then you're hearing illegal rule-making. And if the applicant can show you that, then you're gonna look at Standard No. 2 and say, well, is this decision arbitrary and capricious?

Standard 3, "That the decision or order was a manifest abuse of discretion." This one is

really tough. This is really tough because you've got the word "manifest" in front of "abuse" and then in front of "discretion." So it's kind of like this – what? But in order to know that you're dealing with this type of these, the Director in the law has to say he has that discretion. You'll see Public Works. They'll say the Public Works Director may reduce the size of a sidewalk if da, da, da, da, da, da. Okay, well, we look at the da, da, da, da, da, da. And we say, the Director says, you know, I'm not reducing the size of the sidewalk. But it says you can. It says you can if these factors are there, and they're there. Well, too bad. It's his discretion. He can do it if he wants to. It says he can if he finds it, but if he finds it, it doesn't mean he has to. It's his discretion. The problem comes out to when the Director decides to hold his course on that, and it's really, really unnecessary. I mean, you gotta show like there's some manifest injustice in his decision to use that discretion in that way. Oh, you know, this guy was a jerk, and, you know, I did a project with him last time, and he lied to me. And then – this project – and then he blamed me. And then, you know, oh, yeah, and this. And you're going, so this is nothing to do with the size of the sidewalk. That's pretty hard to show because most Directors are canny enough to make up some reason. Well, you know, ADA, and, oh, we're trying to follow ADA. You know, we wanna make sure that wheelchairs can get to the beach. So that's why no. 3 is really tough for the applicant to show that there's a manifest abuse of injustice. And that's why as an attorney, I would hate to have to try to show no. 3. I would, you know, come in with no. 1, no. 2, no problem. We'll make a good run at it. Come in with no. 3, you're gonna see a pretty ugly contested case because then there's going to be all kinds of accusations. But anyway, that's for you guys to figure out. Not me.

So anyway, I just wanted to point that out because it's really important that when you guys close – at the close of evidence, go into discussion, that that's the type of conversation you should be having about the record, and evidence, and the weight, and everything, because at the end of the day, by law, we will have to produce a decision and order based on this standard. And whatever happens, whether you deny it or whether you – if you deny the appeal, or you grant the appeal, the person can take that appeal, and go into Circuit Court. The winner – the loser can go into Circuit Court and have the Judge review the order, and that's basically what they're gonna be looking at. So we gotta make sure that it's solid in order to make sure that your decision is upheld in court. And I think we had the Parks' one. Yeah. And that was kinda, you know, interesting because we were trying to craft a decision, and it was complicated. So it's really important that the discussion on the record helps us, the staff and the lawyers, to draft that order in order to make sure that you guys have the best fighting chance when you – if somebody does appeal your decision to go in there, because the deference should be given to you guys. You guys are the ones who either heard the testimony, or, you know, have the expertise in the area in order to administrate the laws. So that's pretty much all I had to say in that area.

Mr. Tanaka: I have a question. Actually I have two questions, if you don't mind me

asking. You know, when you talk about the first part of the appeal and erroneous fact, you know, you made the example–red car, blue car. If that is true, but there are five other factors, this is just one out of six factors that was erroneous, is that part of – or is that it comes back anyway, and this Board reviews and then says, well, okay, yeah, we were wrong on the red and blue, but the other facts remain, so we stand by our decision and order?

Mr. Giroux: Yeah, what would happen is that at this level, you're the appellate authority right after the decision of the Director. So if the Director, you know, made a decision, and it was based on Fact 1, 2, 3, 4, and 5, and only maybe Fact 3 was erroneous, but looking at all the other factors, he would've made the same decision, then you gotta make the decision–is Fact No. 3 material? Did he weigh – was that the weight of his decision? So if he was right in all the other factors, but wrong in just one, then you gotta decide was that the main – you know, was that a material factor? Because sometimes they'll come in, and we've seen this where the Director will make a – send a letter back to the applicant and say, we're denying this because your park is using drainage. When we get into the middle of the case, the Director starts saying, well, yeah, that's what the letter said, but then when you look at the subdivision, there's a problem with the cul-de-sac. There's a problem with the amount of homes. There's a problem with the yard size. The setbacks are all wrong. And all of a sudden, there's six factors. You know, you're like, come to the end of it, you know what? They would've denied the subdivision anyway. So even if you find that, oh, wait, you could've used that drainage area as a park, okay, we'll, you know, we'll say that it was wrong in that area. But the Director still has to review in accordance to all the other laws whether or not he's going to grant the subdivision at that time. So it's only on the matter as appealed for before us that we really have jurisdiction over.

Mr. Shibuya: James, can I add a little bit more? What James is talking about let's say the color of blue or red, let's say it's a shade of violet. And we could go through the discussion as to whether it's blue or red. And these shades actually– It can be in such that we need to document. That's why we have our minutes, verbatim minutes. And the importance of it is also the record reflects our actual rationale. One person – Hari might say, well, if you look at this shade of violet in the sunlight, it has a bluish tinge, so it's more bluish in color. But if you look at it indoors, and this subject is actually for outdoors, and let's say I say that it looks more red indoor, then later on because I may be the Vice-Chair, I sign off on the decision and order, I have it changed, then I have done a capricious, arbitrary decision in changing other than the minutes. And so therefore, the Second Circuit Court, when the Judge reviews it, it's actually not the merits of our discussion, but actually, the procedures in which we followed through. And so if we didn't dot the i, or cross the t's, and we didn't do it properly, then we are aggrieved. You can correct me, James.

Mr. Giroux: Yeah, there's all – you know, all of those standards go into the review of an

appeal so that it's– The main thing is that the discussion is on the record.

Mr. Tanaka: Thank you.

Chairman Endo: Kevin, you had a second question?

Mr. Tanaka: Oh, yeah, sorry. Procedures concerning appeals, the second one–discovery is not allowed. Can you define the term "discovery?"

Ms. Kapua`ala: Sure. If you look at your BVA Rules– Well, actually, James, you could probably define "discovery" better than I can.

