

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
NOVEMBER 25, 2009**

**(APPROVED: 1/28/2010)**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Vice-Chairman Kevin Tanaka at approximately, 1:30 p.m., Wednesday, November 25, 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.)

Mr. Kevin Tanaka: The meeting of the Board of Variances and Appeals will now come to order. Let the record show we have a quorum of five. And our Chair will be joining us for the second item on the agenda. Trisha, do you have a--?

Ms. Trisha Kapua`ala: So we're moving on to C-1? Oh, no, the first item?

Mr. Tanaka: Yeah, the first item on the agenda.

**B. PUBLIC HEARING**

1. **MAUI LAND & PINEAPPLE COMPANY, INC. requesting variances from Maui County Code, §19.36.070 "Fences and Landscaping" and §19.36.080 "Paving" to allow an unpaved, natural-surface parking lot with non-irrigated landscaping whereas paving and irrigation are required for property located off of Honoapiilani Highway, Napili, Lahaina, Maui, Hawaii, TMK: (2) 4-3-001:001 (por.) (BVAV 20090010)**

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

Ms. Kapua`ala: And I do have a short presentation for the Board. So this is West Maui landscape here. And I'm going to zoom in on the property. As you know, the property is across from Napili Plaza which is right here. And what we're talking about is a variance to allow a parking lot in this area. This is a Hui Road, Honoapiilani Highway. And the purpose of this view is so you can see the general area. As you can see, there's residential subdivisions across the street. To the north, pineapple. South, pineapple. You can actually see street views, if you're interested. So that's the Napili Plaza. Here's the entrance, Hui Road "C," Napili Plaza. And because we're staff, and we're backing our staff report, we wanted to show you the pine trees that are surrounding. I also have superimposed where the parking lot will be located. So on the plan which you have on your packets, these are the seven trees that we're talking about. And other than that, Ms. Yarrow Flower is here representing the applicant. Thank you.

Ms. Yarrow Flower: Okay, good afternoon. My name is Yarrow Flower with Maui Land and Pineapple Company. I'm here today to present a variance application for the pavilion meeting platform. This is my aerial photo as opposed to Trisha's, but is a location map nonetheless. So in West Maui, this is Honoapiilani Highway. Napili Market is located right here. The structure that triggered the parking requirement is called the "Pavilion Meeting Platform," and it's located here. The proposed parking area again is down here. This TMK includes over 1,600 acres of agriculture

and conservation land. The only way to access the pavilion is with a four-wheel drive shuttle. So the parking area was located close to the highway adjacent to the ML&P baseyard. This reduces the impact to the agriculture roads specifically, erosion, and allows access to the parking lot for all vehicles. The County of Maui Planning Department did approve the location of the parking lot and as well as the landscaping plan that we saw as part of the building permit application process.

So the pavilion is simply a deck and measures just over 2,000 square feet, and approximately half of it is covered by a roof shelter. This is what the deck looks like now that it's finished. The structure is used primarily as a shelter from sun and rain. Per Maui County Code, the structure requires 20 paved parking stalls. So here is the parking lot and the landscaping plan that was approved by the County of Maui. The landscaping plan uses all native plants including, kou, nehe, and native hibiscus, and we added an additional five stalls.

Maui Land and Pineapple is seeking an approval of a variance from Maui County Code, Chapter 19.36.080, which states in part that, "Every required off-street parking space or area other than for single family dwellings, farm dwellings, guest house, or service quarters shall be paved with asphaltic or concrete surface or equivalent." The parking lot location falls within the State Land Use Commission's agricultural district and is designated agriculture by the West Maui Community Plan. The County zoning for the parking lot site is also agriculture across the board. The location is surrounded by the Maui Land and Pine baseyard, pineapple fields, Kapalua Farm, and other agricultural land. Honoapiilani Highway lies to the west and creates a barrier separating the parking lot site from the more urban area of the Napili neighborhood. We can reasonably characterize the location of the parking lot site as agriculture. And by not paving this parking lot, we're hoping to help preserve the essential character of this agriculture area.

So here's an aerial photo that's a little further out showing the fields and open space in the surrounding areas. The pavilion is located right about here, and the parking lot is down here. Again, the highway acts as a barrier between the urban makai lands and the mauka lands which are agriculture and conservation. So through here we have agricultural fields and gulches. It transitions into forest here. And right about here is where the Puukukui Watershed Preserve start all of which are included on this parcel.

Maui Land and Pine is also seeking an approval of a variance from Maui County Code, Chapter 19.36.070(D), which states, "Each landscape planted area shall be regularly irrigated and maintained." When we submitted this application, we had the understanding that the existing seven Cook Pines would satisfy the landscaping requirements for this project, which is one landscaping tree for every five parking stalls. However, the Planning Department has recently informed us that because specific landscaping plans were approved, this is not the case. Also, evidently Cook Pines are not acceptable shade trees. A variance for all of 19.36.070 is required to allow the existing trees to satisfy the Maui County Code landscaping requirements. In light of this new information, Maui Land and Pine is willing to adhere to the landscape plans as approved by the County if necessary. Our application does specifically request a variance from the irrigation requirement which require permanent irrigation. All of the plants included in our landscaping plan are native and were chosen because they grow well in this region becoming fully naturalized. We propose to install a temporary irrigation system until plants are established in their natural habitat. I would also like to point out that we are not requesting a variance from maintaining the landscaping or the parking lot, only the permanent irrigation.

So again, an aerial photo: Napili Market, Maui Land and Pine baseyard. This red square here identifies the area where we propose to provide a 25-space parking area planted with native plants to satisfy the Maui County Code requirements for the deck that's located two miles up the hill. However, we are seeking variances for paving the parking lot and permanent irrigation.

This is a recent photo of the location where the parking lot would be. The plans include a graveled parking lot with layout and dimensions similar to the approved plans. The grass and weeds will be removed and native plants installed per the approved the landscaping plan. The lot will be a compacted gravel and the stalls will be identified with parking stops. So it's not – we're not asking to just leave the parking lot as it is. We would improve it. We would add the plants. We would identify the parking stalls.

So again, this TMK does contain 1,636 acres. They're all zoned agriculture and conservation. Existing uses of the parcel include the Maui Land and Pine baseyard, Kapalua Farm, organic pineapples fields, and the Kapalua Adventure Zip Line activity area, as well as a portion of the Puukukui Watershed Preserve. The requirement to install over 6,700 square feet of asphalt to accommodate the use of a 2,000 square foot deck that is only accessible by a four-wheel drive vehicle is unreasonable and would produce a substantial change to the character of the area. A gravel surface parking lot will provide the functional requirement and protect and compliment the existing agriculture and conservation uses of the property. Also, a permeable surface will potentially minimize runoff that's generally associated with hardened and impermeable surfaces. Maui Land and Pine is respectfully requesting that this Board grant our variance application. And I'm available and happy to answer any questions that you may have.

Mr. Tanaka: Thank you. Is there anyone from the public that would like to testify on this matter? Please come up to the mic. Identify yourself.

Ms. Elle Cochran: Hi. My name's Elle Cochran. I drive through this intersection constantly, and in fact, I just did a walk-around where you see the photos. And it does need to be paved. I mean, there already is a lot of runoff. The drainage system that runs on Hui Road "C" which is just above the lot, it goes underneath the lot in question, and then it goes to a ditch that goes alongside the highway. Then it plugs up. I mean, it's very overgrown, unattended. And so if – even if it was a hard, asphalt surface, if you keep the area with less erosion, dirt, and gravel, and all this over stuff, which does get sort of compiled up until the intersection, I think that would alleviate, you know, the idea about having runoff and erosion. So there's some really bad drainage system negligence there. And you can see there's about nine residents that use the lot. There's actually a high school. The Maui Prep has been upgraded to that. A lot of children, I see them pulling their little, you know, luggages that they take to school. The – if you see, there's – I don't know if there's photos here, but the crosswalk was just painted six months ago. It's completely wore down. It's a really unsafe intersection. There's gonna be a lot more traffic with this coming in. So I think that a lot more improvements need to be attended to for safety features with the extra usage of this area and especially for the school children, you know, that I see commuting across the highway and around. And there's no dedicated right turn-in handling from Lahaina heading into the area where the parking lot is. There's a lot more I think that needs to be looked at and addressed that was not brought up. So that's just kinda my comments. And it's – so that's kinda – yeah, what I wanna bring up with that. So thank you.

Mr. Tanaka: Thank you very much.

Mr. Francis Cerizo: Excuse me. Could you sign in on the sheet, please? Thank you.

Mr. Tanaka: Board Members, any questions for Ms. Flower? Does the applicant – would be agreeable to waiving the reading of the staff report?

Ms. Flower: Yes.

Mr. Tanaka: Okay, thank you. Okay, sorry, back to the Board. Any questions or discussion? Actually, I do have– Sorry, before we continue, I'll close the portion of public testimony for this item. I do have a question. The paving and landscape requirements, as part of the building permit, was it necessary for you to address issues like drainage? Did you have a civil engineer?

Ms. Flower: No, that was not required. For the building permit process, it was all associated with the site where the building is. The parking requirement is dealt with during Planning review. And then the plans for the parking lot and the landscaping were submitted to Planning for their review and approval. I think that it's generally accepted that a paved surface would create additional runoff as opposed to alleviate any situation that . . . (inaudible) . . . in the area.

Mr. Tanaka: Yeah, I agree in that– Well, how many square feet of paving was it? Three thousand?

Ms. Flower: Six thousand, seven hundred.

Mr. Tanaka: Six thousand square feet of paving for a 2,000 square foot structure, but you're creating additional runoff – that would create additional runoff.

Ms. Flower: By paving it, yes.

Mr. Tanaka: But my concern would be whether or not it's paved, or graveled, and/or landscaped, the drainage issues that arise. That was not part – that was never a requirement for the–?

Ms. Flower: That was not a requirement. If you like, I could go over the existing drainage that's on the site now.

Mr. Tanaka: Actually, yeah, especially from the comment we had.

