

APPROVED

Maui County Board of Variances and Appeals

Meeting Date: OCTOBER 8, 2009

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
SEPTEMBER 10, 2009**

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, 1:35 p.m., Thursday, September 10, 2009, 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: At this point, I would like to let the public know that public testimony will be allowed as to each agenda item. At this point, I'll be asking for public testimony each time a new agenda item comes up. If you have a special circumstance when you need to testify and leave early, then come up and make yourself known, and we will probably allow you to speak even before your agenda item comes up. At this point, if there's no objections from the Members, the Chair recommends that we take out of order, Items C-1, 2, and 3 as they will be fairly quickly to finish up. Is there any objection to that? Seeing none, we will now proceed with Item C-1.

C. APPEALS

1. To determine a hearings officer to preside over the following matter:

- a. **MEH LIMITED PARTNERSHIP appealing the Director of Public Works' determination that preliminary subdivision approval for the Sunset Estates Subdivision (DSA Subdivision File No. 3.1834) is null and void for property located off of Waipuilani Street, Kihei, Maui, Hawaii, TMK: (2)-3-9-046:013. (BVAA20090003)**

Ms. Carolyn Cortez read the agenda item into the record.

Chairman Endo: Will the parties please make their appearance?

Mr. Steve Parker: This is Steve Parker. I'm appearing on behalf of MEH Limited Partners. I am the general partner.

Chairman Endo: Good afternoon.

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

Chairman Endo: Good afternoon. Is there anyone here in the public who wishes to testify on this matter? Seeing none, public testimony is closed as to this agenda item. At this point, we're supposed to select the hearings officer, is that correct?

Ms. Johnston: That's correct. If the Board will entertain the possibility, Mr. Parker and I have talked. This is a very straightforward matter. It has to do with – he wrote a letter trying to extend the

subdivision application and it was untimely. So the Director said no, you've missed the deadline. To sort of expedite things, we would request that rather than appointing a hearings officer that the Board would agree to hear this matter at the next meeting or one that they could accommodate as I anticipate there would be only two people testifying: Mr. Parker and somebody from the Department. It's a very focused issue.

Chairman Endo: Okay, and both parties are agreeable to that?

Mr. Parker: Yes.

Chairman Endo: Okay, any questions from the Board? No? Otherwise, okay, then we will – the Board, seeing no objections, we will allow your request, and we will proceed to handle this matter without a hearings officer taking into account what you've stated as to the fairly or reasonably short amount of – or small amount of testimony and time needed for the Board to hear the appeal itself. We will at a later date request a scheduling order for the procedures and we can discuss that later on.

Ms. Johnston: Okay, thank you.

Mr. Parker: Thank you.

Chairman Endo: Thank you. Okay, moving on to the next agenda item, C-2.

2. **MICHAEL BASKIN of SEASHORE PROPERTIES, LLC appealing the Director of Public Works' Notice of Violation (V 20090014) for completing exterior renovations without first obtaining the building permits for property located at 93 Hana Highway, Paia, Maui, Hawaii; TMK: (2) 2-6-002:027. (BVAA 20090001)**
 - a. **County of Maui's Appeal Hearing Memorandum**
 - b. **County of Maui's Exhibit List**

3. **MICHAEL BASKIN of SEASHORE PROPERTIES, LLC appealing the Director of Public Works' Notice of Violation (V 20090018) for completing interior renovations without first obtaining building permits for a commercial building located at 93 Hana Highway, Paia, Maui, Hawaii; TMK: (2) 2-6-002:027. (BVAA 20090002)**
 - a. **County of Maui's Appeal Hearing Memorandum**
 - b. **County of Maui's Exhibit List**

Ms. Cortez read agenda Item C-2 into the record.

Chairman Endo: Would the parties please make their appearance?

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

Department. We were able to reach a settlement agreement on Tuesday not only on these two cases that are on your agenda today, but there's a third case, a third notice of violation that has not yet been set for a hearing. We're settling all of them. We haven't finished. Because we just reached an agreement on Tuesday, we haven't been able to finish the paperwork, and get the Mayor's signature, and so forth. So what I'd like to do is, if the Board is interested, I can just outline what the terms of the settlement is. And if you need to put this back on the calendar once it's completed, we've gotten the money, and the Mayor's signed off, we can come back and we report to you. That would be fine too.

Chairman Endo: That sounds good.

Ms. Johnston: Okay. Do you want me to tell you what the settlement is?

Chairman Endo: Sure.

Ms. Johnston: Okay. First of all, the third case that's not on your agenda, I don't even have a BVA number for it, but it was for a notice of violation issued in 2008 for some problems with the fence. All of these three NOVs deal with property Mr. Baskin or his company, Seashore Properties, was renovating the Old Paia Inn which is now the Paia Inn Hotel. So all of the NOVs rose up from that. He was able within a fairly short period of time after the NOVs were actually issued in each case to abate. He'd been working along. And there were some glitches maybe more at the Planning Department than with the Department of Public Works. The total fines he will pay – the total fines from the time of the NOV to the periods of the abatement under the schedule, \$43,600, the settlement will be 10% of that which is sort of what the Department is using now as a settlement if people have been cooperative and acted forthrightly on it. So the total fines between the three NOVs will be \$4,360. And Mr. Baskin is going to be put under the requirement that he obtain all the certificates of occupancies for the building, which are the retail, and the deli, and so forth within 90 days. So that's basically – and then we will stipulate to dismiss the appeal.

Chairman Endo: Okay.

