

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
SEPTEMBER 25, 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 1:31 p.m., Thursday, September 25, 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: Will the Planning Department staff read the first item on the agenda, please?

B. APPEALS

- 1. PAUL R. MANCINI, ESQ. of MANCINI, WELCH & GEIGER representing HIOLANI RANCH, LLC, appealing the Director of the Department of Public Works and Environmental Management's decision to not recognize separate lots within TMK: (2) 3-2-007:001 located off of Kahekili Highway in the vicinity of Waihe'e Elementary School, Waihe'e, Wailuku, Maui, Hawai'i. (BVA 20060006) (Deferred from the May 8, 2008 meeting.)**

a. Status Report

Ms. Trisha Kapua`ala read the agenda item in the record.

Chairman Endo: Okay, before we have the parties come up, I'd like to open it up for public testimony. Is there anyone in the public who would like to testify as to any item on the agenda? Seeing none, we'll close public testimony. And now could the parties make their appearances, please?

Mr. Paul Mancini: Paul Mancini appearing for Hiolani Ranch.

Ms. Jane Lovell: Good afternoon, Jane Lovell, Deputy Corporation Counsel representing the County of Maui and the Director of the Department of Public Works.

Mr. Mancini: If the Board might recall at the last session with the Board on this matter, we agreed to go into mediation with Judge McConnell as a result of a couple questions with regard to this proposed decision. The parties did meet with Judge McConnell last month. And pursuant to that mediation session, the parties have agreed upon a settlement agreement which has been drafted and the terms of which have been accepted. Hiolani Ranch has executed that settlement agreement as of today. I think Ms. Lovell is getting the signatures of the County. And once that is completely signed, we will be filing with the Board a dismissal of the appeal.

Ms. Lovell: Yeah, all I need to add on behalf of the County is that I was waiting for the – for Mr. Wynn's signature on the agreement. Now that I know that Mr. Mancini has it, I can take the document, have it signed by the Mayor, and we will be through with this one, and the dismissal of the appeal will be signed – will be filed. So thank you for your patience. Judge McConnell did a

wonderful job at the mediation. And – oh, there he is. Anyway, he did a wonderful job in helping the parties reach an agreement. We did have a lengthy mediation session on July 29th and that was – that was fruitful. So I thank the Members for allowing us to go that route.

Mr. Mancini: Also, I thank you for my client, myself, for your time on the matter. And usually I don't like thanking Judge McConnell, but I will today.

Chairman Endo: So at the end of the day, there's not gonna be any findings of fact or anything then? It's just gonna be dismissed?

Ms. Lovell: No, I think that's right. We will just file a stipulated dismissal.

Chairman Endo: Okay.

Ms. Lovell: Thank you.

Chairman Endo: Yes, Warren?

Mr. Warren Shibuya: Mr. Chair, I don't know if this is appropriate, but I just have a question because I wanted to find out whether – how this Land Commission Awards actually work. I understand these properties were not clearly titled, and that the individuals who possibly could've owned these properties could not be located. So how could we determine that all of these unknown titles could be consolidated or judged to be one single property? I have that question here, and I couldn't resolve it. Or how we could come to an agreement that, yes, this is one single property unless we go way back into ancient history saying that the ahupua`a was one single unit?

Ms. Lovell: If I could just briefly address that? I think that was one of the complexities of this case where that some of the individual lots had good title, and some had clouded title, and some had clouded title, but they had been through a quiet title action in the court, and had achieved clear title. And it was in part because of those complexities– And then we also had within lots of record, we had things like po`olimas that further complicated the thing. So this particular dispute turned out to be extremely complicated. And it was precisely because of those complications that the parties decided that it was better to just work something out than to fight over it. It was because at the end of the day we really didn't know how it was gonna be resolved. And I think all of the parties realized that no one was gonna be very happy with the way it came out if, you know, if we just litigated it for a long time. So that's precisely why we were able to reach an agreement. So fortunately, none of us are going to have to deal with any of those complexities in this particular case. We'll leave those issues for another day and another matter.

Mr. Mancini: The case involved a number of interesting issues, but the broader issue to put into perspective anyone who deals in this area is that title in this State has a lot of these Land Commission Awards back from the 1850s, and they exist, and there quite a bit of them exists. And they – when they are created, they are created as legal, existing, established lots of record. What happens is, is a property owner will come in, and they'll have those hodgepodge of a number of Land Commission Awards in his property. He'll ask for that property to be subdivided. The position of the County is that when you come in and ask for that property to be subdivided, you're asking for a consolidation of all those Land Commission Awards into one or more lots as a result of the

subdivision. And as long as you've the consent of all of those owners, and they agree to that, then those Land Commission Awards are consolidated into the number of lots resulting from the subdivision, but sometimes you don't have all of those lot owners before you. And then that creates a complexity, and sometimes you – it's difficult to find them. And our case involved a hodgepodge of those issues on that one subdivision. So I don't know if that helps, but it puts a little bit of perspective.