Ms. Flower: Okay. The majority of the drainage that comes down is collected in a culvert that runs along here, and that's an open culvert. There's a closed culvert that runs here to the State highway. And then it drops into a very large State highway drainage system. Currently, the issue is that the drainage system on the State highway that's operated and supposedly maintained by the Highways Department is clogged. I have made multiple calls and asked them to fix it as I'm sure residents in the area have also been doing. We did go out upon the request of one of our neighbors and do some drainage maintenance on that open culvert, and also confirmed that the culvert that runs underneath this dirt area was not clogged. Additionally, there's a berm right here. What that berm does is it catches the drainage that comes down from this road and directs any

surface runoff again, towards that DOT very wide, big culvert. Currently, it's full of grass. So although we are working and have done a lot of work on the drainage that's on our property, what has happened is once it gets to State highways, we have less control. So there is drainage in place. It's not just a dirt lot. And there is a culvert that runs underneath. And there is a berm that was recently reshaped to make sure that it was doing its job. But the issues and the intersection especially with the mud on the intersection is coming from inlet being clogged. I believe DOT actually came out and put a silt cloth over it.

Mr. Tanaka: Thank you. Board Members any questions, discussion?

Mr. Cerizo: Mr. Chair, I'd like to amend our staff report. Upon reviewing the conditions further, and as showing the site on the – visually, on the screen there, we have discovered that the parking lot actually is not adjacent to any streets. So that's one thing. If it's – on two sides, it's not adjacent to the street, so the landscaping along that edge would not be required. But we've also discovered that the requirement for landscaping is for more urban uses. In the staff report, it indicates A-1, H-1, B-R, B-1, 2, and 3, and under industrial districts, requires landscaping plans. And in this case, this property is agricultural. So the requirement for landscaping is no longer required. So the only issue that we have remaining is the paving.

Mr. Ray Shimabuku: I have a question, Mr. Chair. This parking, I take it, was for the building that was further up on the mountain, but it was mentioned in testimony about children and school. Is this parking lot for schools also?

Ms. Flower: The parking lot is being built specifically as a requirement to fulfill the building permit requirement specifically for the building, the deck that's located two miles up the hill. There is a school nearby. That would be Maui Preparatory Academy. They have their own parking and that's accessed by this road here.

Mr. Shimabuku: Okay, thank you. My next question is, the paving portion, I have the map here in the book. The paving all the way goes into the existing highway? It ties into the existing highway?

Ms. Flower: No, the code only requires that the paving stalls – that the stalls be paved.

Mr. Shimabuku: Okay, so the driveway approach to the parking would be as is as what–gravel?

Ms. Flower: Yes.

Mr. Shimabuku: And the existing road, that Hui Road, is gravel also?

Ms. Flower: Yes.

Mr. Shimabuku: So chances are a lot of the mud and dirt, whatever, is coming from that road when vehicles are going onto the highway?

Ms. Flower: I would say that issues from mud on vehicle tires would be from the road, yes.

Mr. Shimabuku: Okay, thank you.

Mr. Tanaka: Any other questions?

Mr. William Kamai: So this question is for staff: so the fencing is out, too? The fencing and landscaping?

Mr. Cerizo: Yeah, there's no fencing. Fencing is when the property is adjacent to residential uses.

Mr. Kamai: Can anybody tell me what the building permit for the pavilion was issued at? What kind of dwelling?

Ms. Kapua`ala: I can. I have the ability to check our records online. It would take a little while. So I can pull it up for you now. It might take a little while.

Mr. Kamai: Okay. Could you?

Ms. Flower: Or I could just tell you that it's commercial. I did— As— Coming to this Board is not my first choice in resolving issues. And I did work with DSA regarding the occupancy rating of the building. And my argument was that it was an agricultural accessory building, but DSA did not agree with me. So it remains zoned — or not zoned, but it's occupancy class is commercial, which is why it triggered the parking requirement for all the employees of the deck and the guests of the deck.

Mr. Tanaka: And how many automobiles would it be? Do you anticipate 20 cars being parked there at any given time?

Ms. Flower: The way that our operation run right now is that we stagger groups, and these groups are taken up in a four-wheel drive shuttle. The maximum number of people in a group I believe is 12. Generally, we have a lot of families or we have guests from the resort who are actually taking our shuttle anyway. So there is very little traffic that's generated by the Kapalua Activity which is the zip line. Nobody's taking a shuttle up just to go to the structure. They're going up to the zip line.

Mr. Tanaka: Just discussion within the Board, anyway. I have no problem with having a gravel lot versus pavement. Sixty seven hundred square feet of additional pavement, that's not really necessary from what I see in my mind. My concern is the drainage issue. What happens to — because this is such a wet area, where does the water divert? And will it cut across the intersection? And does it become a hazard or public safety issue? Any thoughts by any Board Member?

Mr. Shimabuku: I have a question, Mr. Chair. I didn't hear any number of cars at one time would be parked. I mean, I know she said there was 12 people in the group, so I'm assuming at the most maybe 12 cars? Would that be the right number to—?

Mr. Tanaka: Yes, that's probably a good—

Ms. Flower: At a maximum.

Mr. Shimabuku: At a maximum. So that parking lot would probably never be filled at one particular time. Thank you.

Mr. Tanaka: How we doing, Trish?

Ms. Kapua`ala: This is our system that we use to track permits for parcels of land. And this building permit was issued to Maui Land and Pine for the meeting platform. Usually, they're pretty detailed, but in this case, because it's a simple structure. I think it's just an explanation of what it is. Does this help you in the question you asked?

Mr. Kamai: Yes, but I just wanted to know what determination was used to trigger the commercial use? Was it the size? Was it the walls? The roof?

Ms. Kapua`ala: For parking, what our Plans Examiner does is categorize it, qualify it. And what they qualify it as is – qualified it under as an assembly area similar to like a church or a community center which is a one stall per 100 square foot calculation. Is that–?

Mr. Kamai: Nothing to do with the structure?

Ms. Kapua`ala: Not what the structure looks like or what it's made of. It's purely out of the use. It's used as an assembly area.

Mr. Kamai: So it could be a parking lot?

Ms. Kapua`ala: The structure?

Mr. Kamai: The determination of a meeting place or a gathering place?

Ms. Kapua`ala: You mean would we assess–? I'm sorry. Go ahead.

Mr. Kamai: The trigger for the parking lot was anything other than a single family dwelling, farm dwelling?

Mr. Cerizo: Okay, the trigger for this one is the building that they built a mile or so up the hill. And the use of that structure is for – that's where they're gonna gather the group and they're gonna – okay, this is the whole story of what we're gonna do. So it's a gathering place. So for any building or structure, we determine the parking based on its use. And like Trisha indicated, the use is an assembly use. And you know, right now they say 12, but, you know, if things go well, you might have 12 groups of 12. You could have more vans. There's no limitations as far as that use of that deck, but we maximize it as – we maximize the use of the deck per square footage. For every 100 square feet is one stall.

Mr. Kamai: So in determining that that building is a single family dwelling, that would be exempt from paving anything?

Mr. Cerizo: That's true.

Mr. Kamai: Or farm dwelling.

Mr. Cerizo: Okay, there's a whole list of uses, like 50 uses. And whenever we look at parking, any one of those uses will trigger parking. So if you had a farm dwelling, it's a— Dwellings are not required to be paved. So that's one exemption, but as you go down, you have museums. You have offices. They all have one stall per whatever unit, a square footage of that building or structure.

Mr. Kamai: So the trigger for the paving, that commercial use, was determined by the applicant?

Mr. Cerizo: Yes.

Ms. Flower: Just for clarification, I never requested that the deck be considered a commercial structure.

Mr. Cerizo: Yeah, I think the building, DSA—

Ms. Flower: When you get the building permit, they assign an occupancy class, and that was the occupancy class that was assigned.

Mr. Kamai: That's what I was trying to get at: how that determination was—

Mr. Cerizo: Yeah, it's not related. DSA or Public Works has — they have their set of rules of how they determine what a structure occupancy is. And many times it's not consistent with the zoning. They call it one thing. We call it something else. Ours is more general. Let's say— We look at uses. And they group their uses into one. So they may have all kinds of uses that are commercial, but for us, we might say it's a church, but it's not commercial, but they're saying it's commercial. We're saying it's a church. They're calling it commercial. So there's a difference there. So it's not the same, I guess, that's the point.

Mr. Tanaka: Any other questions? If there's no other discussion, I would ask if there's anyone who has a motion. Trish, does staff — so the landscaping requirement and fencing would not be a part of it, but the pavement still is?

Ms. Kapua`ala: Yes

Mr. Tanaka: So the staff's recommendation would be denial because you want to see a paved—?

Ms. Kapua`ala: Because this is a criteria-based approval, the staff feels that although it may be illogical or impractical to provide the paving that based on the applicant's justification for the granting of the variance that they do not meet all three of the criteria, so the staff would recommend denial.

Mr. Tanaka: For myself as I went over this, I'd have to agree with Trisha's statement that although personally I feel like I actually would not want to see a paved surface, but justification of granting this variance by staff's opinion has not been met. Okay, well, with that, I am asking for a motion or any other discussion.



Mr. Kamai: Mr. Chair, I'd like to make a motion that we deny this variance.

Mr. Tanaka: It's been moved. Do we have a second?

Mr. Shimabuku: I'll second.

Mr. Tanaka: It's been moved and seconded. Can I have a vote? All those in favor of denial of this application, please say aye. The Chair votes aye.

**It was moved by Mr. Kamai, seconded by Mr. Shimabuku, then**

**VOTED: To Deny the Application for a Variance.**

**(Assenting: W. Kamai, R. Shimabuku, R. Phillips, S. Duvauchelle,  
and K. Tanaka)**

**(Excused: J. Shefte, H. Ajmani, and S. Castro)**

**(Recused: R. Endo)**

Mr. Tanaka: The motion has been denied.

Mr. James Giroux: The motion passed.

Mr. Tanaka: **Oh, the application for a variance has – the motion has passed. The application for the variance has been denied.** With that, I'll hand it over to Chairman Endo.

Ms. Flower: Thank you very much.