Mr. Giroux: Yeah. When you're in a contested case and you're – basically the parties have certain burdens of proof and production. Okay, so, in order to put on their case, they have to have evidence. Now, in preparing that – their case, there are certain things that are discoverable or what they call "discovery." Now, these – one party, in civil procedure, what they do is that they can ask for interrogatories. They can ask for admissions. They can subpoena–what they call subpoena duces tecum to have production of documents, and they can subpoena people. All of that is considered. Once those things are recovered, they are considered discovery. And if one party has possession of it and they're gonna present it in a case, they have to turn it over to the other side. And that's the idea of discovery. And in this type of litigation, you don't want surprises. You don't want, you know, litigation by ambush. You want both parties to hand over – he'd say, here, this is what I'm gonna present at the trial. Hand it over. You hand over to mine. And now I know what you're gonna say when you get to the hearing. And that's the idea of discovery.

In the appeals where we – the new section that covers – was it 12.16.18? Those in the sense of the notice of violations, those are – those do not have – they're not – yeah, you're not allowed the normal forms of discovery. What you are required to do is disclose what you're gonna use at the hearing, which is a very quick–this is my stuff. Here's your stuff. And what we're trying to do is to get these cases processed quickly because the Director should already have everything he did to make his decision. The applicant should already have their story together. You know, they either did it or they didn't. And there's none of this massive subpoenaing, you know, I wanna see all the permits that were issued in the last ten years, you know, that type of stuff, because that's what happens in litigation. So we're looking at very truncated situations where people are given a chance to just confront what the Director is saying.

Mr. Tanaka: I was just confused that the discovery is not allowed meaning that – well, this wasn't really clear–surprise discovery.

Mr. Giroux: Yeah, yeah, yeah. There is gonna be a certain extent of discovery, but the

discovery procedures are very truncated.

Mr. Tanaka: Thank you.

Mr. Shibuya: James, I have a question. Maybe it deals more with Sunshine Law, but it's the members here are not – once they see the item on the agenda, it is not – they're not required or they should not go out on their own and investigate the situation. Can you address that?

Mr. Giroux: Yeah, I was gonna touch on that on my Chapter – my Sunshine Law, but I'll address it now. It's just an issue of that because you're quasi-adjudicatory that if something comes up that you know that's gonna be on the agenda, every decision that you make has to be based on what's presented on the record. And that means it has to be presented by the parties, and under oath, and right to cross examine, testify, and that stuff. So you don't wanna go off on your own and do your own private investigation, or do your own site visit at that time. If it comes up that we need to do that, we can vote, and then we can all go and do a site visit.

Ms. Kapua`ala: That concludes this portion. Are there any questions about variances and appeals? Okay, thank you.

Chairman Endo: Thank you, Trisha. So now we're going to Chapter 91?

Mr. Giroux: Yeah, I'm gonna go to Chapter 91. There's maybe a couple things I wanted to touch on. You want a break?

Chairman Endo: Does anyone need a break?

Mr. Giroux: It's gonna be short.

Chairman Endo: Okay.

Mr. Giroux: A couple of things on appeals I want to, I guess, address. Because there's– On appeals and on variances, we're quasi-judiciary meaning you're making decisions that are based as if you were judges. You're listening to evidence. The parties are required to bring forth evidence to show whatever standard they need to show by a preponderance of the evidence. It's very – it's not the lowest standard of proof, but it's a lot lower than criminal law where it's beyond a reasonable doubt. Criminal law is your highest standard in law. Beyond a reasonable doubt is your highest. And then if you're a criminal defense attorney like I used to be, I would say the only thing higher is proof beyond all doubt and that's God, right? So you have your proof. And it's very hard because it's a nebulous concept. What is the level of proof? We got nine people here. Everybody's gonna hear the same thing, and you gotta base it on credibility. You know,

does– Okay, yeah, somebody just said red, and somebody just said blue. Now I gotta decide. Oh my God. It's a matter of credibility. How did the person look? Did they look like they were like trying to conceal something? You know, you gotta go through this whole thing like a juror. You're the judge and the juror. So you gotta judge this evidence. And it's – when you come down to it, it's preponderance of the evidence. Who has to prove it? Whose burden is it to prove it, you know, and we usually say it's the person who initiates the action. If somebody comes in here and they need a variance, well, it's their job to bring you enough evidence to say, hey, yeah, I've met all of these criterias. It's their job. It's not the County's job to say that they didn't meet the criteria. It's the applicant's job to say that they did. If they can't do that, then, no, you don't get the variance. Sorry. You know, it kinda sucks, but, you know, you didn't meet the burden. Then you gotta look at the quality of that evidence. You know, is that– You know, oh, see, I've got a document. And you're like, where'd you get this, you know? Yeah, well, my document says I own the property. Is this from a notary? Was this filed in the Bureau, you know? What do you mean this is a deed? It doesn't look like any deed I've ever seen. So you got to question, you know, what's that – what is that evidence that the person's showing you? You know, and then this comes down to photos even. You know, oh, here's a photo of it, you know, you know. It doesn't look that bad. And you're like, Dude, it's blurry. You took this from like a mile away? What kind of Nikon camera did you use, you know? So you gotta test the information you have, in that sense.

The other thing is is that in notices of violation, it's not necessarily the government's job to prove beyond a reasonable doubt that the violation occurred. They should be giving you enough information and say, hey, you know what? It's our job to enforce this area of law. We went out. We have an investigator. That investigator collected this amount of information. It led us to believe that a violation occurred. At that time, the other person has a right to rebut that. This is a venue for the public to challenge that. If they cannot convince you that they dd not violate the law, then you gotta make a decision of, well, the assumption is is that the people who are enforcing the law would want to make sure that they are collecting adequate information to lead you to believe that an infraction did occur, you know, and that's the preponderance. And you don't have to say, well, you know, did collect fingerprints? And did you run that by CSI? And did you calibrate that ruler, you know? It's not that level of scrutiny at this level because what you're doing is you're saying, well, the inspector went out. He used a ruler. Here's the ruler he used. Hey, it looks like a foot to me. You know what? I think the guy violated the setback. You see the difference in scrutiny on the fact that the inspectors are on an administrative level just trying to get out there and inspect, and get the law to you? They're not really out there as CSI investigators, you know. So we don't – we're not out there, you know, calibrating their equipment, and everything. So that's the difference between pushing the government to prove it beyond a reasonable doubt, and just saying, hey, was there a violation? And it's most likely that that violation did occur. Now, let's hear the other people's side of the story, you know. You know, and then if

they come in, and they say, well, we measured it. And it only came out, you know, we're like five feet. We don't think we're in the setback area. Okay, now we gotta weigh the evidence. We gotta say, well, what did the inspectors give us? What did the public give us? And make a just decision. So I think that's all I have as far as your role as a judicial function.