Ms. Johnston: Are there any questions?

Chairman Endo: Any questions for Corporation Counsel? Hari?

Mr. Harjinder Ajmani: I was just curious as to what kind of violations you thought there were. What kinds of changes were made that the Department thought may not be right, or they were just not taken – they were done without permits?

Ms. Johnston: Correct. They were done – there were some fence issues. There were renovations outside. He changed windows. He actually did a very nice job on it. And then additions were made to the interior—changing some rooms around and putting bathrooms. And he proceeded without getting either the building permits or any of the SMA permits or exemptions. At one point, there was a permit actually issued that got revoked by the Department. It was all very unclear so these matters have been abated, and he will move ahead. So it was basically doing the work without permits—three cases.

Mr. Ajmani: Thank you.

Chairman Endo: Okay, at this point, I'd like to allow the public to testify as to this agenda item. Is there anyone here who wishes to testify? Please come forward. Seeing none, we'll close public testimony as to this item. And we don't need to take action, but we will look forward to your next report on that.

Ms. Johnston: Okay, I will – maybe what I should do is just let you know when the settlement's completed and can just be put on the calendar for a report on that.

Chairman Endo: Sounds good.

Ms. Johnston: Okay, thank you.

Chairman Endo: Thank you. Okay, so that was actually Items C-2 and C-3. So if the Department could now call Item B-1.

B. PUBLIC HEARING - VARIANCES

- 1. JAMES G. & ELIZABETH P. WHITEHEAD requesting a variance from Maui County Code §19.30A.030(F) to allow an existing wall, approximately five (5) feet in height, to remain within the agricultural setback area whereby a maximum of four (4) feet in height is allowed, for property located at 701 Kai Hele Ku Street, Laniupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-010:017 (BVAV 20090007)**

Ms. Cortez read the agenda item into the record.

Chairman Endo: Does the Department want to start off with a power point presentation?

Ms. Cortez: Yes, please.

Chairman Endo: Okay, go ahead.

Ms. Cortez: Okay, first we're going to start off with a video, which is of the wall. And I apologize in advance. The video is a little bit segmented. Okay, so this is one of the driveways from Mr. Whitehead's property and this is the wall that runs along the front boundary. You can see here that there's a jog. The wall runs behind this. This is the electrical pedestal wall. Okay, and this is the boundary right here—Mr. Whitehead's boundary. And you're gonna see that the wall does not run the side. It just stops right here. Okay, now this is the same starting point that we had, and now we're going to go towards the left side of the property so you can see the wall that runs across the left side. And this is the second driveway into the property. Okay, and this is just the Google Earth topo view, the top view. Okay, and this is Mr. Whitehead's property right there. It's really hard. You can't really see the wall, but it's just an overview of the entire property. Okay, and that's all we have.

Chairman Endo: Thank you. Will the applicant please come forward, speak into the microphone, and state your name?

Mr. James Whitehead: Good afternoon, Board. My name is Jim Whitehead. I live at 701 Kai Hele Ku. We've been living up at that property since November of 2001. That's when I built the wall. Had no clue there was such a rule of four feet. According to the Planning Department staff's letter, 57 people had got violations up there in the last six months also didn't have a clue that there was a four-foot rule. So I was asked to take the wall down. I was given approximately, 26 days from the time I actually got the letter, not from the date of the letter because the date of the letter was three, four days in the mail.

I'd like to read – because it was a shock to me. I was a contractor. I'm retired and going through social security disability right now. But the letter I got, never violated the law or breaking building codes in my entire career, but next to the last little paragraph, "Please be advised that a followup investigation will be performed and if not in compliance will be subject to civil and criminal enforcement action." That's a pretty harsh letter to tell somebody they did something wrong right off the bat. It kinda shook my wife and I up. We just didn't realize.

My wall is approximately, 225 feet long. Thirty-eight feet of that is columns, and there is 19 of them. They're two-foot wide. Some of them are as little as six or eight inches above the top of the wall. Some are as much as 11 inches or 12 inches above the top of the wall. So it's 187 feet of five-foot wall. I know this to be a fact because the Planning Department apparently asked the Building Department to go out there a few weeks ago and examined the wall, checked every inch of it to see if it conformed to Building Code. Scott from the Building Department came out and measured everything on the entire wall from one end to the other. Said I had two columns that were over six feet: one by two inches, one by four. That's 72 inches. I was at 75 on one, I believe it was or 74, and the other was about 76 or 77.

Anyway, there was erosion on that side of the wall, so I backfilled the dirt from the erosion on the street side because every time it rains up there, all the water comes to my side of the street. Totally comes flooding across there like a river. I've read the law now that I know that there is a law, and it does say four feet. It's 19.30A.030 describing lot areas in ag zones, lot widths minimums, minimum yard setbacks, and so on and so forth. E, "Unless otherwise provided in this chapter, the maximum height of any dwelling shall be 30 feet." I'm sorry. I'm on the wrong one. No. F, "Maximum wall height. Walls shall not exceed four feet within a yard setback area measured in the finished or existing grade whichever is lower to the top of the wall as defined herein. This does not preclude construction of fences on top of the wall for safety purposes." I didn't intentionally violate the code. I didn't do this to thumb my nose at the County of Maui. And as I said 30 years as a general contractor, I prided myself on following the code at all times, the Building Code. Building Code and Engineering Code has been everything I've worked with my entire career. Zoning was something developers dealt with always. I never had to worry about the zoning because when I went in, there it was. Utilities stubbed in, go to work. Six-foot is the code for building anywhere on this island except for ag zones, apparently, but yet building doesn't acknowledge that. They allowed me to put up a wall, and apparently from the count, 57 other people, without anything being said, ten years after the law has gone into effect, they show up and say we're all wrong.