### **C. UNFINISHED BUSINESS**

1. **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) *(Continued from the September 10, 2009 meeting.)*
  - a. Department of the Corporation Counsel, Brian Moto, Corporation Counsel, Mary Blaine Johnston, Deputy Corporation Counsel, Attorneys for Milton Arakawa, Director of Public Works, County of Maui presenting the County of Maui's Appeal Hearing Memorandum
  - b. Department of the Corporation Counsel, Brian Moto, Corporation Counsel, Mary Blaine Johnston, Deputy Corporation Counsel, Attorneys for Milton Arakawa, Director of Public Works, County of Maui presenting the County of Maui's Exhibit List; Exhibits "1" - "11"

**c. Department of the Corporation Counsel, Brian Moto; Corporation Counsel, Mary Blaine Johnston, Deputy Corporation Counsel, Attorneys for Milton Arakawa, Director of Public Works, County of Maui presenting the County of Maui's Witness List**

Mr. Randall Endo: Would the Planning staff please read the next item on the agenda?

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

Ms. Mary Blaine Johnston: Good afternoon. Deputy Corporation Counsel Mary Blaine Johnston appearing on behalf of Milton Arakawa, Director of the Department of Public Works.

Chairman Endo: Good afternoon.

Mr. Steve Parker: Hi. I'm Steve Parker.

Chairman Endo: Please speak into the mic.

Mr. Parker: My name is Steve Parker. I'm the General Partner of the Partnership known as MEH Partnership, the owner of the subject property.

Chairman Endo: Okay. Ms. Johnston, would you want to tell us where we are exactly, procedurally?

Ms. Johnston: We had filed – the County has filed a very brief memo in preparation for this hearing, plus 11 exhibits to put before the Board with the key points that are containing the files of the Department of Public Works. And I have Lesli Otani from the Department available to give very brief testimony.

Chairman Endo: So you're ready to proceed?

Ms. Johnston: We're ready to proceed.

Chairman Endo: Mr. Parker, I don't think we've got anything on file from you. Are you submitting anything?

Mr. Parker: No, I'm not.

Chairman Endo: Okay. So you haven't submitted any exhibits, or you have not submitted any witnesses, is that correct?

Mr. Parker: Correct.

Chairman Endo: And you have your original appeal on file and both documents?

Mr. Parker: Yes, I do. I don't have them with me . . . (inaudible) . . .

Chairman Endo: Okay. Alright. Does the Planning Department need to do anything preliminary?

Ms. Kapua`ala: No, sir.

Chairman Endo: Okay. Okay, if you folks would want to give opening remarks limited to just a few minutes, just an overview of what evidence and testimony you'll be providing and the points you're trying to make, we'll allow you to do that, and then we'll jump into calling witnesses. We probably should begin with the appellant, though. So if the appellant wants to make opening remarks, you can do so now.

Mr. Parker: MEH Partnership has been owning this parcel since 1999. We have been endeavoring to get a subdivision approval since that time. We just – we had submitted for preliminary approval I believe it was in 2002. And all extensions and renewals were handled by my engineer, Wayne Arakaki. We finally got our SMA approval in February of this year. And in the meantime during this February till now, we've had some personal problems in our office. My principal broker suddenly died, and I've had to take over a lot of the management of that side of the business. Some little things started to go through the cracks.

Chairman Endo: Mr. Parker, you're gonna have a full opportunity to state your case. You can probably call yourself as a witness. At that point, I'll swear you in to testify. At this point, we're just asking for initial opening remarks. So I wouldn't want to have you make say everything over again under testimony. So if you could just tell us basically what your case is about and what the point of your appeal is, that might be better.

Mr. Parker: Simply put, there was a deadline that I wasn't totally aware of, of the 15<sup>th</sup> or the 17<sup>th</sup> of June to file for our extension of our preliminary subdivision approval. That, I submitted it on the 23<sup>rd</sup> of June about six days after that deadline. Our extension for the subdivision approval was to run out on July 2<sup>nd</sup>, but the notification of application for the extension should've been in on the 17<sup>th</sup> of June, and I didn't make the deadline. It went in on the 23<sup>rd</sup> of June. And therefore, the preliminary subdivision extension was denied by the County.

Chairman Endo: And that's what you're appealing?

Mr. Parker: That's what we're appealing.

Chairman Endo: Okay. Ms. Johnston?

Ms. Johnston: The . . . (inaudible) . . . facts as Mr. Parkers has indicated. The letter was late. It didn't comply with the requirements of the County code which required it to be submitted 15 days ahead. Under the code, the Director has no discretion. If the letter's not in there, he can't make a determination about whether there should be an extension because the deadline hasn't been met. In this appeal, the appellant must show under the Rule 12-801-81 that the issue has been prejudiced because Director Arakawa's letter denying extension is, 1) based on clearly erroneous finding of material fact or erroneous application of the law, or 2) arbitrary or capricious in its application, or 3) a clearly unwarranted abuse of discretion. So that will be the – the Board is asking to be considered.

Chairman Endo: Okay, so what we'll do now is begin with the appellant. Allow them to call any witnesses you want including yourself, and then we'll go to the appellee. But before we do that, since this is a public meeting, why don't we open it up for anyone in the public who wishes to testify on this matter. Seeing none, public testimony on this agenda item is closed. So now, Mr. Parker, are you gonna call anyone else other than yourself?

Mr. Parker: No, I'm not.

Chairman Endo: Okay, in that case, I'll swear you in, and then everything you said earlier where I kinda cut you off, that – all that kinda stuff you can just go into as much detail as you want. I didn't mean to, you know, hinder you in what you were trying to make your case. I just wanted to put it at the correct time and place. So if you'd raise your right hand. Do you swear that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Mr. Parker: I do.

Chairman Endo: Okay. So why don't you go ahead and speak into the mic. And go ahead and testify on your case.

Mr. Parker: Well, again, to reiterate what I've already said, we've been attempting to get a subdivision approval since 2002. All of the extensions— We did get a preliminary approval I believe it was in 2002. All extensions for our extension was handled by my engineer. The plans have changed over the years as we've had input from neighbors and the Planning Department in the SMA approval process. We've done drainage reports. We've done archaeological studies. We've done traffic studies. We've done everything that's required under the SMA for the approval of the subdivision which was granted in February. Again, to reiterate our own personal problems we've had in our office, we've had a sudden death and more work that came my way than it was previously. Again, to reiterate, the applications primarily for the extensions were always handled by my engineer. We were notified by the engineer that, oh, you better get your extension in. We got an e-mail, but there was no time date on it. I just assumed that the deadline was July 2<sup>nd</sup> and I had to get it in there ahead of time. And we applied for the extension on the 23<sup>rd</sup> of June which we noticed was six days after the deadline of the 17<sup>th</sup>. It's clearly in violation of the rules and regulations of the Department. I just ask for – in these tougher times, if we have to go back and redesign the subdivision that need new requirements, our costs are gonna be going up for a five-day or six-day lapse. I think that we will be heavily burdened. So we're asking a variance – the Board of Variance to appeal this six-day lapse that we have. Thank you very much.

Chairman Endo: Cross examination?

Ms. Johnston: No.

Chairman Endo: No? Okay. Does the Board wanna ask Mr. Parker any questions? No? I mean, you can ask more later on since he's the party, but as a witness? No? Okay. So you have anybody else you wanna call, Mr. Parker?

Mr. Parker: No, I do not.

Chairman Endo: Okay. Then at this point, we'll allow the County to present its case.

Ms. Johnston: The County is going to call Lesli Otani to testify on behalf of the Director.

Chairman Endo: Please raise your right hand. Do you swear or affirm that the testimony that you're about to give is the truth, the whole truth, and nothing but the truth?

Ms. Lesli Otani: Yes, sir.

Chairman Endo: Okay. Please begin.

Ms. Johnston: Thank you. Lesli, could you say what your position with the County is?

Ms. Otani: I am a Civil Engineer IV.

Ms. Johnston: Okay. And how long have you been in this position?

Ms. Otani: I've been a staff engineer for Public Works for over ten years, and processing subdivision applications for over six years.

Ms. Johnston: Okay. And in your capacity in processing subdivision applications, are you familiar with the file for MEH Limited Partnership for the Sunset Estates Subdivision?

Ms. Otani: Yes, ma'am.

Ms. Johnston: Okay. The County has identified and submitted to the BVA 11 exhibits. All of you should have copies of those. Exhibit 1 is a copy of part of the Maui County Code. Exhibits 2 through 11 are documents from the files of this subdivision, primarily the correspondence extending the deadlines from I think 2002 on, Director Arakawa's notification that the time to process the subdivision has expired, and Mr. Parker's letter. Can you, from your position, verify that these exhibits are true and accurate copies from the files of the Department of Public Works?

Ms. Otani: Exhibits 2 through 11 are. That's correct.

Ms. Johnston: Okay. Maui County Code, Chapter 18 governs the subdivision process, is that correct?

Ms. Otani: Yes.

Ms. Johnston: Okay. And Chapter – Section 18.12 specifically deals with subdivision plats, right?

Ms. Otani: The final plat, yes.

Ms. Johnston: The final plat. Okay. Can you just very briefly describe the process for an application for a subdivision how that person has to proceed to obtain approval of the final subdivision plat?

Ms. Otani: Once we issue preliminary subdivision approval, we send a preliminary approval letter along with preliminary plat check set to the applicant or their agent. And sometime later, as soon as they want to, they can resubmit to us the final plat along with the check set. And the final plat should include revisions that we require, that we noted on the check set, as well as compliance with Section 18.12.040. It's a listing of things that must be submitted with the plat. So those items can be submitted back to our office.

Ms. Johnston: Okay. And under Section 18.12.10., what is the timeframe for obtaining approval for the final plat after approval is given on this preliminary plat—Exhibit 1?

Ms. Otani: It states, "The final plat shall be prepared and completed within one year following the approval given on the preliminary plat or construction plan."

Ms. Johnston: Okay. And then an applicant can extend that by making a request, correct?

Ms. Otani: Yes.

Ms. Johnston: Okay. And that's under Section 18.12.060, correct?

Ms. Otani: 18.12.10. I'm sorry.

Ms. Johnston: Numeber 18.12.60(A).

Ms. Otani: Yes, 60 is the finding of the plat, and 10 is the time extension.

Ms. Johnston: And this provision provides that the subdivider can obtain extensions provided that they submit the application within 15 days before the expiration of the one-year period, correct?

Ms. Otani: Yes.

Ms. Johnston: And it's correct that MEH Limited Partnership did that for the years 2002 through 2008, correct?

Ms. Otani: Yes.