My other role is to make sure we follow the Open Meetings Guide. This is a – I bet you guys read the last lawsuit coming out of the County–Wailea 670. Well, anyway, this is my job to make sure that when people challenge our process that I advise you timely and accordingly that we stay out of trouble like that. So what we're looking at is the Open Meetings Law, the Sunshine Law. The important thing to understand is that the – this is coming out of HRS 92, and that's Hawai`i Revised Statute. It came out of the Legislature. And I'm just gonna read you basically what their intent of this statute is. It says:

> The intent of the statute is to open up the government process to public scrutiny and participation by requiring state and county boards to conduct their business as openly as possible. The Legislature expressly declared that "it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and actions of government agencies - shall be conducted as openly as possible."

That being said, our appeals process is actually excluded from this law if we are in a contested case. Our variance process is not excluded. Because of our Charter, our Charter says that we, in doing variances, we have to have a public hearing. So that means we would then go back to Chapter 92 and make sure that we are conducting our meetings in accordance. When you're doing the notice of violation-type cases, because there may be timeliness issues, logistics, those types of things, those meetings can actually be done in a more ad hoc fashion. In fact, because we may have to meet two days in a row, or we may have to, you know, meet on a weekend, or, you know, something in that fashion where we're trying to process these types of litigative cases, the law does acknowledge that when you're in that type of process, you can – you don't have to post an agenda. As long as the parties are given notice, they have a right – the ability to prepare, testify, and state their case in front of this tribunal, then that'll be fine. But you do not want to, again, I've gotta reiterate, go out and do your own investigation just because we're in a contested case because then we then start violating due process because the applicant has a right to have a fair and impartial jury looking at his case. And that means that the decision-makers will be making their decision based on everything on the record and nothing outside the record. And all of the members who are making a decision have access to the same information. Okay?

When looking at the Open Meetings Law, I think one of the biggest things that you need to understand is some of the definitions. Is that–what is the definition of a meeting? A

meeting is the convening of a board for which quorum is required in order to make a decision or to deliberate towards a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power. So the issue here is quorum, right? We need, I believe, five people to make a quorum. So if we don't get five people into a meeting, we can't start the meeting. The only thing we can tell the public is we don't have a quorum. We're gonna reconvene at a certain date, time, whichever. So it's very important that everybody show up, or at least let the staff know that you're not gonna show up so we know that we're gonna either have a quorum or not have a quorum.

The idea of making decisions or to deliberate towards a decision is very important because oftentimes, the issue of whether, oh, I saw so and so talking to so and so. Well, yeah, so what? So what? They're talking. You're not deliberating towards a decision. You're talking about, oh, you know, are you guys gonna drive to Lahaina for the meeting? Or are you guys gonna carpool? That's not deliberating towards a decision of the case, you know. You guys aren't talking about the case. In whether or not you have supervision control, or jurisdiction over, or advisory power over the subject matter is very important. You know, whether or not you are going to be actually making a decision over the subject matter.

The issue of Board business is very important. When talking to the OIP, they like to use the word, well, it's gonna be Board business if it's subject to a foreseeably – if it's foreseeably going to be on a future agenda. And that's a tough one because is it foreseeably? And here we are–we're the Board of Variances. You know, we got all of these codes that we have jurisdiction over, but the idea is is that if you have wind that so and so's gonna come in for a setback variance, you gotta assume, hey, it's a variance. We do variances. I don't wanna be talking about that case. I don't wanna be doing investigations about that case. I don't want to go out, and, you know, prep for that case. You wanna make sure that your decision is based on what they actually bring forward into this room and put it on the record.

Permitted interactions–92-2.5, Permitted Interactions. Okay, two members, you can get together to gather information. Two members can actually come together and gather information as long as there's no commitment to vote. So you're not deliberating towards a decision, and you're not committing to vote. Two people can, you know– Hey, Hari, you know, I'm looking at the maps of such and such case, and I was just wondering. You're an engineer, and I'm not, and what is a vector? Hari, come on, tell me what's a vector, Dude. So, no, I'm just kidding, Hari. I'm not going to put you on the spot. But, you know, you understand that you can ask somebody else a technical question. So you can have that conversation. But now that you've discovered what a vector is, you can't start saying, wow, I think, you know, if they were to build that house like that, that's really gonna – man, that's – you know, Hari, I think this house is gonna be in the setback area, man. You can't start that conversation, but you can ask, you know, hey, I'm looking at the map. I'm trying to read this thing, you know. I look at

engineering maps all the time, and I'm like, hey, I'm a lawyer, not an engineer. So as being lay members of the Board, we expect that there may be some information that you don't understand. You can ask somebody, but you can't deliberate towards an end.

One of the exceptions is 92.25, Investigative Group. An investigative group is one way to get a body less than quorum to do an investigation. You have to follow the strict parameters of an investigatory group. It's gotta be discussed on an agended item on the record. The scope and membership of that group has to be determined. That group has to do a report. And they cannot – you cannot deliberate and make a decision at the same meeting that the report is made. We look at this as a three-step process: create the group, do a report, and then do deliberation. And this allows for the public to understand what you're doing because you can meet in private. You can collect information in private. You can actually make a quasi decision in private, but in the end, the whole Board has to participate in the final decision. And I think this Board rarely – we rarely do an investigatory group. There's other boards that have more of an advisory role, and we then – you know, I think it's a little bit more flexible. But because this Board is – does such an adjudicatory function, we'd like to have everything on the record so that we don't get into due process problems.