Mr. Shibuya: Yeah, so then the interpretation of this settlement is actually it's a temporary resolution.

Mr. Mancini: No, it's a permanent resolution of this one problem. There may be other subdivisions that come in, and I think to some degree this case maybe established a clearer perspective on the subdivisions for all parties involved, in any case, but for this case, it is pau.

Mr. Shibuya: Okay, thank you very much.

Chairman Endo: I have one question also on this case, then. Sort of a side matter, but is the – is the settlement confidential?

Mr. Mancini: I don't believe settlements of the County of Maui, in my mind, can be confidential. Can they? I don't know of any ordinance that would require a settlement – that would allow a settlement to be confidential. Possibly in litigation, it might be, but this does not have a confidential provision to it as far as I know, so the answer is no.

Chairman Endo: Would one of the parties maybe be able to just summarize real briefly what the terms of the settlement were?

Mr. Mancini: Sure. I have it front of me, but I'd rather do it from my memory. The parties agreed that as a result of the appeal, 21 lots will be – 21 Land Commission Awards will be agreed upon and acknowledged as lots – existing, established lots. And the applicant will withdraw the appeal before the Commission. That's about it.

Chairman Endo: Thank you.

Mr. Mancini: The lots are identified and there's a map attached to the settlement agreement.

Ms. Lovell: (Inaudible)

Mr. Mancini: Yeah, the 21 that were identified are identified. Others may not be identified and not there so it's–

Chairman Endo: All right. Thank you. Any other questions from the Board? No? All right. So we'll move to the next item. Thank you, Judge.

2. STEPHANIE RAGER appealing the Planning Director's notice of violation (NOV 20070002) for operation of a transient vacation rental in the R-2 Residential

District for property located at 2626 Mikoï Place, Kihei, Maui, Hawai`i; TMK: (2) 3-9-014:048. (BVAA 20070008) (Continued from the January 24, 2008 meeting.)

a. Stipulation to Dismiss Appeal

Ms. Kapua`ala read the agenda item into the record.

Chairman Endo: The parties may make their appearance.

Ms. Mary Blaine Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, appearing on behalf of the County.

Chairman Endo: Good afternoon.

Ms. Johnston: Good afternoon. We've reached settlement in this case. We've actually been settled for quite a while now. And I'm happy to answer any questions the Board may have. The appeal has been – we've stipulated to dismiss the appeal, so technically, it no longer is before the Board because Ms. Rager has withdrawn it, but if you want to know about the settlement, or have any questions, or any observations about this case, I'd be happy to talk with you about it.

Chairman Endo: Hari?

Mr. Harjinder Ajmani: (Inaudible)

Ms. Johnston: Okay. Ms. Rager paid a total of \$35,000 in fines in this matter. We have a copy of the check here—July 24th. She also, as part of the settlement, agreed to take all website advertising off. She still had a website that was up even after our hearing, and basically that's it—the settlement agreement.

Mr. Ajmani: So she no longer has a vacation rental at this point?

Ms. Johnston: It's not real clear. The neighbor that, you know, had provided information before, I haven't heard from her, but occasionally one of our inspectors goes by, and it looks like there may still be some activity going on there, but certainly nothing like it was. And there may be that she is having – really is having friends and family there now rather than renters. I don't know. So – but I'm sure that if it becomes a problem again that the neighbor will advise us of that. And I understand that the house is up for sale. She put the house up for sale several months ago.

Mr. Ajmani: So not having a vacation rental was not a term or a condition for the settlement?

Ms. Johnston: Well, yeah, that was part of it. I mean, basically, if she starts it up again, we'd just start all over again. And she'd get a notice of violation and we'll proceed down that path.

Mr. Ajmani: But that will be a violation of the agreement also?

Ms. Johnston: I can't, you know, I can't remember. I don't have the – I don't think that we included that in the agreement. I don't have it in front of me. James, do you have a copy of the agreement?

Mr. James Giroux: I have a stipulation to dismiss.

Ms. Johnston: No, no, no. I didn't– I couldn't– I was running late, so I couldn't pull my file to see that, but I could check that out, and let James know, and he could let you know. I don't think that that was – recall that as being a term of the – term of the agreement.