Ms. Johnston: Okay. And in 2009, very briefly what happened?

Ms. Otani: In 2009, we received a letter from the applicant that did not meet the deadline. And each year when we extend the subdivision, we clearly state in bold writing towards the end, what the dates are that request for the final plat and the request for the construction plans must be submitted by. And that deadline was not met. Then, you know, actually as a courtesy we called the applicant to let him know that if he didn't get the plat in to us within so many days, the subdivision would end along with – you know, he put in the construction request that the subdivision would expire. And when the plat was not in, then we expire the subdivision by letter.

Ms. Johnston: Okay. In 2009, did your office call Mr. Parker and remind him? Do you know?

Ms. Otani: Yes.

Ms. Johnston: Okay. Under Section 18.12.060 of the Maui County Code, does the Director have any discretion to extend the deadline?

Ms. Otani: No, ma'am.

Ms. Johnston: Okay. I have no further questions.

Chairman Endo: Mr. Parker, would you like to cross examine the witness?

Mr. Parker: No, it's all factual.

Chairman Endo: Okay. Does the Board wish to ask the – Ms. Otani any questions? Okay. Thank you, Ms. Otani. Any other witnesses for the County?

Ms. Johnston: No.

Chairman Endo: Okay. Since both sides have had their full opportunity to present their cases, normally we would allow you to do final remarks, but since it's so short, you can always waive that. You folks want to say anything else?

Ms. Johnston: (Inaudible)

Chairman Endo: Okay. Mr. Parker, do you have anything else you wanted to—?

Mr. Parker: (Inaudible)

Chairman Endo: Okay, we still might have questions for you, but I just want to make it clear that you're done presenting your case. Okay. The Board can now ask more questions or make a motion.

Mr. Tanaka: Actually, I'm just curious. Mr. Parker, we have in front of us seven letters written pretty much June of every year requesting the extension. I understand that you have this ability to keep requesting extensions and you have been doing it for seven years. Is it just—? I'm just curious why. Economic times that have—? In this time period, we've seen it go from pretty good to where we're at now.

Mr. Parker: To address specifically, my engineer handled all the extensions until last year. And so it was kind of— I wasn't really that involved in it—the extension process. And then '08 was when I applied. He no longer was doing it on behalf of his clients, and I slipped up in '09. The subdivision has changed from the original design based on a lot of input from Kihei Community Center – Kihei community, and during the SMA process. So it was the SMA process that was really delaying our getting into a final plat and starting construction years ago. So we only received that in February of this year. So that's one of the reasons why this thing has taken so long. I'm not a professional developer. This is my only one. So it's not something that I normally do. I'm a real estate appraiser and broker. I'm not a developer.

Mr. Tanaka: Thank you.

Chairman Endo: I have a question for DSA. Ms. Otani, in your experience, have you – are you aware of any situations in the past where other subdivisions have come into this same situation where they've filed for an extension too late to meet the 15-day time limit, but some accommodations were made for any other subdivisions?

Ms. Otani: Well, many, many years ago, the Department was more lenient. And then there were legal issues. And since then we've been following the code. And so it happens where people don't meet the deadline. And similar to that, as a courtesy, we try to call them and let them know if they – if we're aware of it, to submit their final plat. And sometimes they can get their plat in on time to us, but recently with the water availability requirement, that's one of the things that have to be submitted with the final plat. So since that time, it's happened more often where people missed the deadline, and are unable to submit the plat to us, and then we expire it.

Chairman Endo: So when you say in the past they were more lenient, how long ago was that?

Ms. Otani: I think it was around 1999, 2000 where prior to that with – our Director was Charlie Jencks and David Goode where it was more lenient. So many years ago. We've expired numerous subdivisions since then.

Mr. Tanaka: One other question, Lesli, the call that you made to Mr. Parker was made on what date?

Ms. Otani: It was immediately after. I think it was immediately after he had submitted the letter and we realized he wasn't meeting the deadline.

Mr. Tanaka: Okay.

Ms. Otani: It's a courtesy. By code, we don't have to notify them, but we just try to help.

Chairman Endo: So just for clarification then, so they'd have to submit their final plat, but it doesn't have to be approved by the deadline, it just has to be submitted?

Ms. Otani: That's correct. So the deadlines that we have, 1) is for submittal of the final plat, and also we have a deadline for submittal of the construction plans. So not approved, just submitted by.

Chairman Endo: The Board have any further questions? Comments? Otherwise, the Chair would recommend that someone make a motion either to approve – sorry, either to approve the appeal, or to deny the appeal, or to be more precise, to approve the – to affirm the decision or order being appealed upon, or to reverse and remand it, or reverse.

Okay. Perhaps since we're all stuck in a pause here, I'll read the criteria since we haven't really discussed that. So standards of appeal—we're supposed to review the decision or order on the appeal, and we can affirm it or reverse it or remand it. But to reverse it, to reverse the order of the County, we'd have to find that the petitioner has been prejudiced because the decision or order is



based on a clearly erroneous finding of material fact, or erroneous application of the law; or 2) it was arbitrary or capricious in its application; or 3) a clearly unwarranted abuse of discretion. Those are the standards under Section 12-801-81 for standards of appeal.

Ms. Rachel Ball Phillips: I'll go ahead and just say that my heart goes out to you because I know what work goes into getting a subdivision approved, and the cost, and the time, and the effort, but similar to the other one, I can't see that you've met the criteria. So I hate to do this, but I guess I'll make a motion to affirm the County's decision.

Chairman Endo: Is there a second?

Mr. Kamai: Second.

Chairman Endo: Okay, it's been moved by Member Phillips, seconded by Member Kamai to affirm the decision and order of the Department of Public Works. Discussion? Seeing none, all those in favor of the motion to affirm the Department's decision, please say aye. Opposed, please say no.

**It was moved by Ms. Phillips, seconded by Mr. Kamai, then**

**VOTED: To Affirm the Decision and Order of the Department of Public Works.**

**(Assenting: R. Phillips, W. Kamai, R. Shimabuku, S. Duvauchelle,  
and K. Tanaka)**

**(Excused: J. Shefte, H. Ajmani, and S. Castro)**

Chairman Endo: **Okay, the motion is carried, and the decision is affirmed.** Thank you. Would the Planning Department call the next agenda item?

2. **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, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-010:017. (BVAV 20090007) (Continued from the September 10, 2009 meeting.)**

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

Ms. Kapua`ala: And, Board, before you on your desk is a petition to intervene from the Department of Planning. Representing the Department of Planning is Deputy Corporation Counsel Jane Lovell.

Chairman Endo: Please state your appearance.

Ms. Jane Lovell: Thank you. Good afternoon, Chair and Members. My name is Jane Lovell. I'm the Deputy Corporation Counsel, and our Department was asked to represent the Department of Planning as an intervenor in this action. The rules allow the County, any agency of the County or of the State, to freely intervene in these proceedings unless the petition is untimely. And the

petition is timely as long as it's reasonable and as long as it happens before you have voted on the particular application, in this case, for a variance.

Chairman Endo: Okay, so the first order of business is to rule on this motion?

Ms. Lovell: I would imagine so, yes.

Chairman Endo: So we would allow any of the current parties, including Mr. and Mrs. Whitehead to speak to this motion, or actually, I take that back. Before we do that, why don't I call for public testimony, yeah?

Ms. Lovell: Sure.

Chairman Endo: Anyone want to testify on this matter in the public? I want to open it up for public testimony. You can come forward, and you'll be limited to three minutes, and if you'll please sign up on the witness sheet, testimony sheet. After we take public testimony, then we'll rule on the motion to intervene.

Mr. Richard Lopez: Good afternoon. My name is Richard Lopez. I'm here to testify on behalf of the Whiteheads. I don't know them. Never met them till now, but I'm aware of the situation. We live in the area. I think you're probably aware that walls and pedestals, electrical pedestal walls have become an issue in the neighborhood. We don't understand it because most of these walls were built as long as ten years ago. We, in the community, don't understand why anyone would object to them. There's a difference between residential requirements, and ag requirements, and the height of the wall, which we also don't understand. I came from Kauai, and there we had the same standard. And anyhow, it is not – the wall is not objectionable. It does not interfere with any view plains, or air, or anything else that is stated in the ordinance. So anyhow, we're here to testify that we'd like to see Mr. Whitehead get his variance granted.

Chairman Endo: Thank you. Any questions? Alright, thank you. Okay, is there anyone else in the public wish to testify as to this agenda item? Please sign up.

Mr. Mike Segura: Good afternoon. Thank you for giving me a couple minutes. My name is Mike Segura. I'm also here to testify in support of the Whiteheads. I have a double stake in this. The Whiteheads are very good friends of mine, and I also live in the subdivision, and I'm dealing with the – that pedestal issue myself, not so much the walls. There's a lot of gray area in this, and I say that not in my opinion. I've spoken with some of the Building Inspectors here in the County of Maui with representatives of MECO. And a lot of it from what I've gathered, the word that has come back is what came first—the chicken or the egg? And there's a lot of paperwork, a lot of people trying to figure out, you know, where, and when, and how to enforce these.

Now, I was a – I built the house but I was the second owner of the lot. And by no means that I know that I was in any violation. And the letter that I received in the beginning of this year really threw me for a loop. And, you know, it was like the way it was addressed made me feel quite criminal, to be frank, as well as a lot of other people that I talked to.

As Mr. Lopez stated, the situation that we're dealing with, this subdivision is a sloped subdivision.

Therefore, view plains, which I've been told were the initiating incidents with this really is not in question. If there's any view plain blockage to be had with any of these walls or pedestals it's by the particular homeowner looking back up mauka, not makai. I walk the neighborhood every evening. I've been – since these letters have come out, I've been looking and trying to address all these walls. And again, the Whiteheads' wall in particular, is aesthetically, beautiful. I don't see where it creates any view plain or any nuisance. I'm also a licensed contractor here in the State of Hawaii, landscape. I've seen some of these walls, including Mr. Jeff Hunt's. And I'm assuming you folks know who Mr. Hunt is who are covered with landscape, beautiful foliage. And again, gray area. The landscape is fine. We're being told we can grow a 50-foot tree, a 25-foot hedge, and I understand we're talking about, you know, construction, pedestal, concrete, whatnot.