There's also limited meetings. If you can meet where it's dangerous, you know, then we gotta go through a process. Executive meetings is probably the biggest exception that we use because we are dealing with technical matters. The executive meeting is closed to the public. We would be in a meeting that would be agended. If you wanna go into an executive meeting where the room would be cleared, you have to vote in the open meeting. Two-thirds of the members present must by an affirmative vote of the majority of which the Board is entitled. You have to have two-thirds of the members present. So for this Board–five votes. You would need five votes to go into executive session. So usually, I would say something to the Chair, like, hey, you know, this is getting sketchy. I think we need – you guys need – I need to talk to you about your powers, duties, privileges, immunities or liabilities. Oftentimes if you're gonna deny something, and I'm unsure about what your basis is, I'll tell the Chair, hey, you know, I think we need to go into executive session so I can explain what your analysis has to be so we don't get sued later, or we don't overturned later. I just need to know what your basis is. It's– When you go into executive session, it must be announced, and the purpose has to be strictly adhered to. So we have to say, well, you know, we're going into executive session in order to look at the standards or, you know, to talk to our attorney about possible liabilities in this situation. As long as our conversations are on that topic, we'll be fine. If we start straying, and then we start talking about, oh, yeah, I wanna vote for this, I wanna vote for that, you know, and then we start debating what should be debated in public, then whatever we say in private can be turned over to the applicant. And they would do that by court. They would take it to court and say, you know, I think they violated the Sunshine Law, and we need to know what they talked about. And the Judge would review it. And then if he found that, yeah, we weren't talking about what

we said we were gonna be talking about, he can hand it over. And then whatever decision we made that day would be overturned. If we know we're gonna go into the executive session, it should be on the agenda, if it's anticipated that we will go into executive session. It's kinda hard to anticipate that, but there are situations where you know guarantee. You know, I think like the last time we had a very strange variance come through. And it required an analysis of preemption law. You know, and me knowing that, I probably should've told the Board or when it was on the agenda, you probably should put going into executive session because it was a very critical area of law that wasn't common to our normal analysis of a variance.

As far as the Agenda Notice, 92-7, the agenda can be changed. Anything we talk about has to be on an agenda. The agenda can be changed by adding items, but you need two-thirds of the vote of all members entitled. And even if you get two-thirds of the vote to change the agenda, if it's a matter that is of reasonable major importance, and it affects a significant number of people, it won't be allowed to be put on the agenda. We rarely fiddle with our agenda. This Board usually has a very definite application in front of it, and we usually agenda it very well. But some things can be thrown on like, hey, let's move the meeting to Lahaina. Oh, okay, well, let's put that on the agenda for discussion. Two-thirds vote. Everybody vote. Okay, now it's on the agenda. Now let's talk about it because it doesn't affect a heck of a lot of people. It's more of an internal process. So we would wanna talk about it because we wanna see how many people of our membership could actually make it to Lahaina for, you know, the next meeting or so and so.

So I wanna talk about the consequences of violating the Sunshine Law. 92-11 says that any decision is voidable if the violation is willful. The public, 92-12, says that the public, if they feel that we've violated the Sunshine Law can go to the Circuit Court like in this Wailea 670 case and ask for an injunction. 92-13 says that if it's found that this Board or that we purposely or willfully violated the Sunshine Law that we could be prosecuted for a misdemeanor by the Attorney General. So I just wanna throw that out, you know, because there's sometimes where I might give advice that I would say, you know, I would discourage this, or I would encourage this. And there's other times where I'll be like, oh, no, guys, no, absolutely not, you know. And you gotta listen to my advice in accordance because my job is just to give you advice. I'm not the Sunshine cop. I'm not an enforcement agent. I just gotta make sure that my Board stays as clean as possible. If I can keep you guys out of court, I'd love to. I can't always do that. People appeal. We end up in court, and that's why the lecture about getting our facts and things solid so you guys have the best fighting chance if you guys are appealed because the decisions of the Board of Variance in Corp. Counsel's eyes should be defensible. We should always have a defensible decision. We defer to you as the body, a public body coming in here, and making a decision based on the law so that we can defend, you know, that decision. Sometimes you'll have Corporation Counsel on the other side. And it looks kinda weird, but we try to keep things separated.

I just wanna touch real quickly on–this is my last section–on ethics. And this is coming out of your Charter, Article 10. And I just wanna touch on the prohibitions. Section 10-4, it says members shall not receive gifts that reasonably – that can be reasonably inferred that the gift is intended to influence performance of official duties or reward and action. If you receive a gift, you already should be thinking, okay, what? You know, if you think that's in connection to this service that you're giving the County, you gotta think about, okay, first of all, why am I getting this? A new Lexus–wow! Cool! But you gotta make that analysis. And if there's any doubt in your mind, you know, that somebody's giving you something to affect something coming up before the Board, bring it up to me. We can talk about it. If you wanted an official decision, we can take it to the Board of Ethics. There's another board that will make – actually make an official decision saying, well, that Lexus from the guy who wanted the setback variance, nah, that's gonna be real weird, you know. You guys are gonna have a hard time being independent once you – you know, so, you guys gotta think about that. If somebody brings doughnuts, you know, gifts of aloha are common in Hawai`i, and it's, you know, it's not like the doughnuts are gonna change your decision, and you're gonna be influenced, you know. So, yeah, just don't ask who brought the doughnuts. Make sure Aaron gets them first. But – so it's just – just have that in mind. You don't want to be accused of receiving gifts in violation of the Code of Ethics. If it is a real blatant violation, there is a process to kick you off the Board for that.

The second thing is disclose – you shall not disclose information not available to the public. This is kinda tricky in the sense that I think most of what we do is open to the public. There may be situations where we're in a contested case, maybe. That information may be only available to us, and the litigants, and the County. And you don't want to go around talking about that until the case is over. Once the case is over, it is open to the public. Somebody can subpoena all of that and get – you know, look through the records. And most of the stuff we do is disclosable under Chapter 92. Somebody could actually just ask the County–can I have the transcript from such and such meeting? Fine. Here. All that information's public. The only thing is that if we go into an executive session, you have to be very aware that whatever we talk about is confidential. You should not be disclosing that to the public. Once it is disclosed, then we lose that confidentiality. And that could hurt the processes of the Board. And you don't want that happening.

You shall not conduct business transactions incompatible with discharge of duties in which may tend to impair independence of judgement in performance of the duties. So if you're working on a project and that project needs to go – come before us for a variance, you should probably disclose that and abstain from discussion and voting.

You have a question, Randy?