Chairman Endo: The idea is that it wouldn't even need to be because she's already prohibited from doing TVRs.

Ms. Johnston: Right. Right.

Chairman Endo: You don't have to get her to agree to do something that she already is prohibited from doing.

Mr. Ajmani: Oh, I see. Okay.

Ms. Johnston: It's like getting her to agree not to keep breaking the law, you know? It's just how you're not supposed to go back commit another burglary, but if you do, you get picked up, and you go through the process again. Okay. Any other–? Any–? Yes?

Mr. Shibuya: Mr. Chair, I just had a question in terms of the jurisdiction of the CC&Rs and the community association. The CC&Rs are very clear that Subparagraph 6 in Section 1 it says, and I quote, "Periodic and non continuous habitation of a dwelling unit, rental, short term leases having a duration of less than 30 days shall not be permitted." Another one in Subparagraph 1, I quote, "No building or structure nor any portion of any building or structure on any lot shall be used as a boarding house, tenement house, rooming house, hotel/motel, or apartment house, nor as a bed and breakfast facility."

Ms. Johnston: It's pretty clear. The problem is that the CC&Rs like that are enforceable by the other parties to the CC&R agreements. If there's an association, they could come in and enforce against their– There– It's a very– There are only about a dozen houses in this little subdivision. And I don't think that the owners' association is really active. You may remember she testified though she was told that they weren't in effect any more. That's highly unlikely that she was told that, which she might have been told, oh, nobody's really enforcing them, but clearly, she knew when she bought into the area that she was going not only against the law, but against the CC&Rs too. And you may recall Ms. Roark, the neighbor who testified, testified that they – she had purposely bought – she and her husband had purposely bought into the subdivision to get away from the rentals that were in the condo they were in the Kihei. So – and the next thing you know, she got one right in her doorstep. Yeah, so the association could've sued, and taken Ms. Rager to court, and it would've been pretty close to a slam dunk case, you know, in court, too, but that would've been a different– They wouldn't– Well, I don't know, I guess, the court could've probably – could've ordered a cease and desist on the property or house in that fashion, and fined her in some way. I don't know what the CC&Rs provide for a penalty, but certainly they could get an

injunction against her from doing that. So any other questions?

Mr. Shibuya: I'm done. Thank you.

Chairman Endo: Any more questions? Thank you.

Ms. Johnston: Okay.

Chairman Endo: All right, Members, turning our attention to the August 14, 2008 meeting minutes.

C. APPROVAL OF THE AUGUST 14, 2008 MEETING MINUTES

Chairman Endo: You folks have had a chance to review those? Would somebody make a motion?

Mr. Ajmani: I wasn't part of the meeting so—

Mr. Shibuya: I move to accept the minutes as written.

Ms. Sandra Duvauchelle: I'll second the motion.

Chairman Endo: Okay, it's been moved and seconded to approve the minutes. Any discussion? No? All those in favor, please say aye. Opposed?

It was moved by Mr. Shibuya, seconded by Ms. Duvauchelle, then

VOTED: To approve the August 14, 2008 meeting minutes as written.

**(Assenting: W. Shibuya, S. Duvauchelle, R. Ball Phillips, H. Ajmani,
J. Shefte.)**

(Excused: W. Kamai, S. Castro, K. Tanaka.)

Chairman Endo: **The motion is carried and the minutes of August 14, 2008 are approved.** Moving on to the Director's Report and status update on BVA's contested cases.

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: There's really – the only status I have to report is that the hearings officer's contract is moving back and forth between Judge McConnell, and Corp. Counsel, and the Department of Finance. We are still awaiting the proposed findings of fact, conclusions of law, decision and order from the – it's a Water Department appeal that Jane Lovell is handling. And other than that, no hearings have been set up or no progress on any other of the cases.

Chairman Endo: Thank you, Trisha.

Mr. Shibuya: Mr. Chair, Trisha, from your vantage or oversight of these hearings, how many do we have right now, approximately? Five? More?

Ms. Kapua`ala: I would say more. I manage SMA appeals and shoreline appeals as well, so I'm having a little trouble right now discerning—

Mr. Shibuya: Sure, sure, no problem. Well, Mr. Chair, I think – and Board Members, I'm very concerned about this type of action happening that the hearings are not being promptly addressed as the two hearings that we had before us. The reason for these hearings of contested cases is that they get processed quickly and more thoroughly than this Board would do. I would like to somehow recommend that we either forward a letter requesting that they hurry up or provide us a status on when they are about to complete. Is that something within our jurisdiction or – is it something that we just throw over the fence and then hopefully they'll come around the fence and deliver the goods?