I've asked because of financial reasons because all I have is social security income. I have no way of ever regaining money again. We live off partial savings and our social security. I got quoted over \$20,000 to do this work. And my calculations, that's about two years of our supplemental income, what my wife and I call our supplemental income, is our money we've saved up to take us to the end.

I took a lot of pictures. I'm sure you all had a file for that at least 25 copies. And the other confusion item to me is why six, eight, ten, 12-foot hedges on the property line completely blocking the view plane is legal if my little wall being 12 inches too high is illegal. I don't understand that. And I don't understand the intent – what the intent of the law was. The staff report said view plane. Well, if it's a 12-foot hedge the entire property length, it doesn't have a view plane anyway.

I just feel that if the County wanted to make a law and they put it in effect, they should've been enforced from day one, not ten years later. The financial hardship is causing all the people up there in Launiupoko which apparently is the only subdivision Zoning's gone to. If mine is \$20,000, I've heard people paying \$10,000 and \$15,000. One gentleman paid \$26,000. At \$10,000 at 57 violations, that's \$570,000. And I know the amount's gonna be bigger than that because most people are paying more than \$10,000, but I'm just using that as an example. This is a financial hardship to everybody. Nobody did this on purpose. And if Zoning Inspectors have been coming up there to check farm plans all these years driving right by your home and never saying anything, you assume everything's okay. You really do. But I've included pictures in my submittal of all the hedges. There's pictures of my wife standing by the wall because the County – the Inspector stated that I had seven-foot walls. Nothing down on that entire wall according to the Building Inspector was bigger than six feet except for two columns. The rest of the wall was at five feet. Some of it's even less because you'll see a picture of my wife standing by the wall and she's 5'1", and the wall is lower than the top of her head.

I was told that I could file for a variance, and "You can go and spend your money, Mr. Whitehead, but you're going to lose." A lot of my other neighbors also were told the same thing, "You can go through the trouble." We pulled fourteen hundred dollars of our savings out to get to this point today, but we're going to lose, "So you're really wasting your time," is what we were told. I hope that's incorrect. I truly do.

The last thing I'd like to bring up is you have a permit, a copy of a permit, was issued to a Greg Stille in 2007. And on the first page, permit look up matching permits, you'll see a picture of rock walls. This lot is on the corner of Wailau and Kai Hele Ku, a corner lot. I'm not here to get this gentleman in trouble. Don't get me wrong. I think he did a beautiful job on the wall. It was built to give him a flat area to plant his trees up top for whatever type of trees he's planted, but this wall exceeds the four-foot limit, and it's inside the 25-foot setback, and there's two terraces inside the 25-foot setback. They say it's called a retaining wall so it's okay. Well, the problem was that wall wasn't required. That lot – I was up there in 2001 before there was a phase three. This is a phase three lot. And that slope going up was a very gradual slope. So what this gentleman did, because you'll notice on the paperwork, it says "after-the-fact permit," is he put up these rocks, backfilled them with dirt, kept going until he got up to the elevation he wanted to have a flat lot, and he graded it out, and planted his trees. If that's okay, and he's on a corner lot, which I'm not sure of the code, but I think it's three feet on a corner lot that nothing can exceed three feet in height for line of sight

view, why did the County give him a permit? And he's not the only one that got a permit up there. There's some other lots, too, but when I tried to go in with the customer's name, or my neighbor's name, or his address, or his TMK, for some reason. I know they got permits. I couldn't pull it off the computer. And I was told that it could be a period somewhere that I didn't put in, but I do know they had permits in the same condition this gentleman did here.

So I just don't understand why all of a sudden we are all wrong. I do know there's a law. I'm not saying there wasn't a law. If I had known there was a law, I wouldn't have done what I done. I didn't spend a 30-year career doing it the right way to come up here and start doing it different. But I'm done. I'm retired. I've gotta have back surgery, but they won't do it any more because I've already had two. I have no way to recover any money that I'm forced to spend to do this so I'm asking the Board's consideration considering the law's been in effect for over ten years. Nobody's ever been in violation of it even with the Zoning Inspector's coming up there week after week for years. And I'd have your consideration that I could have this variance. Thank you.

Chairman Endo: Thank you. At this time, let's open it up for public testimony. Is there anyone in the public who wishes to testify on this matter? If so, would you please--? Or you're actually--

Ms. Elizabeth Whitehead: I'm his wife.

Chairman Endo: Yeah, you're the wife. You can speak as an applicant. So hang on for one second. Is there anyone else? Is there anyone in the public who wishes to speak? No? Okay. Let's close public testimony as to this item, but you can still speak, ma'am, as a co-applicant for this application.