My final argument with this, again, in these times, we're talking going green. Everyone's going green. We're trying to value our resources, our water, our refuse sites, whatnot. To me, this is just a waste. To take these walls down, to throw all that concrete, rubbish, the rebar, all the toxins, everything else back in the landfill does not make any sense to me. Thank you.

Chairman Endo: Thank you. Any questions for the testifier?

Mr. Kamai: Yes, yes. Mr. Segura, please. So are you one of the—? So you've been cited by the County?

Mr. Segura: Yes, sir.

Mr. Kamai: Have you made any changes to your wall since then?

Mr. Segura: Well, my wall – actually, my situation is a pedestal, which accommodates the electrical panels from Maui Electric. And my situation is the pedestal in question represents three different homeowners. So one of which is a part-time resident. The other, Mike Gronemeyer, has been in contact with myself. He's written several letters. He's been in contact with the County. So he has been on the paper front of all of this where I have been talking to Inspectors and again, representatives of Maui Electric and whatnot. I've spoken with Conrad Cokelin with Maui Electric, some of the field techs. And again, right now, what I've been told– And again, these letters came out of Mr. Hunt's office, and Mr. Hunt lives across the street from me, and he's in the same boat, so to speak. He's got one of these pedestal walls. And, you know, I really don't– I haven't seen him, you know. I haven't had the opportunity– I'm about ready to go and knock on his door, and introduce myself, you know, and talk story, and say, sir, what's your approach? What are we gonna do with this? But I have not done that so far. So again, it is a very interesting situation being that these letters that came out of this gentleman's office, he's right in the same boat as we are. So it's gonna be interesting to see where this goes.

One of the things that I have had heard from Mr. Gronemeyer, my neighbor who has been in correspondence through, excuse me, e-mails, and letters, and whatnot, meetings, and such, and phone conversations is that he was told that one of the messages coming from the offices was, well, you know, if we grant variances for this, you know, what do we do in the future? What do we tell the next batch of people that come in? And my personal answer to that is, well, first off, you know, we're looking at anywhere from seven to ten years for some of these pedestals, not the decorative walls, because people, you know, built those after they moved in and built their

properties, but these pedestals, which is my understanding were the actual blueprints and dimensions were submitted by Maui Electric to the developer and the homeowners to say this is what we need, this is what you need, to put up to facilitate our equipment. So they – you know, all the homeowners and developers at that time, because again, myself, I wasn't even a homeowner up there, they were taking the advice and the guidance of Maui Electric. Now, where Maui Electric and the County of Maui, where they are or were not talking to each other, I have no idea. But all the years that have gone by, okay, again, anywhere from seven to ten years for some of these original pedestal walls have been up to facilitate the electrical, there's been a lot of building. I mean, things have slowed down, obviously, but there was a lot of building, a lot of Inspectors up and down that hill over all these years. And my question and a lot of the homeowners' questions are, what happened in seven to ten years and all of a sudden we get these letters, you know? And for myself, I don't feel – you know, I'm willing to do what we need to do, but I don't feel that I'm particular at fault here. And if I need to take corrective action to do that, personally, I think someone else needs to come in as well and kick in a little – you know – do you know what I saying, sir? You know, I don't think the developer, the homeowner, Maui Electric, I don't think anyone singularly is at fault here, but again, gray area, gray area.

Mr. Kamai: So since you received your letter, have you tried to comply by--?

Mr. Segura: I have – I have – I have tried to comply via my neighbor again, who we're – we're on the same wall. So I've been corresponding with him. We've been talking. He's been my voice.

Mr. Kamai: No. So the answer is no, you haven't?

Mr. Segura: I have not. Well, you know, I do believe I wrote one or two e-mails and sent it in to the County. I have not written any hard draft and put it in the mail, no.

Mr. Kamai: Thank you.

Chairman Endo: Any other questions? Okay, we now have several people who've signed up. So the next person is David Nutter. Please excuse me if I mispronounced your name.

Mr. David Nutter: That's fine. Thank you for giving me the opportunity to talk to you for a moment. I'm a third owner of the property also in Launiupoko. And I have not received a letter, but I am concerned several of my neighbors have, so we're just awaiting the ax to fall. But looking at this as a possible – is a questionable process. If you multiply the number of individuals that will be involved with this, we could keep you busy for the next five years on – and at work either here, or in your legal system because there's such a cost that is being proposed to reduce these walls and pedestals that if you multiply that cost, and instead of discussing variances with you people, if this was transferred to your legal system, the damages that we would incur and the cost would keep your legal system going for perhaps the next five years. So it doesn't make any sense. This looks like a virtual work for the County. It doesn't make any practical sense. I'm fully in support of the proposal for the variance, for this wall, as well as I am very concerned about perhaps future variances as far as relating to pedestals. So I'm very much in favor of the variance process again, since the variance process – since the problem is the same for 50-plus individuals. You're multiplying the time that you're spending today by 50-plus just through the variance process. And

if you continue in this direction, I would imagine that the legal process would be equally as long and as convoluted. And thank you very much for your listening.

Chairman Endo: Okay, any questions? Thank you. Any questions for Mr. Nutter? Bill, go ahead. Mr. Nutter, a question for you.

Mr. Kamai: Have you received a letter?

Mr. Nutter: No, I have not. As I mentioned that in opening. I'm a third owner of the property and have not received any communications. And as I've said before, I'm responding in support of the plaintive. And I just wanted to present my appraisal of the process as I see it.

Mr. Kamai: Thank you.

Chairman Endo: Any other questions?

Mr. Shimabuku: I have another question. You said you're the third owner of the property.

Mr. Nutter: The property was built in 2000.

Mr. Shimabuku: Okay. So do you think you have a wall or a pedestal that might be affected by this?

Mr. Nutter: Obviously, or I wouldn't be here.

Mr. Shimabuku: Okay. Did you put up the wall or was it there before you purchased it?

Mr. Nutter: No. As I mentioned it was constructed in 2000 on the request of MECO under their supervision and approval, and the County's subsequent approval.

Mr. Shimabuku: Okay, thank you.

Chairman Endo: Any other questions? No? Thank you, Mr. Nutter. Okay, the next to testify is Pam English.

Ms. Pam English: Aloha, Board. Thank you for having us today to speak on behalf of this variance application. My name is Pam English. I am one of the Directors of the Board at the Launiupoko Homeowners Association. And I wanted to give you just a little bit of history. When the first letter was sent out about a year ago, it was right at about the same time as we had our annual meeting. And we did all speak about it. And Jeff Hunt was there, as a matter of fact. He is, as you've heard before, also has a pedestal in his front yard and has been given a violation notice.

What we talked about at our annual meeting was, yes, and I know that Jane's here taking notes, but, yes, if you read your code, it specifically says the heights and the setbacks of walls or structures, whatever you might like to call them. But these things were built ten years ago in 1999 with a written agreement between MECO and the developer, and it was made a requirement of everyone that built a home in that area, and this is all written documentation that has been given

to the County. And all of a sudden, these people started getting letters. I haven't received a notification myself. I'm here just to simply help because since that time one year ago when everyone started getting these letters nobody knew what to do. At that – like I said at that homeowners meeting, I suggested the Board of Variance because, yes, if you read the code, there's not really much else you can do. You can't – as we saw in these other couple cases earlier this afternoon, the Director doesn't have the ability to vary the code, so the Board of Variance is where you go.

A lot of my neighbors without any technical training have been reading this code in their sleep trying to find ways that they could ask a Director for an interpretation of the code. And as a matter of fact, they've gone through just about every Department that you have in the County, and tried to work with them, tried to work with Public Works, tried to work with Planning, tried to work with Zoning, tried to work with the Electrical Inspectors, and have had no help. I'm very disappointed in them, and I need to tell you that publically. Have had no help from any one of these Departments to show them the ropes, to help them understand how to do their applications, to even come to the Board of Variance with a proper application. I've been speaking with Trisha and finally I've stepped in myself to help them get a meeting with her so that she can help them figure out how to do an application. It's the only way that we've been told can solve this problem. It's a definitional problem that we believe in the code that there is – the Director has the option to make a ruling on that. Of course, Jeff has recused himself so he can't step in. We've asked the Public Works Director. He says it's in the different code section, not his section, so it has to go to Planning whether it's Title 19 to Title 18, or 18 or 19. I don't remember off the top of my head. So there's a lot of frustration here. We've got–

Chairman Endo: Three minutes.

Ms. English: Okay. Fifty applications are coming your way. It happened ten years ago. It was a requirement by the developer with written – with MECO. And I think you're gonna be seeing a lot. Unless we can see some way or someone can help us through this, we're gonna be keeping you busy for several years. And by the way, this wall, it looks great. There's nothing wrong with it. It's not interrupting anybody's view plain. And it was built since I remember. Thank you very much.

Chairman Endo: Any questions for Ms. English? I would like to ask you a question. It's actually kind of generic, though. Just so that we don't get all confused here, you, as well as the last three or four testifiers have been pretty much exclusively talking about the pedestal wall issue, and this application is not for a pedestal wall variance. It's for the regular perimeter wall, isn't that correct?

Ms. English: That's correct. And we had a community meeting last night and we discussed that. And we felt as though it was appropriate to bring this to your attention because we didn't want you to be confused later on when you started to see more and more applications and which was which. We also didn't want it to fall into our laps to have some sort of a precedent set before we had our chance to speak. So we figured we might as well let you know that this is – we've been struggling with your staff to try and get this before you for a year. And we didn't want the precedent to be set by something that might be confusing because both – in both instances, the Department is saying the same thing—they're defining it as a wall, and they're using the same code section. So we wanted to make that clear.

Chairman Endo: Okay, so that's fine. I just wanted to make it clear so that we don't confused because a lot of you've been saying, well, it was required by Maui Electric, and it's been there 2000, and that might apply to your pedestal wall, but might not apply to the particular application at hand.

Ms. English: Thank you for that clarification, and that's absolutely correct.

Chairman Endo: Okay. Any questions? Okay, thanks. Okay, at this point we should— Is there anybody else in the public wish to testify on this matter? Okay, if you do, would you please—? Oh, I'm sorry, you're right here. My bad. Okay, the next one to testify is Sunny Vermaas. Did I say that correctly?