Ms. Kapua`ala: I think it's the latter. I mean, being that – a lot of times it's the aggrieved party that suffers. And if they're not pushing it– You know, we're just the processing agency, and a lot of times—

Mr. Shibuya: Yeah, I'm open to hearing discussions from staff, yeah, not necessarily just you. Maybe Aaron or Francis can lend us some guidance here on this—your opinions as to how do we energize this group in coming to a resolution or coming towards a resolution?

Mr. Aaron Shinmoto: The problem is, there's no real time limits. We're at the mercy of the hearings officer and the two parties—when and if they can meet. They got their own vacation schedule, their own work schedule. So most of the delays are because they can't get everybody together at the same time, and we have no control over that. There's no time limit in the rules. I mean, it can drag on and on. Like this Rager case was over a year, year and a half maybe. We did get resolution in our favor, but still, it just drags on.

Mr. Giroux: And I think that's kind of the idea when we were trying to modify the Subchapter 10 when we came up with that in order to consolidate the notice of violations into a specific chapter. The idea was that those would be taken up by the Board because you wouldn't have to deal with discovery issues. You wouldn't have to deal with all the interrogatories, and pre-meetings, and meetings for pre-meetings, and orders for pre-meetings, and all of that stuff. And that stuff is what's still happening in appeals. The whole – everything that's in an appeal from a Director's decision, they still have, you know, meet with the hearings officer. Okay, what did we discuss? Okay, then they have an order. Then they have a discovery battle. Oh, okay. Now, you didn't show us your box of stuff, so we're not gonna you our box of stuff. And then they go, okay, now that we've gotten past that, let's mediate. Oh, okay, now they're in mediation. And so you've got this ongoing attrition of— And basically by the time the attorneys are sick of it, then they figure out, oh, hey, there is a resolution, and then they haven't even litigated. So, I mean, that's kind of what we were trying to avoid by at least getting the NOV's out of the regular appellate procedure because the appeals in and of themselves by Charter, they don't need public hearings. They're pure contested cases. But we felt that the Board could process at least the notice of violations more efficiently than we were seeing the hearings officers. But in all fairness, a lot of the issues that come up in appeals

from Directors' decisions are highly complex like this Hiolani Ranch you saw. I mean, for us to figure out kuleana, and all of these LAC Awards and – we would have to have a highly specialized knowledge of that area of law in order to even start deliberating of what would be a just outcome. So that's the benefit of having a hearings officer that they are highly trained in usually the area that we, you know, have to deal with. And a lot of times it's dealing with exactions. Remember? We had to deal with parks. You know, what is a park? What is not a park? And is it abusing the discretion not to call green areas parks? So those are very technical areas of the law that– But the discovery behind that is just huge, I mean, all of your County records, all of the developers' records. And then when you get the two lawyers involved, then you have your correspondence. I mean, the packet of correspondence– Because I get a lot of the stuff. I have like my own bin. Stuff comes in, and I try to keep track of it, and stuff. And it ends up being banker's– I'm not even litigating. I have banker's boxes of correspondence. And oh, okay, we agree to meet you at four o'clock. And then, okay, no, four o'clock's not good for me. I think we could meet at 5:30. And then you get another letter back a week later–oh, sorry, but we need to cancel that meeting–the hearings officer's out sick. And then you just get hundreds and hundreds of these letters back and forth, and you're going–this is ridiculous. Are these people ever even going to get into a room and get to the facts of this case? So in all fairness, there is that lengthy period of time that – when you have a hearings officer. So just so you understand the difference between how we wanna see the notice of violations processed as opposed to how you see appeals of Directors' decisions as they're dealt with by hearings officers.

Mr. Shibuya: Okay. I'm just trying to expedite the process here. Of course, I'm not trying to overrule or run over the defendants' rights here, but I just would like to have some progress or some means in which maybe the Chairperson who'd at least know what's the status of it. Are they sitting? Are they waiting for discovery items? The problem here is that I was a hearing officer for the University of Hawai'i. And we went through this lengthy process in which we had lots of discovery items being brought up by both sides. And the problem is you get too much discovery and it really lengthens the process. And somewhere along the line you just cut it off and you say let's go with what we have and we gotta proceed. We can't be using these delay – well, I call it “delay tactics,” but I just was impatient with that type of procedures. Can Randy write a letter, or is there a way in which this Board get some kind of feedback directly from each of the hearings officers?