Chairman Endo: Yeah, James, just wanna go back just for one second on the

disclosure of information. You were giving the example of if we had a contested case. That information might be kind of protected for a while, but actually, most of the contested case hearings are actually public meetings. So anything that goes on in a generic contested case hearing actually you can tell anybody. It's all public. The only time would be maybe if we were privy to some kind of like a confidential settlement conference, or something special, some kind of executive session-type stuff.

Mr. Giroux: Yeah, anything that the public wouldn't be privy to. If the public wasn't privy to it, then you shouldn't disclose it.

Mr. Kamai: What about when we ask questions say in a contested case and there was a settlement, like you said, and we wanna know what that settlement is?

Mr. Giroux: Usually if it's a violation, the State can settle with the violator at any time and take it out of our jurisdiction. If the State decides, okay, you're gonna remedy – you're gonna tear down the building. You appealed our– You appealed– We said that you built it too close. You made an appeal. Or actually, we gave you a notice of violation. We said that your house was too close to the edge. It was in the setback. You appealed that to the Board of Variances and Appeals saying that, no, I think you're wrong. My house isn't too close. But before they come to us for the finding of fact, they negotiate. And the County goes, well, look, here's all the information we have. And then the homeowner goes, oh, wow. I'm dead in the water. What if I tear down that structure and then move it back? Then the County would go, oh, that's – yeah, you're gonna remedy it. Well, okay, we'll dismiss – we're gonna miss the notice of violation if you agree to move your building back. Once that type of agreement is entered into and the applicant withdraws his appeal, we lose jurisdiction because there's no case in contest. So we wouldn't even be privileged to that settlement, but we could possibly find out about it. Sometimes the lawyer shows up. Sometimes the State lawyer shows up and we could ask them, oh, okay, what did you guys settle it. But technically, we don't even have jurisdiction anymore to make any decisions because there's no appeal to make a decision on. I know in the Planning Commission, it's a different issue because they have to actually agree. The Planning Commission is the final authority so they have to agree to the settlement, and then that settlement is disclosable. It has to be disclosed to the Board, but I'm not sure. Randy, can you think of any other–? Have we reviewed settlements?

Chairman Endo: Well, I guess if two parties are trying to get like a variance, and then they went in and talked story, and decided okay, they came up with a compromised settlement on how the variance would be granted, what kind conditions, obviously, we gotta hear all of that because that, we would have to approve.

Mr. Giroux: Yeah, they couldn't agree on a variance without our authority. Yeah, you can't bargain a variance.

Chairman Endo: But in the appeal, you're right. I guess if they withdraw it, they're like they're getting out of the system, yeah?

Mr. Giroux: Yeah. Even the government attorney cannot negotiate a variance with a private applicant. It would violate the Charter. So you would be the final authority. Yeah. I guess the only third party agreement is is that one of the standards is that it wouldn't affect the neighbors. And then, you know, somebody could intervene on a variance, and then they could make a private settlement.

Mr. Kamai: That's what I wanted to know.

Mr. Giroux: Yeah, but the settlement would not guarantee that the person gets a variance. It would just be like, oh, we 're not gonna– We're your next door neighbor. You built your house too close to us. We didn't want it at first, but you offered us ten thousand dollars to just shut up. Well, that's a private agreement. And if the person comes and testifies and says, you know, I, after further negotiations, I no longer feel that the setback really is that intrusive. You can ask the person, oh, what kind of agreement did you get? What bought that answer, you know? You can ask that. That goes to the weight of whether or not, well, that's one person, but what about the community because you still have a right to analyze whether that variance affects the community. Yeah.

Let me see. I got one last – this is the last one as far as the ethic goes. The failure – you shall not fail to disclose a financial interest affected by the action. So if you're the architect on a building, and you're gonna come in for – that project needs to come into a variance, and you're sitting on the Board, you have to let the Board know that, you know, I'm the architect on the building, and I'm the one who kind of said it was okay to put it that close to the wall. You don't have to go that far, but you can just say that you – you know, you're working on that project, so you need to – you're gonna benefit from our action because now that, you know, if they get the variance then, you know, you're going to be able to finish up the job. You're gonna get paid and all that.

So I'm open to any questions. No? Okay. And I'd just like to tell you, you know, I advise the Commission as private – you know, as members, you know, feel free if you have a Sunshine Law issue, an ethics issue, or even if there's something that bothers you about, hey, you know, I don't understand this standard. What are they talking about when they say this, you know? Feel free to talk to me. I'm pretty open as far as giving legal advice. It's free. But really, my job, I really see my job as to allow you to try to make the best decisions you can with the information you have. I want to protect all due process rights. I wanna make sure that the applicant gets a fair hearing. That the government gets, you know, its ability to do its job. And that you guys are comfortable making the decisions that you need to because there are a lot of rights involved, a lot of decisions that are gonna be hard-fought. And you will, as members of this Commission,

disagree with each other. And you may even disagree with me, or Randy, or the department, or whatever, but as long as you know that–feel free to ask. If you feel that it's a matter of a legal issue, and you just want an interpretation of, you know, well, what laws are we looking at? What's our parameters here? You know, what kind of decision – you know, what are our options? That's something I'm pretty open to discuss. And if we have to go into executive session to discuss it, that's – you know, we can do that too. But, you know, off the record I'm happy to talk to anybody who wants to kick around some issues or whatever.

Mr. Shibuya: Liability. Okay, I just wanna ask a question. I know the answer, but I don't know if the other people know this, but I'd like you to clear it up for them. This is in a sense that we get a variance, and we go through, and we hash it through. And all of a sudden, we come up with a decision and say, okay, we're in favor of the appellant or the person requesting the variance. He builds a multi million-dollar house over this gulch. And, you know, the hundred-year storm comes, and it's at the 50-year mark, and all of a sudden boulders, and trees, and knocks – wipes out the house. He comes around and says, well, you guys, in the BVA approved it and allowed me to do this. Had you not done this, I wouldn't have wasted my – or lost my home. Are we liable?