Ms. Whitehead: Hi. My name is Elizabeth Whitehead. And I just want the Board, the Variance Board, to know that I am upset. I am angry, very angry when all this could've been avoided many years ago. We were not the first wall put up. Why didn't the Zoning Department stop the first wall, then we wouldn't have followed suit? And all these years, the other 57 people put their walls up. They could've been stopped. I just think the Zoning Department didn't do their job and now we're being penalized. And they're just harassing us at Launiupoko. They haven't gone to Kahana. They haven't gone to Kula, Kapalua. They all have walls more than four feet. I took pictures, but I don't wanna turn everybody else in. I just feel it's pure harassment on Launiupoko. They've been after us from day one 'cause we have a beautiful property. First time in my life that a local person can afford two acres. Can't really grow anything to make a living off it, but I enjoy the fruit trees, the vegetables. What's one foot of wall gonna do? The poor neighbor down the street got intimidated by the Planning Department or whoever he came up here to see that he took one foot of wall up. It didn't do anything. His hedge behind the wall is taller than the wall itself. You can't even tell the difference, but he spent seven thousand dollars to take it down. Another one got scared. Took hers down. Her trees-- Drive up Launiupoko Street. Both sides, there is no view plane. It's either got 20-foot naupaka hedges, areca palms, and the walls are way below. One neighbor had two columns maybe this high, this high. His walls were four feet and he got scared. Went -- drove past by there. He had knocked his wall -- his column down, just that little bit of column just so it would be five feet -- four feet. And his bamboo hedge behind it is taller than that. I don't understand. So anyway, I just think it's pure harassment. I don't wanna sound redundant 'cause my husband covered it all. Thank you.

Chairman Endo: Thank you. At this point, is the applicant agreeable to the waiving of the reading of the staff report by the Planning Department?

Mr. Whitehead: Yes.

Chairman Endo: Okay, thank you. So we'll waive reading. At this point, we'd like to open it up for discussion amongst the Members, questions and deliberations otherwise, I'll move on to the recommendation.

Mr. Ajmani: Is there somebody from the Planning Department here to clear the discrepancy whether the wall is seven feet, or five feet, or—?

Chairman Endo: Okay, we have various representatives of the Planning Department. Mr. Shinmoto, would you like to answer that question?

Mr. Aaron Shinmoto: I can answer several questions – clarification. The reason we're in Launiupoko is not because of a sweep. These are all results of complaints we received. Every case we're investigating up there is a result of a complaint. As to the permits that some people have gotten, the Department of Public Works can – will issue permits and they can approve walls higher than four feet, and those are the permits that the Public Works' people issued. We cannot do that. The Public Works Department can.

Chairman Endo: Okay. Hari?

Mr. Ajmani: So I'm still unclear as to they say the wall is five to seven feet while four feet is allowed. Can somebody tell me how much length of it is five feet or how much is seven feet? Any such idea?

Chairman Endo: The applicant could answer that. Or if you had a site plan or building plan, that would be great showing the wall and plan view. No?

Mr. Whitehead: No, there is no permit for the wall because if it's six feet or less, there's no permit required by the Building Department. But as I said earlier, the wall is approximately, 225 feet long. Thirty-eight feet of it is columns, and I'm saying two-foot each. There's 19 columns and they're two feet wide. Those are at six feet, 71, 70 inches, 69 inches, but they're all below the six-foot mark. The rest of the wall is all at five feet. So if you subtract it, that's 187 feet that's five feet, and 38 feet would be say, six feet.

Mr. Ajmani: So only the columns are higher? The wall is always five feet?

Mr. Whitehead: The wall has always been five feet. It's the columns that's just below six feet, but it's always been that way since I've built it in 2001.

Mr. Ajmani: On the picture that you showed—the video—can I see it one more time?

Mr. Whitehead: Okay, when you're looking at this column right here, that is just under six feet.

They're all pretty much the same. This one, go a little bit farther down here are all just under. And these parts of the wall are at five feet. So these columns are not exactly 12 inches above. Some of them are only six or eight inches higher than the top of the five-foot wall.

Mr. Ajmani: Okay, thank you. This wall is five feet, the one you're showing. Thank you.

Chairman Endo: At this point, why don't we move to the Planning Department's recommendation.

Ms. Cortez: Based on its analysis, the Department of Planning hereinafter referred to as Department finds that:

1. There is no exceptional, unique, or unusual physical or geographical condition existing on the property which is not generally prevalent in the neighborhood or surrounding area;
2. Strict compliance with the applicable provisions of this title would not prevent reasonable use of the subject property;
3. The conditions creating the hardship were the result of previous actions by the applicant.

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

In consideration of the foregoing, the Department recommends that the Board of Variances and Appeals adopt the Department's staff and recommendation reports prepared for the September 10, 2009 meeting and authorize the Deputy Planning Director to transmit said findings of fact, conclusions of law, and decision and order on behalf of the Board of Variances and Appeals. Department of Planning, signed by the Deputy Planning Director Kathleen Ross Aoki.

Chairman Endo: Thank you. For the record, could you let us know if there are letters of support or opposition on this matter?

Ms. Cortez: No, there were no letters of support or opposition.

Chairman Endo: Thank you. Okay. Hari?

Mr. Ajmani: Yeah, I had a couple of questions for Mr. Whitehead. Mr. Whitehead, you said that you had been a licensed building contractor for a number of years?

Mr. Whitehead: Yes.

Mr. Ajmani: And you were not aware of this rule at all?

Mr. Whitehead: No, sir. As a general contractor, everything I did was by the Building Code. I didn't

have a license to do any of the excavation work so I – really, Engineering Code, I had subcontractors. But, no, I wasn't aware of it. And I've spoken to a number of contractors since I got my letter. They weren't aware of it either. Nobody got a letter. Even when I was with the Contractors Association, never received anything stating about this was put in effect or when it was put in effect.

Mr. Ajmani: And you also quoted that somebody gave an estimate to demolish the one-foot of this wall for \$220,000?

Mr. Whitehead: No, for over \$20,000. I was getting quotes from \$20,000, \$21,000, up to \$25,000.