Mr. Giroux: I guess one kind of out-of-the-box suggestion is we can look at the rules, the appellate rules, now. And I think the hearings officer is given a lot of discretion in that they have the power to give oaths, they have the power to subpoenas, and all of that. But if you look at it, and if you were to give the Chair the power to decide discovery matters, the Circuit Courts have that, too, sometimes the Judge will be just so overwhelmed he'll say, you know what? I'm assigning a discovery master. And then that person is supposed to be neutral, look at everybody's stuff, and say this is what everybody needs. And that's one way to say, well, if there's a discovery problem, then maybe the Chair would decide what– Because I believe – I gotta read the rules again, but I believe the – subpoenas are actually supposed to come to the Chair to sign in certain instances.

Chairman Endo: That's correct, they do send them to me and I sign them.

Mr. Giroux: Yeah, so the Chair would actually have the discretion to say I'm not gonna sign it

because why are you subpoenaing the Mayor? Why are you subpoenaing—? Give me justification for this because this is getting ridiculous. I've got 600 subpoenas sitting on my desk. I'm not signing these. So that's one way an administrative body can have some impact on that system.

Mr. Shibuya: Maybe as a legal counsel, James, maybe you can give us some way in which we could advise them. Either the Chair advises them, or advises a request status, or encourages a hearings officer, or the Corp. Counsel do that. I don't know what the jurisdiction is.

Mr. Giroux: With the litigators in our office, I have had conversations with them about discovery, and they do— Because the County's usually the one with a lot of stuff to subpoena. They do request the hearings officer to put a limit to it, but there's no incentive for the hearings officer to do that. I mean, if everybody's gotta look at the discovery, guess what? Everybody's getting paid. That's the life of billable hours. And so there's really no incentive in the system to say, you know, why don't we just—? Why don't we just make this short and sweet? Because like this case, the Rager, I mean, if that was with a hearings officer, and it lasted for a year and a half, that's a year and a half of billing. That's a good, solid, \$10,000 to \$25,000 of billable hours. So I hate to rag on my own profession, but that's a reality of the economics out there is that people are looking at the County as an augmented paycheck. And that's not a negative thing. Everybody's gotta get paid for their work, but also in the world of construction, we know this happens also. The faster you get it done, if you're paid a flat rate, you get it done faster. But if you get paid by the hour, you work all day, and then you work overtime, and that's the problem. So we work by a contract system. And I'm really not that familiar with how the contracts work, so I really can't comment on that.

Mr. James Shefte: Question?

Chairman Endo: Jim?

Mr. Shefte: Who does the hearings officer work for?

Mr. Giroux: Well, he's—

Mr. Shefte: We appoint him, so is he working for us?

Mr. Giroux: Yeah, he has the powers that the Board gives him, and he does not have the power to ultimately dispose of the case.

Mr. Shefte: Right, but couldn't we, you know, establish some guidelines? Since he works for us, our goal, our mission is to settle these cases as fairly and expediently as possible rather than letting him drag and on and on and on, can't we give him that sort of a guideline?

Mr. Giroux: Well, there's two ways you can look at that. There's the pre – there's the initial appearance where it's on our agenda that there's an appeal, let's say. And you look at the – you have it on your agenda, and you usually have the underlying packet of stuff. And then the first decision is, you want to get a hearings officer, right? And then the second decision is, I guess we pick the mediator. But in that step, there is that the possibility of looking at the nature of the case, if there is an ability to do that and look at the nature of the case, and actually send the hearing