Mr. Giroux: That's an interesting question because, well, first of all, the County is self-insured. We're self-insured, and we have a Risk Management Department that analyzes, you know, the County's risk–what do we expose ourselves to? When somebody asks for a variance, they're asking for a change – basically, a change for themselves of the law. In order for that law to be valid, the Supreme Court said zoning laws have to be connected in some sense to health, safety, or welfare. So basically, we are creating a standard that we believe protects that. Otherwise, we wouldn't make up that law. We wouldn't say that there's a setback requirement unless we believe that it was protecting, you know, health, safety, or welfare. And that's one of the reasons that when you do this analysis, variances are – well, they shouldn't be that easy to get. And Trish touched on the fact that area variances are – you know, you're not giving as much scrutiny as use variances because once you get into use variances, you might as well be zoning. And then zoning is a legislative act, not an administrative act. So when you grant a variance, you really wanna understand that you're granting it based on all of the criteria presented in front of you–that it meets all of that. As long as you're following that criteria, and you grant it, and then something horrible happens, and then the person says, well, I'm gonna sue the County. Well, it's their action that is causing– They're asking for it. They're the ones who said I wanna build my house taller than 30 feet. Well, okay, you built it taller than 30 feet, and all of a sudden a plane crashes into it. Now, you're gonna blame the County. No, forget about it. We saw that there was a topographical, pre-existing. There was hardship, yada, yada, yada. We granted you a variance from our code. We require them to carry a million-dollar insurance as part of our regular conditions. So in that sense, we're covering ourselves just in case, you know, there is that issue arising. But it's in the request for the variance that that person

really – you know, our attorneys would argue, you know, we – there's no but for, you know. There's no but for. But for us granting your variance, the plane crashed into it. No. It's ridiculous, you know. We would argue that in court. And our insurance company would argue that in court that because – as long as–and this is why I really stress the findings of facts–as long as the criterias of a variance were met. Usually it's the neighbors that complain post facto after we grant the variance. They're the ones who say, well, you know, you–and I've read a lot of case law in this area–you gave these people a variance. And oh my God, they built the ugliest house. And it looks disgusting. And you guys suck. And so they take us to Circuit Court. And the court says, well, as long as I have in my hand an order from this Board, and these are the criterias, and they're within their parameters to give this variance, there's nothing the court's gonna do. They're gonna say so sad, too bad. And didn't you get notice of this? And didn't you intervene? Didn't you do something to participate? And if we have procedures that allow that, then they're really not gonna – the court's aren't gonna – wanna get involved in our decisions, but we have to be in accordance with our own standards. So as long as that's clear.

Mr. Shibuya: So our rationale has to be stated on the record, and then that is recorded. And as long as we have that, there's no problem there.

Mr. Giroux: Yeah, the County would defend you. If it came to the point where, you know you guys made a decision. And I was like, oh, you know – your attorney's over there going, yeah, but look, no, and you guys pass it anyway, and then you get sued later, yeah, our attorneys would be like, oh, wow. They really – they blew it. They didn't even listen to their own attorney's advice. I don't think we can defend this. And then, you know, if you did get sued, you'd probably– What happens is that our attorneys have to go in front of the Council to get you an attorney, but if you didn't follow our advice, then the Council would say, well, you know what? We're not paying for your attorneys. You can get your own attorneys. But usually if you're within the parameters, whatever decisions you would make, you would be indemnified as far as that decision.

Mr. Shibuya: Yeah, because the insurance hold harmless is hold harmless the County. It doesn't say hold harmless the BVA or the members of the BVA.

Mr. Giroux: Yeah, the Council would actually have to do an affirmative act, and say, yeah, you guys did act in your parameters of this Board. And we would then assign you an attorney.

Mr. Tanaka: Yeah, so the BVA and/or the BVA members never have to defend themselves.

Mr. Giroux: As long as you're acting within the parameters of your job. And the thing is, too, when somebody appeals your decision, they're not suing you. I think in the last

appeal, there was a lot of concern about that because we had made a decision regarding the parks. And our own department was fighting against, you know– Corp. Counsel was over there telling us that we were wrong, you know. And then I gotta go back into the office, and be like, no, you're wrong. We're right. So there's that weird situation that it's like if somebody appeals your decision, but it's our own department appealing your decision, we're not suing you. It's just a legal battle. It's just a matter of legalities. And then the Circuit Court would clear it up. They would say, well– And they would just look up the record. There would be no other – maybe a couple of things filed in court. They would look at the order, look at the record. The court would look at the law de novo, and say, yeah, you interpreted– You know, either the BVA interpreted the law wrong or Corp. Counsel interpreted it wrong. No harm, no foul. It either comes back, gets kicked out, moves along. So it's not that big of a deal, but I do wanna stress that we always wanna try to get you guys in a position where you win. That's my job to make sure that I'm getting you guys on track to make sure that your decisions stand because, I mean, you guys are gonna put in time, and effort, and thought, and you wanna see your decisions, you know, stand ground.

Chairman Endo: Just to clarify, James, when it does say that they indemnify and hold harmless the County, the BVA is a body of the County. So we would actually be included as part of that.

Mr. Giroux: Yeah, yeah. As far as the – yeah, as far as the liability goes.

Chairman Endo: As far as the entity, the BVA entity.

Mr. Giroux: Yeah. I think one of the exceptions would be that if it was like a civil rights' violation. You know, somebody actually filed a 1983 action against you guys, then we would have to go through – you know, we would have to go through the Council, and say, well, you know, they didn't blatantly use their government power to violate the civil rights of this party, you know. They were just making a decision based on variances, you know. Yeah. So that's the difference between being sued personally in your official capacity and just being appealed from.

Chairman Endo: Okay. Anything else?

Mr. Giroux: I'm done.

Chairman Endo: Are all the presentations over? They are? Okay. All right. Okay, yeah, for *Robert's Rules of Order*, actually there is one important one, a basic one that I'd like to stress everybody. A lot of people aren't familiar with it, but sometimes when people are getting really passionate about what you're saying, they'll look at the person who has the opposite opinion, and stare them down, and talk to them like that and say, "Hari, no, I think you're wrong, blah, blah, blah." That violates the principle rule of

Robert's Rules of Order which is to keep decorum and to keep it calm, you should always look to the Chair when you're talking. Even though you're trying to rebut the other guy across the table, his position, you look at the Chair, and say, "Chair, I feel this way, blah, blah, blah, this is my position." And then the other guy will have a turn to talk. He'll look at the Chair and say, "Chair, no, my position is blah, blah, blah." So that way, you don't look at each other even if you're mad at each other. Okay? That was just one thing. All right.