Ms. Sunny Vermaas: Yes, you did. Good afternoon. Thank you for allowing us to speak. My husband, Richard Lopez, and I are residents in Launiupoko and knowing we are just to speak to the wall that's before you today. We don't personally know the Whiteheads, but I commonly walk all around the neighborhood, and there are many people with beautiful rock walls including the Whiteheads. I don't claim to know the code intimately but, you know, I understand that something that would directly affect a view plain or air space would be considered a negative. And I can say this is one of the most beautiful walls in our neighborhood, and it's not obstructing anything. And as a matter of fact in many areas including this gentleman and wife's home, the plants, and the trees, and the shrubbery far exceeds the heights of the walls. And so that's all I have to say.

Chairman Endo: Thank you. Any questions for Ms. Vermaas? No? Thank you. Okay, the final one on our list we have John Kevan.

Mr. John Kevan: Thanks for letting me talk for a few seconds. I'm here to support the Whiteheads' wall just because – on their variance just be it is – Sunny was just mentioning, it looks really nice. I've been living up in the neighborhood now for almost six years. I'm one that walk it all the time. And something coming this late in the game after it's already been built and looking well just doesn't make sense. I don't understand the process.

On the pedestal issue, I have been one of the ones who have received a letter on the pedestal, too, so which absolutely makes less sense to me. Rachel even knows originally when I bought the property that that was already pre-built way before I moved in there, and it's an existing structure based on MECO and everything else. The cost to change that when you don't have a view plain issue, when you have to bring in electricians, and everything else is a major cost, and there's four houses on that wall. So I don't understand it.

It seems to be, to me, a grandfathering issue. You grandfather people who've – you know, or the situation was set as a certain time, change it going forward. I just want to at least give my opinion on that because I don't understand why this has even become an issue and why I got a letter indicating I'm like a criminal. To tell you the truth, the letter was really poor.

We've even – Rich finally got our paperwork in processing for a variance. And as Pam was mentioning, the help – getting any help out of this County to understand that process, and deliver 20 copies of everything, and do it over and over again is insane. And I think that process needs to be looked at, too, just going forward. But I wanted to give my opinion. I think some things need

to change, and some things need to be fixed. But seeing a \$20,000 cost or a \$30,000 cost to move a foot off a wall that is not obstructing a plain, a view plain or anything is just, I don't know, I consider it to be kinda silly to do. And I wanted to give that opinion. Thank you.

Chairman Endo: Thank you. Any questions for Mr. Kevan?

Mr. Kamai: Yes. So you, too, received a letter, the citation?

Mr. Kevan: Sure did.

Mr. Kamai: How long ago?

Mr. Kevan: Mine came in March. It was March, February timeframe, earlier this year.

Mr. Kamai: Had you made any efforts to comply with that letter?

Mr. Kevan: Well, we've made efforts in the sense that I replied. I made phone calls actually, when I got the letter. I put some e-mail responses in to the Planning Department. We have filed the proper – well, I thought was the proper paperwork. Rich basically, handled most of the paperwork, gathering it all, and spending tons of hours trying to coordinate 20 copies, get it signed, get the plats, the maps, the neighbors, get them to sign. I mean, it's just an incredible process you have to do for this. And that has gone in numerous times and we finally – Rich finally submitted it again last Friday. So it's not a simple process where you just go do it. It is a six-month long–

Chairman Endo: For clarification, you're talking about submitting an application for a variance?

Mr. Kevan: Yeah.

Mr. Kamai: Yeah, I meant compliance by lowering your wall.

Mr. Kevan: No, because basically, there are four houses on the wall. It's gonna be a little difficult to do. We've noted with the MECO issue, if I'm told by MECO, and these are the electricians that I'm supposed to have to have a seven-foot wall, I'm not going to knock it down to five feet unless I understand what's going on. Then I gotta hire electricians. Some of the neighbors have actually gone out and got some estimate costs, and they're in the \$20,000, \$30,000 range, from what I understand. And that's for something that was there before I bought the house, and it's been there for, you know, years before I bought the place. It was never an issue. And it's not an issue in some other ag land areas like in Kapalua and that. I guess I just – no, I did not attempt to change the wall down or knock it down two feet.

Chairman Endo: Okay, at this point, the Chair would like to constrain the discussion to the application at hand just because we're not talking about pedestal–

Mr. Kevan: I just wanted to . . . (inaudible) . . .

Chairman Endo: I know it's an important issue and everything, but I'm just going to try and caution both the Board and the testifiers that we're going to try and bring you a little bit not to keep you



from speaking, but just–

Mr. Kevan: Okay. Any other questions?

Chairman Endo: Let's move on.

Mr. Kevan: Okay, thank you.

Chairman Endo: Okay, is there anyone else from the public who wishes to testify on this matter? Please come up to the podium, state your name, and you'll have three minutes to testify.

Mr. Gordon Firestein: My name is Gordon Firestein, and I'm a resident of Launiupoko, and I'm here in support of the application for the variance. Like some of my other neighbors here, I don't know the Whiteheads, but as you can see, this is an issue that has affected the entire community. In our case, I won't speak to it because I know you want to move along. We have a pedestal wall. And like some of the others because of the property line configurations, there are four separate TMKs that are involved in that. And we are also in the process with Trisha's help and others on the Planning staff preparing an application for a variance of our own. But my purpose in addressing you here today is just in support of the Whiteheads and in support of the variance. I think it would send a very strong message of your concern about the effect that this has on the entire community. So thank you very much.

Chairman Endo: Thank you. Any questions for the testifier? Seeing none, thank you. Is there anyone else in the public who wishes to testify on this agenda item? Seeing none, we'll now close public testimony as to this agenda item and take up the petition to intervene by the Department of Planning. Ms. Lovell is here on behalf – representing the Department of Planning. At this point, everybody has gotten a copy of the motion to intervene. And I'm going to allow the Board to ask questions. Let's see. I'll just take that back. Why don't I allow Ms. Lovell to make just a summary of your argument? Then I'll allow the applicant to respond, if you want to, then we'll – maybe we'll deliberate on the motion.

Ms. Lovell: Thank you very much. I'll try to keep it really short and sweet. I hope sweet. Basically, the rules allow that any State agency or County agency is allowed to intervene unless it's too late. Too late is defined as an unreasonable amount of time into the case, or in any event, you have to file your motion to intervene before the Board reaches its decision. Here we have filed before the Board reached its decision.

I think the really important thing here is we've heard a very large – a pretty large number of people have testified in favor of the variance, but no one here has spoken for the public or for the public interest. We've had only testimony presented by people who have a stake in this controversy. And if you do not allow intervention by the Planning Department, then basically, the public's voice is not heard. And by the public, I mean, you know, the community as a whole, that part of the community that may not come out and testify, but that nonetheless is looking to the County Planning Department to uphold the laws as they're written, that part of the community that asks the County to enforce its laws. So for all of those reasons, there's a very good reason why you should allow this intervention.

Chairman Endo: Any questions? The Chair has a question for you, Ms. Lovell. Are you taking a position that we have to allow you to intervene under the "shall be admitted" phrase? Or are you conceding that you have filed your application somewhat late although not too late since we've already heard one – heard this matter for one meeting? So–

Ms. Lovell: Well, definitely the word "shall" is in the regulation, but the Board – the Commission does – I mean, I'm sorry, the BVA does have the opportunity to determine whether the application is filed within a reasonable time under the circumstances. So I'm not saying that under no circumstances whatsoever are you able to turn down this application. You have to look and see if the timing of it is reasonable. That's right in the rules. It's true that we did not file earlier. Sometimes these cases take on a certain – how shall I put it? Until the case actually gets going, you don't see where it's going, and you don't see whether there is a need to intervene or not. In this particular case, some of the Zoning Inspectors felt that the Board would not have a full and complete picture if intervention were not allowed. And they were told I believe by the Board's Attorney that in order for them to present their point of view, they would have to intervene. And so at that point, they asked our Department, would you please file an intervention. We got that request last Friday. I filed it on Monday.

Chairman Endo: One followup question, then. I take it then that by intervening you want to change the procedure a little bit and move into a contested case hearing format?

Ms. Lovell: Well, I guess that would be the – yeah, that would be one of the ramifications. I mean, we don't – it doesn't need to be complicated. It doesn't need to be drawn out. We could do it today. I have, you know, the two Zoning Inspectors to testify. And we have a couple photographs to show you. So it's not gonna be long, complicated, or expensive, but I guess that would be the legal consequence.

Chairman Endo: But you are ready to proceed today?

Ms. Lovell: Definitely.

Chairman Endo: Okay. Any other questions? No? Thank you, Ms. Lovell. At this point, we'll allow the applicant to speak for the motion. This is not the actual variance. It's just this motion to allow the Planning Department to be a party to the proceeding. So we need to decide that motion. So we'll allow you the opportunity to say whether you're okay with it, say whether you object to it, and your reasons.

Mr. James Whitehead: I didn't know I became so popular. I wanna thank everybody that came and testified on my behalf. Pretty much most of the public that we're referring to is the people who came, me, the people that got the violations. There's nobody come over here except the County of Maui to fight me. That's the only people. And the Zoning Inspectors had every opportunity at the last hearing to speak. So maybe they feel offended with their threatening letters and threatening people with thousand dollars a day fines that they need to speak some more. I'm totally against the intervention. Planning has already said their recommendation what they feel should be done. So why does Planning have to intervene when they've already done their work and submitted their paperwork to the Board?

Chairman Endo: Any questions for Mr. Whitehead? No? Okay. At this point we should then decide the motion. The Chair would request that someone either move to approve or deny the motion to intervene.

Ms. Elizabeth Whitehead: Could I speak?

Chairman Endo: Sure.

Ms. Whitehead: Hi.

Chairman Endo: To the motion, right?

Ms. Whitehead: Oh, well, yeah.

Chairman Endo: To the intervention.

Ms. Whitehead: Oh, just for the intervention, no, I disagree. I don't want the intervention. I'll speak more later.

Chairman Endo: Okay. Yeah, we're only deciding the motion to intervene right now.

Ms. Whitehead: Okay.