officer a message of – like I think we've done this a couple times where we've said this looks purely like a legal issue. And that really eliminates a lot of discovery because all you gotta do is look at – you don't have to look at all the facts. You have to look at the legal– Everybody can agree on the facts. We have a development. We have a certain amount of acreage of grassy area, but the legal issue is, is it a park or not? And did the Parks Department abuse its discretion in declaring that it's not a park? So trying to frame the issue – and a lot of times, that's supposed to be the hearings officer's job at the initial hearing is that they can actually ask the two parties to give them a memo that frames the issues. And that's what you're gonna litigate on. They call it a position statement. The two parties will say these are my – this is why I appealed. The other party says, well, this is why I don't think that they should win. Okay, now, let's just concentrate on this. What facts do we need to get – to establish in order to get this litigated? And that's really what an efficient hearings officer would do. And I haven't gone to these hearings to see how it's done, but I think from what I've been hearing from the litigators is that somebody will come from the public and just say we wanna see all files related to any type of parks' situation. And that is hundreds and thousands of pages of documents and banker boxes stacked up in somebody's room and says, okay, now somebody's gotta read through that. And we have to go through it because we have to look for confidentiality issues. The lawyers have to go look through it to see if it's even relevant to what they would need. And then you gotta make copies of all of that. So one discovery request can take your whole department out. And then you gotta go to the hearings officer and say, we can't do this. This is ridiculous. We can't produce all of these documents. You have to limit this. What do they want from this? And that's the type of discussion that goes on between the attorneys and the hearings officers, and we haven't been seeing the hearings officer say, yeah, you're right. You know what? I misheard the question. And now that we see all the banker's boxes, I think we should pull back on this discovery on this issue. What is your question? What are you looking for because it's called a fishing expedition. You're just fishing—just looking for something. And you should have an idea when you ask for a discovery what you want. And usually, especially, for the notices of violations, if you need more than the notice of violation itself, and pictures, or correspondence between investigators and staff in framing the violation, you really are going way beyond the scope. I wanna see all the times you cited somebody for a six-foot wall. Well, why? Why would you need that? We have a wall in front of us. Let's go measure it. And now I can tell you that it's a 6'6" wall and now what's the law say? The law says you can only have a six-foot wall. Simple. And that's what we're looking at in the sense of how do you limit discovery but still allow people their due process to have their chance to present them their cases. And really, when you look at the due process analysis, that's what you're looking at is, did somebody have a fair chance to present their case? Not did they have a chance to rummage through all of the County's information resources and keep staff on the stand for hours, and hours, and hours, and then when we're done with that, go and depose them again. And then it becomes – you're absolutely torturing the system.

Mr. Shefte: It just seems that– This is the fourth year. It just seems like in the last year and a half, more and more of these cases have gone to this situation where in the first couple of years didn't– Maybe it's just the type of cases, I don't know, but–

Mr. Giroux: Yeah, I think we've been here about the same length of time, Jim. The thing is that you can see the litigiousness rising. When we went through the big boom, let's say, everybody just wanted to get their stuff done. But now, you're seeing that there's a lot more resistance as far as

just fix it. Just fix it. No, I don't wanna fix it. I don't wanna go back. I don't wanna spend any more money. I don't wanna do it. No, I did it wrong, but you know what? I'm gonna push you guys until I get it the way I want it. That's where we come in. We're the in the middle of the County laws and rules, and development sometimes. And that's where we're seeing that – that's why we're here because we are that Body that takes care of those things that administrative can't take care of on their own. They have to make decisions. They have to make calls. They gotta make – they gotta try to follow the rules the best they can. And then our job is to say, well, did they within their bounds of discretion – or did they just misunderstand the law? Did they misapply the law? Did they not see a fact that we saw as a fact, and did misapply that? So it is – I agree with you that it is getting more litigious. We are seeing more. And I've been telling my – within my department, this area, we need resources because this is where it's gonna come. It's gonna come here. So it is, for this Body, I think within the next couple of years, you're gonna see a lot more contested cases, notices of violation, those types of things.

Chairman Endo: Yes, Hari?

Mr. Ajmani: I think, too, is when we hire a hearings officer, and he's appointed, and all the contracts are settled, can we make it a requirement on his part that he can come up with a timetable and say—? Like in all court cases, Judges do have a set time for settling court cases and so on. So barring anything unreasonable, can he come up with a timetable and say, okay, I got an appointment today, and I have told people that you need to resolve this in three months or whatever? So it is too much to ask or is it possible?

Mr. Giroux: I think the biggest hurdle is the County itself because our biggest hurdle is first getting that contract out.

Mr. Ajmani: That's why I said after the contract.

Mr. Giroux: After the contract, yeah. That could be something that's actually in the contract. But again, when you're working with parties who may or may not – you may have parties that don't want it settled so they're gonna come up with three-month vacations. You know what I mean? Their inability to schedule. Oh, we can't meet. So you can't really hold that against the hearings officer because he's trying his best to run it – to get these parties together. And if they're not cooperating, that is a very difficult challenge.

Mr. Ajmani: But is there any attempt made to do that? To my knowledge, I don't think anybody has attempted to say that, okay, we want to resolve it in six months, and it just goes on and on and on.

Mr. Giroux: I have seen – I don't know what case it was, but I did see where at the initial hearing, they set up their discover schedule, they set up their motion schedule, they set up their trial schedule. So like again, it depends on the efficiency of the hearings officer. If that's the way they do things, then you are gonna see that. If it's not on their radar, they're like, okay, what's going on, guys? What's this case about? Oh, I don't get it. Let's meet next Wednesday. This is really confusing. I haven't seen any of your briefs. And you're going, you gotta be kidding me. The quality of your hearings officer is gonna be the quality of your product.

Mr. Ajmani: Okay, so I guess we do get a list of hearings officers. So we should have some option of choosing the ones which is more organized.