Mr. Ajmani: To remove the one extra feet?

Mr. Whitehead: Yeah.

Mr. Ajmani: Okay, thank you.

Chairman Endo: I have a quick question. In the jog in the wall, there's a pedestal wall for the Maui Electric meter. Is that – what is the height of that wall?

Mr. Whitehead: That wall is six feet, but it's also 40 feet from the property line, so it's not inside the 25-foot setback.

Chairman Endo: Oh, okay, so it's not part of the matter here.

Mr. Whitehead: No, it's not. The reason that wall was jogged in was because there was a telephone there before when I first built the wall. And I was told to keep that electrical pedestal 20 feet away from the telephone pole. So I had to bring it farther down into the property because they wanted that area open in case they had to do maintenance on the telephone pole, I guess. And now it's gone underground. The pole's gone.

Chairman Endo: Thank you.

Mr. Stephen Castro, Sr.: Mr. Whitehead, who originally built the wall? Did you build it yourself or was it—?

Mr. Whitehead: Yes, I hired people to work with me, and I built it myself, and bought all the materials, and brought it out there.

Mr. Castro: Thank you.

Chairman Endo: Is there a comment from the Planning Department?

Ms. Cortez: Yes, Chairman, we have the Inspectors here also if the Board has any questions for them.

Chairman Endo: Okay, thank you. Hari?

Mr. Ajmani: Yeah, I would like to find out how many complaints the Planning Department received when they went – before they went for the inspection. Some idea. They are saying that they went there because people complained about the height of the wall, so is there one person who complained or five? There are 57 violations on the subdivision. So some extent of how many people are complaining? Do you have any idea?

Chairman Endo: Okay, that question is for Planning. Could you please identify yourself for the record, please?

Mr. Sonny Huh: My name is Sonny Huh. I'm a Zoning Inspector for the County of Maui, for Planning Department. And there was a wall complaint back in 1990 – no, 2008 about a wall in Puone Way. And that's the first time, actually, I went up to the Launiupoko area. And that was a complaint made by one of the residents in Launiupoko, and follows numerous complaints on the list. And how, you know, always complaints goes pointing fingers, and it just snowballed. And there are numerous people, I must say, who complied and was aware of such four-foot rules.

Mr. Ajmani: When you say "numerous" means what?

Mr. Huh: "Numerous" means including the contractors. I can't recall numbers right off the top of my head.

Mr. Ajmani: Ten, 15, 20, one? More than one, I hope.

Mr. Huh: Of course. More than 50% of the properties are in compliance – I mean, parcels in Launiupoko.

Mr. Ajmani: They are in compliant with the four-foot rule?

Mr. Huh: Yes.

Mr. Ajmani: Okay, thank you.

Mr. Huh: Are there any other questions?

Chairman Endo: Just to summarize maybe where we're at since you are the Inspector, so all of the walls and columns above four feet would need to be removed if it's within the 25--?

Mr. Huh: Twenty-five-foot front yard setback, and 15-feet side yard setback.

Chairman Endo: Okay, so anything within those two setbacks?

Mr. Huh: I'm sorry?

Chairman Endo: So within the setback, they have to comply with the four-foot rule?

Mr. Huh: Yes, sir, anything outside of the setback area, they're allowed to build as tall as they – I guess as tall as 30 feet by the guidance with a permit.

Chairman Endo: Okay. Any other questions? But we still might have more questions for you later.

Mr. Huh: Okay. And not only the perimeter walls in question. When they speak of 57 violations, it's not just the perimeter walls. If I'm not mistaken, there were a total of about 30 perimeter wall violations, and eight of them in compliance. And there were about 26, I believe, pedestal wall violations, which is pedestal wall meaning a wall with attached electrical water meters – I mean, electrical meters, as well as utility boxes on the wall. Those walls actually exceeds six-foot building code limits where it expands to seven-foot and even higher. Of course, those were all placed in the setback area without a permit. As Ms. Cortez might have one picture that depicts continuation of those pedestal walls becomes a wall that expands about close to 40 feet in the front yard setback.

Chairman Endo: Okay, but you're talking about other properties, not the one we're talking about today, right?

Mr. Huh: Oh, we're talking about the other properties that the applicant was talking about. There was 57-some violations, I guess, of which there were – 30 were – 20 – 30 were pedestal walls – I mean, perimeter walls, and 26 was pedestal walls, which were the electrical MECO meters, as well as the utility boxes were installed.

Chairman Endo: Okay.

Mr. Huh: So there's a difference, yeah, pedestal walls. Mr. Whitehead's wall is actually five-foot except some columns that are sticking up higher, but the pedestal walls, that's something different. So, yeah, not all 57 violations are perimeter walls.

Chairman Endo: Okay.

Mr. Kamai: Yeah, I got a question. So you would consider one wall, one violation?

Mr. Huh: Yes, sir. I mean, I would consider, I guess, would be – if there's a wall that surrounds a property, that would be one violation.

Mr. Kamai: If it's a perimeter wall or–?

Mr. Huh: Yeah, either a perimeter wall or a pedestal wall, it would be one violation. Of course, if it's a pedestal wall and a perimeter wall, I guess that would still be a one violation? Yes.

Mr. Kamai: So roughly, 57 homeowners, 57 lots about?

Mr. Huh: Approximate, sir.

Mr. Ajmani: Can I ask one more question? Oh, go ahead.

Mr. Kamai: Have you seen this picture that Mr. Whitehead submitted?