C. APPROVAL OF THE MARCH 27, 2008 MEETING MINUTES

Chairman Endo: So move on to approval of the March 27, 2008 meeting minutes.

Mr. Kamai: So moved.

Chairman Endo: Okay, it's been moved to approve the minutes–moved and seconded.

Mr. Castro: Second.

Chairman Endo: Discussion? I do notice one thing. On the Call to Order, it says the "executive session" of the BVA. Okay, so that should be deleted, I guess, yeah? Okay. Any other comments? No? Okay. So if it's okay, we'll amend the motion to approve as amended.

Mr. Kamai: So moved.

Chairman Endo: Okay. All right. All those in favor, please say aye. Oppose?

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

VOTED: To approve the minutes of March 27, 2008 as amended,

(Assenting: W. Kamai, S. Castro, K. Tanaka, W. Shibuya, R. Phillips Ball, S. Duvauchelle, H. Ajmani.)
(Excused: J. Shefte.)

Chairman Endo: **The minutes are approved as amended.** Going to the Director's Report on the HCPO Conference.

F. DIRECTOR'S REPORT

1. 2008 Hawai`i Congress of Planning Officials' Conference to be held at the Grand Wailea Resort Hotel and Spa, Wailea, Island of Maui, on

September 10 - 12, 2008

Mr. Aaron Shinmoto: This is just for a save the date kind of information. September 10 to 12 is the – the County of Maui is hosting the annual conference. It's gonna be held at Grand Wailea. We do have two slots available for this Board. And usually it goes to the Chair and the Vice-Chair. We may get more as the other boards may not send their full compliment of people. I think last year we sent maybe three from this Board. But again, we'll have at least two people attend. And again, there may be more. We'll have the agenda available later on.

Mr. Shibuya: For your information, Aaron, I'm gonna be invited by the GPAC. So don't worry about it. I will not be accepting the BVA. So the quota here is for members to use, but that's between us.

2. Status Update on BVA's Contested Cases

Chairman Endo: Okay, the next item is the status update on contested case hearings.

Ms. Kapua`ala: The first item is the Maui's Best Gift and Craft Fair. This is a 2005 appeal that's still here with the Board. And I just learned that we got sued by the appellant two days ago. The County got sued. So this one's gonna be on the list for a while. I don't think we're going to see a remedy any time soon.

Hiolani Ranch–you are scheduled to review the Judge's decision and order on May 8th.

Mr. Shibuya: That's Judge McConnell's?

Ms. Kapua`ala: Yes, yes, sir. Hanohano LLC–I hear that they're reaching settlement soon. I believe they have a meeting this Friday. And if that goes through, then they will withdraw their appeal.

Anthony Lum Residence–Mark Honda, the attorney appointed as hearing officer, conducted several teleconferences, I believe, telephone conferences while I was on leave. However, the parties are on their own trying to settle the matter. So they have a tentative contested case. No, I'm sorry. They're – the contested case is going as discussed. They're disclosing – they're doing their discovery. And I think through that process, they're figuring out what they can settle on.

Ritz Carlton Renovations Appeal–that contested case hearing has been scheduled to appear before Judge McConnell on July 7th and 8th.

West Maui Village Appeal–we're still waiting for the hearings officer contract. It's been– We have one lady who does all contracts for the entire County. And you can imagine.

That's a huge job. It's in Finance right now. I saw that Tremaine just sent it back. That's why we like the truncated process without hearings officers.

Mr. Giroux: Trish, can you expound on the Maui's Best? That came up for an appeal on a zoning, and then did it go to the Circuit Court? Or is still in the contested case?

Ms. Kapua`ala: Yes, we never got to set a contested case hearing date because the attorney that was hired was not satisfied with the discovery we provided. They did numerous interrogatories which are just simply questions for the inspectors, the Planning Director, the planners to answer. We answered those questions. They did second interrogs, third, fourth, fifth. They requested the provision of documents. They weren't satisfied with our provision of those documents. They asked for it several times. We never set a date. And then the appellant changed attorneys. We had to meet again to get the new attorney on board. The attorney never showed up for another meeting. Judge McConnell wants to throw this out. He wants to give it back to the Board. And I hadn't been able to get a decision and order – I mean, an order from Judge McConnell. So I don't know if we can act without the Judge's order. Maybe you can answer that? I've numerously – I've requested an order from the Judge many times. And he hasn't been able to give me an order. Can we act on this without the Judge's order? He – the last thing he did was call me and say I wanna just throw this out and give it back to the Board. This is ridiculous already.

Mr. Shibuya: No. That's part of his contract, James, right, that he provide certain document? And one is a decision and order.

Mr. Giroux: Yeah, 'cause in this, he's contracted as a hearings officer.

Ms. Kapua`ala: Yes. It wouldn't be a final decision and order. It's just like a pre-hearing order.

Mr. Giroux: Yeah, I think in a situation like this where, you know, I mean, obviously, this is one of the reasons why we re-looked at you guys' rules, yeah, because we were seeing that there were abuses like this occurring where discovery can really be used as a tool of delay. And I think that the Judge – you know, I haven't talked to him or seen any documentation out of it, but I would assume that because he's not able to make any rulings that would dispose of the case that he would probably wanna give back – give us the jurisdiction. And at that time, we could, you know, entertain a motion from the government. I mean, in order–

Ms. Kapua`ala: Do you have to see the order to make a motion to move on with this case?

Mr. Giroux: Well, I think we would need something, at least something, from the

hearings officer transmitting it back to us, at a minimum.

Ms. Kapua`ala: Okay. I'll try my best to get that to you so that you can just move with it. The property has been sold. There's new owners.

Mr. Giroux: Yeah, I think we would want at least an appearance, an explanation, and a transmittal, I mean, just putting it back in our laps, because I think there would need to be some procedural safeguard to make sure that we're not challenged as far as violating any type of due process.

Ms. Kapua`ala: Okay, I'll ask the Judge if he could appear before you and I'm sure that'll get an order to us.

Mr. Giroux: Yeah, because both parties would have to be given notice of any type of hearing. So they would need to be informed or at least a good faith attempt should be made to inform all parties to be present at that hearing in order for us to move it along.