Mr. Giroux: Yeah, you can judge the product. When you see their reports, you do see a quality report versus a report that's— I don't think he was listening to— Because I've seen agencies basically just fire their hearings officer because they're like — they saw what we got. You're nowhere even in the ballpark, buddy. But then that creates a problem, because then you gotta reopen the hearing again and do your own investigation. But if you're here for five years, you get to see different hearings officers. You get to see different quality of work. And that's something that you can ask when the hearings officer presents his report is, did you set up a discovery schedule? Did you set up a hearing schedule? Did you set up a litigation schedule? What was your timeframe to get this job done? In your mind, how long did you have to get this done? And if we're seeing the case a year and a half later, hey, what was the problem? That's a good question. Oh, there was a lot of discovery. Okay, what did you do to limit the discovery? That's all legitimate questions. You hired them. They have a contract. That's legitimate questions to ask somebody who you hired and who has a contract with you.

Chairman Endo: All right, any other discussion on that item? All right. Then we're just about done. Our next meeting is gonna be on October—

Mr. Shinmoto: Mr. Chairman?

Chairman Endo: Oh, sure.

Mr. Shinmoto: Maybe since the Chair and the Vice-Chair attended a terrific conference, they could maybe give the Board on what their personal feelings of the conference was.

Chairman Endo: Sure, we'll let Mr. Shibuya go first.

Mr. Shibuya: You want me to go first? Okay, fine. I went to the conference and actually I emphasized many of my workshops in water, in the water conservation area.

Mr. Shefte: We thought you went for a swim.

Mr. Shibuya: No, no, not swim. I went on the Lao Stream Tour. And I discovered during that tour there were two large grates that were put across the stream and were taking absolutely all of the water. None of it actually reached the streams — I mean down to the ocean. Well, I also discovered that there were hihiwai. I think these are little shells, snails, opai, and the shrimp, o`opu, little fish that they actually all have eggs hatched or at least born on the top of the stream above the grates, and the water takes these eggs out into the ocean in the salt water. And that's where they hatch and survive as yearlings, young ones. And with the stream running, they would actually swim upstream or crawl upstream. With these two grates, these animals, these species would not survive. They won't make it. There's dry land over a mile long that's one stretch. And how do they get up there? There's one DLNR guy named Skippy Hau. Bless his soul. He goes out and catches them, the young ones, and carries them up in his five-gallon bucket all the way above the grates, and he releases them there. He is my hero. He's the only one that's doing that. I just

couldn't believe it. This is not the only stream that he's doing it. He's doing it on East Maui side too. In addition to that, he's taking care of the eggs for the turtles, green turtles as well as hawksbill turtles. He's doing it by himself. This guy is just unbelievable. And so this is the kind of stuff that I learned and I was aware of. I was aware of generally, but I learned all of these specifics from this conference and tour. And we need to be able to balance the water so that we can use it for human consumption, maintain the ecological systems, and some of the native species that we have, and somehow share this water. I think it's a challenge. Being a member of the General Plan Advisory Committee, I've taken it upon myself to make sure that we have some writing specifically for this and you'll see that. Thank you. Any more questions I can answer? I'll go on some more. Thank you.

Chairman Endo: I also attended the HCPO, Hawai'i Congress of Planning Officials. It was a good event. I thought it was very well run by our Maui County Planning Department. I thought Ann Cua as the Chair of the event did an excellent job. She worked really hard. I know she was stressed out, but she was happy with the results at the end. It was a really well run event. Good entertainment. Good speakers. For the most part, I enjoyed them. I went on the windmills tours or the alternative energy tour. Got to see the tour of the Maui Electric Power Plant. Got to see the new windmills they got at the Maui Ocean Center—these tiny, little, mini windmills, which were cool. And then we went up to the big windmills and got to see that. And in fact, even after that, DLNR let us go above the windmills to the nene release site which was pretty cool although it rained on us. So that was all good. And then what else? Yeah, that's about it. So it was a good event. Just really well run, and a lot of fun, and educational. So hopefully, other people can go next year.

Mr. Shinmoto: Next year it's gonna be on Oahu.

Chairman Endo: Next year it'll be on Oahu, yeah. Okay, you guys have—the Planning Department—have any comments on HCPO?