Chairman Endo: Yeah. Okay. If – since no one's going to say anything, the Chair will take the opportunity to say that generally, I think it's correct that the Planning Department's already participating in this matter quite a lot, and so it really doesn't matter either way that much. But I think that to see both sides of the case, and to go to a contested case format is probably helpful to see more of the facts, and so the Chair would support allowing the intervention.

Mr. Kamai: Yeah, I'd like to make a motion to grant the intervention.

Chairman Endo: Okay.

Ms. Phillips: Second.

Chairman Endo: Okay, it's been moved by Member Kamai and seconded by Member Phillips to allow the motion to intervene by the Planning Department. Any discussion?

Mr. Tanaka: Actually, like what you said, I'm a little not sure on – it's the Planning Department that's intervening on a Planning Department decision. So, I guess, I just wanted, I guess, agree with what you're saying that it's – I don't think it would be such a big matter to allow them to intervene. Sorry, I just wanted to throw that in.

Chairman Endo: Okay. Any further discussion? All those in favor of the motion to grant the intervention, please say aye. Opposed, please say no.

**It was moved by Mr. Kamai, seconded by Ms. Phillips, then**

**VOTED: In Favor of the Motion to Grant the Intervention.**

**(Assenting: W. Kamai, R. Phillips, R. Shimabuku, S. Duvauchelle,  
and K. Tanaka)**

**(Excused: J. Shefte, H. Ajmani, and S. Castro)**

Chairman Endo: **The motion is carried and the request to intervene – the motion to intervene is granted.** So at this point, we should have a brief discussion on procedure. I will state what I would like to do. And the parties can raise objections or make comments, and we can consider them.

In order to be expeditious, rather than delay this hearing to another date and, you know, require more documentation, and memos, and exhibit lists, and witness lists, since the County has – the Planning Department said they're ready to proceed, and I'm assuming the Whiteheads were already ready to proceed, I would request that we just move forward. So the only difference from before we granted the motion is that now things would be in a question and answer format where the Planning Department and the applicant would be allowed to cross examine witnesses. So just the way that the evidence is presented changes. It's a little bit more formal. So are both sides ready to proceed in that fashion?

Ms. Lovell: Yes, thank you very much. The Planning Department . . . (inaudible) . . .

Chairman Endo: Okay. Mr. and Mrs. Whitehead?

Mr. Whitehead: Yes.

Chairman Endo: Okay. Yeah, actually, if you take a step back, it's been such a long time since we heard your matter before, I kind of forgot where we left off previously. I know we heard all of the facts of your case. Did you have additional things you wanted to provide since then?

Mr. Whitehead: Yes.

Chairman Endo: Okay. I think what we'll do then is I'm assuming you're just going to speak on your own behalf so I'll swear you in. You testify, and then I'm going to allow Ms. Lovell to cross examine you.

Mr. Whitehead: (Inaudible) At the last meeting, I was instructed to do something prior to this meeting.

Chairman Endo: Okay, what was that?

Mr. Whitehead: . . . (inaudible) . . . Director of Public Works. So I did that. That was why we postponed it till now.

Ms. Tremaine Balberdi: Can you use the microphone, please?

Chairman Endo: Please speak into the mic., because they're recording it--your testimony.

Mr. Whitehead: At the last meeting, because of the way the code is wrote that I was to see the Director of Public Works for an exemption. I did see the Director of Public Works. So I assumed that that's what you were gonna be asking me about today.

Chairman Endo: Well, to tell you the truth, it's been so long I kind of forget. Francis, do you know anything about that where we're at?

Mr. Cerizo: I believe that's what transpired at the last meeting. We had a – we had the presentation made. And there was question and answering. And towards the end, there was a question to the applicant if one of the options where he could have a lower wall was explored, and that was the option to request an approval from the Department of Public Works for a higher wall.

Chairman Endo: Okay. Now it's coming back to me. I think what we should do is just let you testify to that as part of your testimony, and that can just be part of your case. So if you would raise your right hand? And do you swear that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Mr. Whitehead: Yes.

Chairman Endo: Okay, go ahead.

Mr. Whitehead: Okay. I'd like to start off by I'd like to read this 19.30A.030, Item F:

Walls shall not exceed four feet within the yard setback as measured from the finished or existing grade whichever is lower to the top of the wall as defined herein. This does not preclude construction fences on the top of the wall for safety purposes. 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.

Okay? There's nothing in here that says retaining walls are exempt. It says that they have to have an exemption from the Director of Public Works if they put up a retaining wall higher than four feet. There is numerous permits issued, one of which I put up as my evidence, two houses away from me. It was in my package—a permit issued to a Greg Stille after-the-fact retaining wall in 2007. I asked the question because there's a number of walls out in Kahana that were built during the decade of 2000, walls out in Kapalua, walls in Haiku, walls in Kula, walls in everywhere higher than four feet. I asked them how many exemptions did you issue? The answer was I don't think we ever issued an exemption to anybody yet the Planning Department signed off these permits. Now, if this wall is supposed to be adhered to, I would assume that if they got a permit application, and it was in the ag district, and it was over four feet, and it was retaining earth that the Director had to issue an exemption to allow that wall to be built. And if they didn't have that exemption, Planning wouldn't sign off. He couldn't answer my question, but he stated emphatically he doubted that any

exemption was ever done because this was never really that clear to him until this year when this issue all started. And I was one of the first guys that got a violation notice. So that's what I was told to do. I went and did it. He has not issued any letter or any opinion to me as of today. And that was done prior to me going to my Mainland trip. I left on October 22<sup>nd</sup>. I met with him the week before that.

Chairman Endo: Okay. Any questions for Mr. Whitehead? Oh, you can speak not only to the recent thing, but if you want to recap your scenario or add anything to your testimony, you can do so, you know. I'm not trying to limit you to just the request to the Department of Public Works.

Mr. Whitehead: Okay.

Chairman Endo: If you wanted to.

Mr. Whitehead: Well, yeah. I mean, you're dealing with a ton of money, a wall that's been up for over eight years with Zoning Inspectors driving by like weekly or bimonthly basis without any violations for eight years. Same with those electrical pedestals, they are – an electrical pedestal, they name it that because it's holding an electric meter, but the violation is because that wall is over four feet. The violation is because it's a wall six feet long and six feet high. So if you tear off two feet of it, it becomes the same thing I have except mine is my perimeter inside my property line.

So if the code was in effect in 1999, nobody enforced the code. How come now all of a sudden? And it's supposed to be for view plain. And there's no view plain obstructed. Why is it all of a sudden that we have to tear it down if the County didn't do their job and issued permits in violation of this law that Planning signed off on without an exemption from the—? For health and safety only. Those walls— And I was a contractor, I admitted that, 30 years. I worked by Section 16, not 19, because that's Building Code. All the Building Inspectors have said I'm legal by their code so were all those electrical pedestals and the other perimeter walls that got wrote up. Gate entries that are holding a six-foot gate, they got a six-foot pedestal by it. It hadn't got an electrical panel on it, but it's approved by Public Works because it meets the code.

So all I'm saying is I feel there can't be a double standard—one Department says it's there and the other Department says it's that way. And why I can be in violation when the Inspectors drove by my home and never once told me I was doing something wrong when I put it up. I feel that the Board should approve this variance. And if it does not approve it, then all those permits that were issued for all those walls that are illegal by this code should be pulled. And all those owners should have to take it – tear them down, and rebuild them to meet this code because they were down since the code's been in effect and the County approved them.

Chairman Endo: Okay. At this point, we'll allow Ms. Lovell—

Mr. Kamai: I got a question for Mr. Whitehead.

Chairman Endo: Usually I'd like to allow the parties to ask first and then the Board, if that's okay, Mr. Kamai. Okay. So go ahead, Ms. Lovell. You can stay up there. She's going to cross examine you, if you—

Mr. Whitehead: Oh, she's going to cross examine me?

Chairman Endo: Yeah, because you're testifying on your own behalf, if you want to.

Ms. Lovell: Yes, I do. I have just a few questions, Mr. Whitehead. First of all, you have been in the building trade in the construction business for most of your professional life, correct?

Mr. Whitehead: That's correct.

Ms. Lovell: Some 30 years?

Mr. Whitehead: Yes.

Ms. Lovell: And you are the person that built this wall in the first place, correct?

Mr. Whitehead: That is correct.

Chairman Endo: Excuse me. As a matter of decorum, we'd like everybody to look to the Board even though you're asking each other questions. So please look this way and speak towards the Board. Thank you.

Ms. Lovell: It's just a little awkward, the—

Chairman Endo: Yeah, you want me to have him come up here a little closer, or there, or right here? Yeah, you can join the Board. Okay, sorry, go ahead.

Ms. Lovell: So, Mr. Whitehead, we were talking about when the wall was first built and you were the one who built it, correct?

Mr. Whitehead: That's correct.

Ms. Lovell: And as a person in this building trade and in the construction business, it is your job, isn't it, to find out what laws are applicable and regulations are applicable?

Mr. Whitehead: That's correct.

Ms. Lovell: And is it your complaint now that because the County didn't give you a notice of violation when you built it, the County shouldn't be able to give you a notice of violation now?

Mr. Whitehead: I wasn't aware of it because as I stated before in my previous hearing and I just stated today, I have worked my entire career under Title 16 with Building Codes. I don't have a clue what the subdivision, zoning, and all that is because it's never been part of my job as a general contractor. I didn't know I was violating the law. Yeah, I didn't know. I expected the Inspector to tell me if I'm doing something wrong because the Building Inspector sure do.

Ms. Lovell: Now, when you first – when you built this wall, you knew that it was more than four feet tall, correct?

Mr. Whitehead: Yes.

Ms. Lovell: And it is more than four feet tall.

Mr. Whitehead: Yes.

Ms. Lovell: And the wall is a perimeter wall, correct? It's not a retaining wall.

Mr. Whitehead: That is correct.

Ms. Lovell: It's not there for drainage purposes or to hold an embankment in place or—

Mr. Whitehead: Well, it is there because of the water runoff from the road and the reservoir across the street was going directly through my property and washing out my property. So the wall – the rock wall was put up basically to stop the – protect my property.

Ms. Lovell: But it's not a retaining wall?

Mr. Whitehead: No, it's not.

Ms. Lovell: Okay. And the Department of Public Works has not given you any kind of exemption?

Mr. Whitehead: Well, I don't know. I haven't gotten anything from them since I had the meeting with them, ma'am.