Mr. Huh: No, I have not yet, sir.

Mr. Kamai: Could you take a look at it, please?

Mr. Huh: I'm assuming this is the one, I think, nearby Mr. Whitehead's property. The one across? One block right across, on the right, I guess the corner of Kai Hele Ku, and as you mentioned, Wailau, the terraced rock, retaining wall. Yeah, terraced rock, retaining wall, which actually has a permit. As Mr. Shinmoto had indicated that in an ag lot, the walls over four-foot in a setback area, sir, only allowed with a Public Works Director's approval.

Mr. Kamai: Okay.

Mr. Castro: I got a question.

Mr. Huh: Yes, sir.

Mr. Castro: If Mr. Whitehead's wall was built in 2001, and only now the complaints have come out?

Mr. Huh: Well, that's a funny thing you mentioned that because there was some complaints in the past, it was that it was never forwarded to Zoning.

Mr. Castro: Yeah, I'm just kinda curious because, I mean, I would be upset, too, if, you know—

Mr. Huh: Absolutely, I understand.

Mr. Castro: Thank you.

Mr. Kamai: So of the 30 violations for the perimeter walls—

Mr. Huh: Yes, of which eight of them complied, which the applicant pointed out that they were scared, but they did lower those walls to four feet.

Mr. Kamai: So what about the other 22?

Mr. Huh: I do believe they are in the process of second warnings being issued.

Mr. Kamai: And they received this same letter as well?

Mr. Huh: Yes, sir, those are actually a letter that's already pre-written warning letters that goes out for all types of violations that Planning Department enforces. So it's not just for a perimeter wall we use that verbiage. It's for the use violation, SMA violation, any violations.

Chairman Endo: Thanks.

Mr. Huh: Thank you.

Mr. Kamai: I got a question for the applicant. Has the applicant talked to the Public Director regarding approval of your wall?

Mr. Whitehead: As far as getting a building permit for the wall?

Mr. Kamai: Yes.

Mr. Whitehead: This is the first time I've ever heard of that being said. I would've gone and applied for a permit, if that's what it required, but according to the Building Department, if it's under six feet, you don't need a permit. So I would gladly go file for a permit for a five-foot wall, if the Building Department would actually issue one, but they said it's not required so we couldn't give you a permit for something that's not required. I'd be more than willing to do that.

Chairman Endo: The Planning Department has some information on that?

Mr. Shinmoto: For clarification, walls over four feet don't require a building permit, but you still can ask the Public Works Director for approval for walls over four feet—it's just an approval, it's not really a building permit—up to that six-foot limit. Once you exceed that six feet, then you need a building permit, plus the Director's approval. Up to six feet, Director can approve it. So the case of the property, the wall near your home, that wall is over the six-foot, they had to get a building permit. They also got the Director, Public Works' approval.

Mr. Whitehead: So basically, I can make an application to the Building Department for approval for my five-foot wall with my almost six-foot columns?

Mr. Shinmoto: It's just a letter, not really an application. It's just – you can do a letter form with a drawing and a justification. It has to be for health and safety purposes, but they can approve – the Director of Public Works can approve a wall higher than four feet, but if it exceeds six feet, he has to do a building permit along with that approval.

Mr. Kamai: Would that be considered an after-the-fact?

Mr. Shinmoto: Not if there's no permit. And I don't know how they'll address your columns, though. That could be an after-the-fact permit. I don't know what Public Works will do with you on that.

Mr. Whitehead: Like as I said, the Building Inspector came out two weeks ago and measured every column and all the wall, and said that only two columns exceeded 72 inches. And as soon as I backfilled the washout, I was less than six feet on the two columns.

Mr. Shinmoto: Yeah, you need to address that with them. If they said okay, then it's okay, I guess.

Mr. Whitehead: Yeah, that's what they told me is everything is approved by the Building Department.

Chairman Endo: Okay, just for proper procedure, we don't want to have conversations going on between the parties and the staff. So please direct all your questions to the Board, and we will try and get them answered for you. Okay. The Board, any comments, motions? Hari?

Mr. Ajmani: I have a couple of comments here. No, I understand the frustration Mr. Whitehead is experiencing after having – I mean, living there for eight years and now all of a sudden he's in violation under the Zoning Code, but I also understand the real reason for this four-foot limit which is basically to protect the agricultural vistas. You know, people are driving along agricultural– They don't want to see high walls alongside the roads in agricultural zones. And there are eight applicants who have complied after the violations were given – violation notices were given to them. So it's a very mixed set of things over here, and I don't know whether it would be fair to them if we – if Mr. Whitehead is allowed to keep his wall while the eight applicants have not kept them or have already fixed them. So at this point, I don't know where I'm leaning to, but these are my thoughts on it.

Chairman Endo: Thank you, Hari. Stephen?

Mr. Castro: I can see where Hari is coming from, but also, these other individual owners, they were – they had the same privilege as Mr. Whitehead to come and contest it, you know. And if they haven't stepped forward, well, that's their prerogative. Mr. Whitehead is basically challenging this not being aware of certain rules at the time. And being there for eight or nine years, I mean, that's – and only now becoming an issue, I have problems with that.

Mr. Ajmani: I think to me, this is something like if I had speeded for eight years, so I should be allowed to speed again or continue to speed because I've never been caught.

Mr. Kamai: This is for Corp. Counsel.

Chairman Endo: Yes, Bill?

Mr. Kamai: Can we suspend the ruling from making a decision to deny this applicant?

Chairman Endo: You can always move to defer.