Ms. Kapua`ala: Okay.

Mr. Ajmani: Trish, I had heard that this property is no longer used for the marketplace anymore and they moved it somewhere else. So why is this case still pending? I don't understand.

Ms. Kapua`ala: The fines are still outstanding. The notice of violation still is open. They've accrued – during this delayed process, they've accrued thousands of dollars, hundreds of thousands of dollars in fines. They continued to use the property while in the contested case procedure, and eventually got evicted by their landlord because the landlord found a buyer to buy the property, which by the way is West Maui Federal Credit Union who's gonna develop the property one day. So I guess the principle of the matter is that there's this open violation that they continued to abuse the zoning ordinance and the process to conduct business in violation of County code. And–

Mr. Shibuya: So this Board would review that and look at whether we should ignore the fines or agree to go after for payment of fines because of the abuses?

Ms. Kapua`ala: I believe the Planning Director would decide on the final fine amount. I'm not sure if the Board can decide that. You simply would grant the appeal or deny the appeal, then we'll take it. The Planning Department would take it from there.

Mr. Shibuya: Okay.

Mr. Giroux: Yeah, Trisha, I just wanna make sure the department understands that in a situation like this, service is critical. Any attempt to serve them, you need to preserve

that record like–

Ms. Kapua`ala: Notice of hearings, certified mail–

Mr. Giroux: Yeah, certified mail, receipt return, because this is the type of stuff where if that's not on the record, it's very hard to dispose of a case like this, because our rules do allow us to conduct a contested case without the people present as long as they've been duly served and given the opportunity. Otherwise, we can't dispose of it.

Ms. Kapua`ala: Okay, I'll be mindful of that. Madelyn D'Enbeau is the attorney representing the Planning Department, and I will consult with her to what the appellant's new attorney is. And I'll talk to Judge McConnell. I will try to get everybody here to see you the next available hearing, and serve them proper notice.

The last appeal is the Rager Appeal, which is the first transient vacation rental appeal that you've seen. This contested case shall continue on June 26, 2008.

Mr. Ajmani: That date is confirmed now?

Ms. Kapua`ala: Yes, yes, by Ms. Rager.

Chairman Endo: Yeah, I have a comment on that one because we had our – we took evidence, and everything back–I don't know when it was–maybe January. I know it was a long time ago.

Ms. Kapua`ala: February.

Chairman Endo: February. And so it's kinda difficult and it's a waste of time because we're gonna have to refresh our memory since so much – so many months have gone by between that date and this June 26. I think in the future, just as a general rule, we'll try and set fixed new dates. Like if they wanna postpone it, like back in February, we should've said, no. Okay, so if you want it, pick a date right now. It'll be March or whatever. And then put the burden on them. If something comes up, they gotta come back, make a motion for a postponement or whatever because the way we're doing it right now is a little bit too lax on them, I think. It's like, okay, well, just call us back. We'll find a date. So they make up an excuse. Well, I'm not saying she made an excuse but I mean, in general, things happen. Everybody's traveling or whatever, and it's sort of like everything just gets delayed, and delayed, and delayed. So anyway, that's just my thing. So we can bring it up again next time it happens, but I think that's what I would recommend.

Mr. Giroux: Yeah, Randy, I think you're making a valid point because, you know, and this is just to speak generally, because contested cases that linger, we have problems

where people come on and off, and then we have to follow the Chapter 91 procedures, getting them up to speed, doing the orders, giving each other – you know, it becomes very complicated. So the idea again is that if the people are here, we can give them a date, and that date is written in stone unless acted upon by motion. And it eliminates the idea of service also because again, like the Maui's Best, if they're served, and they're duly served, and there's a hearing date, your rules allow you to proceed with the proceedings with them in absentia as long as they're given an opportunity to be here, and they're given notice, time, ability to prepare. So it's very critical because you don't want to start creating a backlog of open cases where we're halfway through evidence. And then you're gonna start collecting boxes of transcripts. And then you're gonna start losing people, and then the Chair changes. So you really wanna make sure that you can process these in an efficient and orderly fashion while giving each party a fair attempt or ability to present their case.

Mr. Castro: So if they're given notice and they don't show up or give an excuse that they can't make it, do we still proceed?

Mr. Giroux: Yeah, you can in accordance with your rules. And even if they are here and they decide to leave and not come back in the middle of the hearing, you can proceed as long as you have given them the ability.

Mr. Ajmani: Okay, but I think the reason that this got postponed was that we ran out of time. People had to leave. We lost a quorum. So how can we prevent that from happening on June 26? Or do we need to preset another date right now before the hearing then we know that if it doesn't get completed, then we'll do it on such a date?

Mr. Giroux: Yeah, I think the staff can probably be prepared that if it runs over, already have a date in mind, and the Chair can just make that on the record that our next hearing date will be on such and such a date. Or like I said, you know, in contested cases, you may – you can meet the next day. You can finish it up the next day as long as you have quorum. So as long as you have five people who have listened to all the testimony or reviewed all the testimony, they can make a decision. You need at a minimum–five, but all five people would have to vote in agreement because you need an affirmative of the majority to get a decision. So if five show up the next day and only four think of voting in one direction, then you've got a non action, and then that's gonna cause a problem.

Mr. Ajmani: I think if you're gonna have a public hearing on that day again, then I'm pretty sure it's not gonna be completed that day.

Mr. Giroux: Yeah, the thing is is that there probably shouldn't be anything else on the calendar. Trish, is that right? Yeah. And there is really no right to a public hearing because it is an appeal. So we're holding it like a contested case. All we're here to do

is listen to evidence, have the parties' ability to cross examine the witnesses, and our ability to ask questions to the witnesses, and then go into discussion, and deliberation, and decision-making.

Mr. Ajmani: Okay, thank you.

Chairman Endo: Okay, anything else, Trisha? Thank you. All right. I think we're at the end. Anybody have any other announcements, questions, or comments? No? Seeing none, the next meeting will be May 8th. And this meeting is adjourned.

G. NEXT MEETING DATE: May 8, 2008

H. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:55 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
Harjinder Ajmani
Rachel Ball Phillips
Stephen Castro, Sr.
William Kamai
Sandra Duvauchelle
Kevin Tanaka

Members Excused:

James Shefte

Others:

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