Mr. Francis Cerizo: Well, I went to the conference also. And we had several good speakers on the first day. And I was impressed on the information that we got. There was one guy that talked about peak oil. And there was another guy that talked about sustainability and how to – how can you— Well, they all kind of blended into each other because the first one – well, not the first one, but the second guy that talked about peak oil he says our resources on oil is limited. He says that the peak of the discovery was in the '70s. Now they're using up all of that oil. As far as the new discoveries, it's all going down. It's getting less and less each year. The best scenario is that we might have maybe 50 years of oil left. So this is the time that everyone's saying that now's the time that we have to do this transition to non fossil fuels and that's the challenge that we're gonna have in our – not in our generation, but probably in the next generation. They're gonna run out of oil. So we're probably gonna see a lot of changes in how we plan things. The infrastructure is gonna be somewhat changing from your normal car to mass transit, and the type of mass transit that can run on renewal energy such as wind, and PV, and bio fuels because pretty soon since there's not gonna be any fuel, it's gonna first affect—this is what one of the guy's said—this is first gonna affect your transportation system. It's gonna affect your ability to bring food in. It's gonna affect especially, Hawai'i since our tourism is airplane-based. So it's gonna be one of those items where you won't – people won't be able to spend on because it's gonna cost so much to fly over here. So we're gonna have to do a bigger – more than most people because we're on an island. We

have less resources. So it's kind of mind-boggling. So, okay, what do we do? It kind of planted a seed for us to think about how can we plan for that. It's gonna be challenging.

Chairman Endo: Yeah, that was a very depressing speech, but it was very interesting, though, yeah. The concept of peak oil was that we have approximately used half of all the oil reserves in the world. They're not sure exactly, but roughly. That's what they mean by "peak." So we're gonna continue to produce less and less oil although the demand is going to keep going up from everybody else. That's not good news for the price of oil at the pump.

Ms. Kapua`ala: Yeah, it's a finite resource that there is an end to it. They say that for every one barrel of oil they find, the world consumes six. So it's not gonna get any better. It's gonna get worse. And what they said to do – well, what I came out of it with – came out of the conference with is the fact – what they said is, be glocal–think global, act local. Simply put–just keep it Maui. Stop the capital leakage from going out-of-state. Reduce your carbon footprint. The best thing to do is buy Maui first and support the farmers markets, Maui economy, local businesses, and that's the best thing we can do. That was the positive thing about it. And the fact that Hawai'i is so unique, and we have so much to capitalize on, it just gave us – that was the hopeful thing about the conference. It was pretty depressing though for that one 45-minute to an hour. And the water – it's gonna be a lot of litigation before that becomes a reality.

Mr. Cerizo: One other thing was on – we went to – I went to the same mobile workshop–the alternative energy on the power. We did the windmills, and we also did the hydro power. And one of the things that we looked at is that there was one mill – one of those windmills provides 1.5 megawatts. I think they have like 20 there. So they have like 30 megawatts. And that's comparable to I believe HC&S. I mean, they create a lot of power. The big mill in Maalaea provides 50 to 80 megawatts. So that – windmills, they plan to double that. And there's another facility that will match that on the – above Wailea. So we're looking at maybe 80 megawatts of power being produced by wind. Another source that A&B is working with is bio fuels by algae. And that fuel source is for every acre you can get 5,000 gallons of fuel. And it's substantial. You're looking at a thousand acres as a start. Eventually, if we're looking at a thousand acres, just think of the potential if the sugar goes down. We might have – if this test pilot goes through, we might have the capacity to grow our own bio fuel to do the – if we need fuel to run the plants, that might be a possibility. So that was kind of interesting.

Talking, too, about what Trisha was talking about, about acting local, one of the examples of doing that is a lot of times, we send our money out. As far as retirement money, we go to the big guys who's all failing now. They have these local markets now. What they do in these local markets, local money markets, the model that they have somewhere in the northwest is that you would find a product that is like – it won't work for everything, but there's some items like in this community that they import like 40 million chickens or something. I mean, a huge amount. Not 40 million, maybe 40 thousand chickens a year. And he was saying if we could produce 40 thousand chickens here on Maui, forget Foster Farms, if we could produce chickens here, that would be a viable company or a business. So we can find these niche markets where it's really – it really can make a difference. Some things like rice, you probably can grow enough rice here or have enough water. There's some crops you just can't do, but there's some of those that you can actually research, and do locally where you can use less energy, or just keep it local so there won't be – keep the money

in town kind of deal.

Chairman Endo: Thanks, Francis. Okay, if there's no other new business, the next meeting will be October 9, 2008. And this meeting is adjourned.

E. NEXT MEETING DATE: October 9, 2008

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:26 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Warren Shibuya, Vice-Chairman
Rachel Ball Phillips
James Shefte
Harjinder Ajmani
Sandra Duvauchelle

Members Excused:

Stephen Castro, Sr.
William Kamai
Kevin Tanaka

Others:

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