Mr. Kamai: To give the applicant time to acquire the necessary letters of approval from Public Works regarding this wall?

Mr. James Giroux: I guess that's an option, like the Chair said, if that's a motion, and it's seconded, and gets the five votes to do so, you'd be in your legal parameters to defer action. We should check with staff as far as time limits. There may be some time limits set as far as an action that needs to take place within certain amount of days of finding completeness of the application. I believe that might be an issue.

Chairman Endo: Okay, Mr. Shinmoto?

Mr. Shinmoto: One – maybe to answer Mr. Castro's question of concern, we do have

approximately, six more applications waiting to be processed. Each of those applications have – for more multiple owners. So you may have three or four owners on one application. So it could be maybe 12 to 15 more people coming in and they've already filed.

Mr. Castro: Okay, thank you.

Mr. Shinmoto: As to the time limit, we have – you have to make a decision by October 22nd.

Mr. Kamai: Question?

Chairman Endo: Okay, Bill?

Mr. Kamai: When you say that they filed, they filed to come before this Board, or they filed with the Public Works Director regarding approval?

Mr. Shinmoto: They filed before this Board. We are just checking for completeness trying to schedule them.

Chairman Endo: Just a point of clarification for Corporation Counsel: how does the rule work again? We haven't dealt with it recently in terms of that deadline to act by that October date. How does that work procedurally?

Mr. Giroux: There's two rules, I believe. There's a 120-day deadline from the time that the application is deemed complete, and there's also a 60-day deadline from the date after the final public hearing. So there's two deadlines that the Board has to comply with as far as time limits.

Chairman Endo: And if we don't meet those deadlines?

Mr. Giroux: The variance is going to be deemed approved, which is an item of debate, but that's how the courts – the courts have come down split on that decision.

Chairman Endo: Okay. Hari?

Mr. Ajmani: I think I would go for the deferral only if it's not going to affect this 60-day period. The 60-day period should start whenever the application comes here again, not from today.

Mr. Shinmoto: Mr. Chairman, we have two dates here: the 60-day date after they close the public hearing is October 22nd. The 120-day date after the completeness of the application is November the 12th. So those are the two dates: October 22nd and the November the 12th.

Chairman Endo: So just as a point of procedure then, if we were to defer this matter but schedule it for another meeting before October 22 such that we would then take action of some sort before October 22, we would probably be safe from those deadlines?

Mr. Shinmoto: Yes.

Chairman Endo: Okay.

Mr. Shinmoto: But you need to take action.

Chairman Endo: We would need to take action at that next meeting then.

Mr. Shinmoto: Yes.

Chairman Endo: Yes, Hari?

Mr. Ajmani: But I think the applicant is required to file for the building permit, and will he be able to obtain the permit that quickly one way or the other before he can even come here? So does anybody have any idea? Knowing how the County works, that seems very speedy.

Chairman Endo: Well, it's not a building permit. It's actually an approval from the Director of Public Works. It's not a full-blown building permit, I believe. Mr. Shinmoto?

Mr. Shinmoto: But there is an area, I guess, you're saying that's over the six-foot limit, the columns? So that may require a building permit.

Chairman Endo: Okay, but that's an open area. I think the applicant said that after he backfilled, none of his walls were over six feet in his opinion. Is that correct?

Mr. Whitehead: That's according to the Building Inspector that came out and inspected, yes. Scott is his name from the Building Department Inspector.

Chairman Endo: Is anyone from the Building Inspectors' – can they confirm that?

Mr. Huh: The Building Inspector is not present, sir.

Chairman Endo: Okay, thank you.

Mr. Whitehead: Could I ask a question to the Board? I'm not sure how this works. Do I write a letter directly to the Director of Public Works with the request? Or who do I send the letter to? If it's not a building permit application 'cause nothing required a permit, who would I send the letter to directly?

Chairman Endo: Mr. Shinmoto?

Mr. Shinmoto: It's to the Director of Public Works. You write directly to him. You might want to send us a copy so that we know you've done that. A question for Corp. Counsel: if the applicant – let's say the Board chooses to defer and the applicant – can the applicant agree to a deferral and yet waive the time limits in case he needs additional time and the Board needs additional time?

Mr. Giroux: I believe the rules allow the applicant to waive, yeah, the application of the rules as long as it's an agreement and maybe made on the record.

Mr. Shinmoto: So maybe we'd like to suggest that the applicant be asked if he chooses to waive the time limit. That'll allow him more time to get the Public Works Director's approval and also give the Board more time to make the decision.

Chairman Endo: Okay. Do you understand the question, Mr. Whitehead?

Mr. Whitehead: I'm just guessing that means that we're not tied to the 60-day thing. It could be 120 days as long as I proceed with trying to go to the Director of Public Works? The time limit will be—

Chairman Endo: The time limits are for your benefit. So if you want to agree to waiving that time limit, that would give other people time to pursue these other options, then you could agree to it, and then we could say set the meeting even beyond October. We could maybe set it in November, or December, or whenever the parties agree to.

Mr. Whitehead: Okay, I agree to waive the time limit then.

Chairman Endo: Okay. We still need a motion. I'm just asking you that question. So that would – we still need a motion to see what we're doing, but thank you for that. So the applicant is agreeable to waiving the 60 and 120-day deadline rules in order to pursue an approval from the Director of Public Works. Mr. Kamai?

Mr. Kamai: I would make a motion to what you just said.

Chairman Endo: Okay. So I believe what you mean then is you're making a motion to defer action on this agenda item until a later date which we can select in a second, and with the stipulation that you'll do so only if the applicant agrees to waive the 60 and 120-day deadlines. Is that correct?

Mr. Kamai: Correct.

Chairman Endo: Okay, is there a second?

Mr. Castro: Second.

Chairman Endo: Okay. I think to avoid confusion, let's get a date and then decide on the options. So what – maybe the Planning Department has a comment on what date would be best.

Mr. Shinmoto: We have two dates available and this would be November: November 12th or 26th which is the day after Thanksgiving – or 25th, the day before Thanksgiving, and the day after Veterans Day—November the 12th or November the 25th.

Mr. Whitehead: I'd like to have November 25th because I'll be out of town on the 12th.

Chairman Endo: Okay.

Mr. Shinmoto: We are agreeable to that too.

Chairman Endo: Okay. I'll check my calendar.

Mr. Shinmoto: Well, maybe tentatively, then, November the 25th, and maybe Mr. Whitehead can confirm with us when you go home and check your calendar.

Mr. Whitehead: (Inaudible)

Mr. Shinmoto: Okay. Okay, well, let's do it on the November 25th.

Chairman Endo: Okay, if there's no objection from the Members, we will consider the motion amended to be a deferral of this matter until November 25th. Yes, Hari?

Mr. Ajmani: Can I make a--? I think this is the next presentation before the Board can only happen after the response from the Department of Public Works one way or the other. Are we sure we're going to have a response from them early enough for them to prepare the case for November 25th? That's my only concern. Am I making sense?

Chairman Endo: Okay. Sure. Mr. Shinmoto?

Mr. Shinmoto: Maybe you'd want to add to the motion that there'll be ability to grant extensions. This is not a final date in case Mr. Whitehead runs a little longer trying to get that approval.

Chairman Endo: Okay. How about we do this then? We'll defer this matter until November 25th, but if the Planning Department and Mr. Whitehead agreed to a later date for whatever reason, then they can agree amongst themselves and just let us know. How's that?

Mr. Kamai: So moved.

Chairman Endo: Okay.

Mr. Giroux: Aaron, just to clarify, so it's the Planning Department's position that if an owner who has a wall that's above four feet in the setback gets approval from the Department of Public Works that they have the authority to grant an approval of the building of a wall higher than four feet in the setback?

Mr. Shinmoto: Yes, let me read the Section 19.30A.030F, the last sentence in that section, "The Director of Public Works and Waste Management may permit greater heights of walls as needed to retain earth, water or both for health and safety purposes." If they do get that approval, then there's no requirement to get a variance.

Chairman Endo: Okay. So everyone clear on the motion? Discussion?

Mr. Ajmani: I think from the sound of the code language, it looks like the Department of Public Works only looks at it if it is for health and safety reasons for the wall height to be four feet or above four feet. I think my suspicion is that they will say we have no jurisdiction on this because this wall is neither for health nor safety.

Chairman Endo: Okay. Further discussion? I guess the Chair would state that he's in support of the motion. At least that's something that it could be checked on. Any further discussion? No? Okay, all those in favor of the motion to defer as previously stated, please say aye. Chair votes aye. Opposed, please say no.

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

VOTED: To Defer Action on this Agenda Item Until November 25, 2009 or to a Later Date as Agreed to by the Applicant and the Planning Department With the Stipulation that the Applicant Agreed to Waive the 60-day and 120-day Deadlines in Order to Pursue an Approval from the Director of Public Works.

(Assenting: W. Kamai, S. Castro, H. Ajmani, S. Duvauchelle, and R. Endo.)

(Excused: R. Phillips, J. Shefte, and K. Tanaka.)

Chairman Endo: **The motion is carried and the matter is deferred until November 25th unless the parties, the Planning Department and the applicant, agrees to a later date.** Okay, thank you, Mr. and Mrs. Whitehead. Moving on to Item D, approval of the June 25th, 2009 site visit minutes, and August 27, 2009 meeting minutes.

D. APPROVAL OF THE JUNE 25, 2009 SITE VISIT MINUTES AND THE AUGUST 27, 2009 MEETING MINUTES

Mr. Kamai: Move to accept.

Chairman Endo: Okay, it's moved to accept.

Mr. Castro: Second.

Chairman Endo: It's been moved and seconded to approve the June 25, 2009 site visit minutes and the August 27, 2009 meeting minutes. Discussion? Hearing none, all those in favor, please say aye. The Chair votes aye. All opposed, please say no.

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

VOTED: To Approve the June 25, 2009 Site Visit Minutes and the August 27, 2009 Meeting Minutes.

(Assenting: W. Kamai, S. Castro, H. Ajmani, S. Duvauchelle, and R. Endo.)

(Excused: R. Phillips, J. Shefte, and K. Tanaka.)

Chairman Endo: **The motion carries and the minutes are approved.**

E. NEXT MEETING DATE: SEPTEMBER 24, 2009

Chairman Endo: Our next meeting date is September 24. And is there any new business of the Board? Does someone want to bring up anything? No? Seeing none, this meeting is adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 2:43 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
William Kamai
Stephen Castro, Sr.
Harjinder Ajmani
Sandra Duvauchelle

Members Excused:

Kevin Tanaka, Vice-Chairman
James Shefte
Rachel Ball Phillips

Others:

Aaron Shinmoto, Planning Program Administrator, Planning Department
Francis Cerizo, Staff Planner, Planning Department
Carolyn Cortez, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of The Corporation Counsel