Ms. Lovell: So the answer is no, they haven't given you an exemption.

Mr. Whitehead: They haven't – yeah, they haven't given me an exemption, but they haven't denied me an extension either – exemption either.

Ms. Lovell: Okay. Now, in terms of what your next step is, have you considered just bringing the wall down to four feet?

Mr. Whitehead: No.

Ms. Lovell: Some of your neighbors have done that, haven't they?

Mr. Whitehead: They have, yes, because they were scared and intimidated by the Inspectors.

Ms. Lovell: So some of the people in your subdivision are complying with the law.

Mr. Whitehead: Three of four of them, yes, did comply.

Ms. Lovell: Now, isn't it true, Mr. Whitehead, that over the last couple of years you have on numerous occasions done some buildings first and then been required to come and get an after-the-fact building permit?



Mr. Whitehead: No.

Ms. Lovell: You've never applied for an after-the-fact building permit?

Mr. Whitehead: I've always built for customers and always got the permit in hand before I started construction, unless you were – I – you gotta bring something to point here. I don't understand what you're saying.

Ms. Lovell: Let me just ask here. Did you do a project for Michael Slater in 2006 which involved a garage and trellis?

Mr. Whitehead: I built a house on Hulapala Street, a cottage.

Ms. Lovell: And weren't you required to come in for an after-the-fact permit for that project?

Mr. Whitehead: No, no, we had a permit to build that cottage right off the bat.

Ms. Lovell: For the garage and trellis?

Mr. Whitehead: It had a garage when I built it.

Ms. Lovell: Did you do a project in 2006 for a Greg and Bernadette Owens that required an after-the-fact building permit because you did the building first and got the permit later?

Mr. Whitehead: No, the building was altered. That was a cottage down in the corner of Kai Hele Ku.

Ms. Lovell: And did you get an – did you have to come in and get an after–?

Mr. Whitehead: I had to redo it because the lanai was made larger, yes, ma'am. The permit to build the original structure was issued before I started work.

Ms. Lovell: But you still had to get an after-the-fact permit because you didn't build it the same way that the–?

Mr. Whitehead: Yes, ma'am.

Ms. Lovell: Now, in 2007, did you do a job for Lee Killett?

Mr. Whitehead: Yes, I built their house.

Ms. Lovell: And that included a rock retaining wall?

Mr. Whitehead: Oh, I pulled a permit, and they hired somebody to go do a rock retaining wall, yes, and the County issued a permit for it, after-the-fact, yes, that's correct, because they were supposed to take care of it and they didn't do it.

Ms. Lovell: Okay. Now, you also did some work for Scott and Anna Ross that required an after-the-fact permit?

Mr. Whitehead: Who?

Ms. Lovell: Scott – Ross and Anna Scott.

Mr. Whitehead: I built their house.

Ms. Lovell: Again, the work was done and then you were required to get an after–

Mr. Whitehead: Because the owner asked me to go get him a permit because the County busted him for building a rock wall without a permit. And I didn't build it, but I went and applied and got the permit for him, the same as the Killelts.

Ms. Lovell: Did you do some work for a Preston Bloss in–?

Mr. Whitehead: Yes, and he had a rock wall that was built. The County busted him, and I built that house, and he asked me to go get an after-the-fact permit for his rock wall, yes.

Ms. Lovell: How about for–? Now, this was all before you got any notice of violation about your wall, wasn't it? All of these after-the-facts?

Mr. Whitehead: Yes.

Ms. Lovell: Including after-the-fact permits for other people's rock walls?

Mr. Whiteheads: Yes, I helped out some other customers. Yes, I did, because they had built with somebody else, and they asked me to go get it 'cause the County busted them.

Ms. Lovell: I have – well, maybe just a couple of other questions. I'd like to show you some photographs, Mr. Whitehead. I guess I can approach the witness?

Chairman Endo: Yeah. Do you have extra copies or–?

Ms. Lovell: I do.

Chairman Endo: Okay.

Ms. Lovell: And just for the record, what I have in the packet is two photographs, and then there is a summary of various building permit issues that one of the Inspectors will speak to, but I want to focus just for the moment on the two photographs. And perhaps for the record, we could just have this packet marked as the Department's first in order, first and only.

Chairman Endo: First County exhibit?

Ms. Lovell: To my knowledge. Mr. Whitehead, looking at the first photograph, the first of two

photographs, does that photograph depict your wall?

Mr. Whitehead: That's my wall.

Ms. Lovell: Okay. And that's the one we're talking about here, correct?

Mr. Whitehead: Yes, it is.

Ms. Lovell: Okay. And is that what the wall looks like today?

Mr. Whitehead: Yes, it does.

Ms. Lovell: Okay. Turning to the next photograph in the packet, does that photograph depict your wall?

Mr. Whitehead: Yes.

Ms. Lovell: And does the wall still look like it looks in this photograph?

Mr. Whitehead: That's correct.

Ms. Lovell: At this point then I would offer these two photographs in evidence. And I'm sorry that they're stapled to this other document. You might want to take that off.

Chairman Endo: That's okay. Is there any objection from the applicant? Mr. Whitehead or Mrs. Whitehead?

Mr. Whitehead: Excuse me?

Chairman Endo: Do you object to the introduction of these photographs as evidence?

Mr. Whitehead: No, . . . (inaudible) . . . same things already in the movie so-

Chairman Endo: Okay. Seeing no objection, we'll accept them.

Ms. Lovell: Thank you very much. That concludes my questioning of this witness.

Chairman Endo: Okay. Thank you. At this point, Mr. Whitehead, you can call your next witness. So you can call your wife or anybody else that you want.

Mr. Whitehead: (Inaudible) She's going to speak whether I tell her to or not.

Ms. Whitehead: Hi.

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Chairman Endo: So, Mrs. Whitehead, will you raise your right hand? Do you swear or affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Ms. Whitehead: Yes.

Chairman Endo: Okay.

Ms. Whitehead: I know you have a really hard decision to make today. And it's going to be really difficult because whatever you do is going to affect everybody who has a violation for the same thing. To me, the pedestal and the wall is the same thing because it was going – exceeding the four-foot height limitation. My thing is that I think there's a lot of discrimination and I think there's grounds for discrimination. Yes?

Chairman Endo: I'm sorry to interrupt. I just realized I made a mistake. I forgot to allow the Board, and Member Kamai had a question.

Mr. Kamai: I can ask after.

Chairman Endo: You can ask after? Okay. Go ahead.

Ms. Whitehead: Okay. I think there's a – we have a loft – I mean, a roof for discrimination here. As one of the neighbors pointed out, he's waiting for the ax to fall. If discriminated – the County has discriminated by not giving everybody a violation. And then the person that my husband was talking about, how can the County give a permit, an after-the-fact permit for a wall already in violation of that wall, the four-foot high wall? And he's only two lots down from us. I don't want to take a foot off my wall. It's going to cost us \$16,000, \$20,000. I'd rather give that money to my grandson in college. That's almost one year's tuition for him. I think you should grant everybody an exemption for that four-foot, you know, to leave it as it is. The pedestal should be the way it is. That's the way Maui Electric expects it to be. So I just think that, you know, there's discrimination here. The guy on the wall that you gave the permit to it wasn't for health or safety. It was for landscaping purposes. But the fact that the wall was in violation shouldn't have gotten the permit. So that's discrimination from – discrimination right there. You're discriminating by giving him the permit, but you won't give us or the other 57 people who got violations an exemption. So I think that's ground for discrimination.

Chairman Endo: Okay, thank you. Actually, Mr. Whitehead, could you go back to the Chair over there now? Yeah.

Mr. Whitehead: (Inaudible)

Chairman Endo: No, because we need to allow your wife to sit there assuming there are questions. Are there questions for Mrs. Whitehead?

Ms. Lovell: No, I don't have any questions . . . (inaudible) . . .

Chairman Endo: Okay. In that case, you don't have to.

Ms. Lovell: (Inaudible)

Chairman Endo: Okay, that's good. So continuing with the formal process then, Mr. and Mrs.

Whitehead, do you have any other witnesses or evidence you want to submit on your behalf?

Mr. Whitehead: No, that's it.

Chairman Endo: That's it? Okay. At this point then, we will – we're going to turn it over to the County to present their case now, but Member Kamai, did you want to ask a question because I kinda – I screwed up and didn't allow you to ask your question earlier.

Mr. Kamai: This question is for Mr. Whitehead.

Chairman Endo: Okay, go ahead.

Mr. Kamai: Yeah, Mr. Whitehead, you – so applied for several after-the-fact permits?

Mr. Whitehead: Yeah, those permits were the owners going and doing something with rocks up there because that place is nothing but rocks, and they used those big rocks to make retaining walls on their property. Well, the County came out, the Building Inspector, and busted them for doing it, but it was done before I even started building the house. So the owner asked me if I would help him by filing for an after-the-fact permit for the Killeets, for Pogni, for almost everybody on there. Michael Slater with the work on his house, I didn't – I built the structure, but this was all a remodeling part that he got done by somebody else that wasn't licensed and then asked me to go help him get a permit because he got in trouble for it. But I did build his house. I built almost all those people's houses. I built something like 25 or 30 houses up in that general vicinity between Puunoa and Launiupoko.

Mr. Kamai: No, I think my questioning was for you used the word "busted," and that was by the Building Inspectors for the wall.

Mr. Whitehead: That's correct.

Mr. Kamai: The same kind of–

Mr. Whitehead: Cited, they were cited by the Building Inspector. The owner was cited by the Building Inspector. And they had to get a permit or they was gonna shut down my construction of the home. So I helped them out by going and filing for the after-the-fact permit.

Mr. Kamai: For the wall?

Mr. Whitehead: Yeah, because when I go in and the land is flat. It has to be flat so I can build the house. I don't do excavation work. I don't have any machines. So I helped them out. Apparently that's in my detriment for being a nice guy, but I did it.

Mr. Kamai: So to be clear, it was a bust by the Building Inspector for the wall?

Mr. Whitehead: To the owner, yeah.

Mr. Kamai: But in your case, the Building Inspector missed your wall?

Mr. Whitehead: No, the Building Inspector said my wall is legal by Building Code, Section 16. My wall is legal by Building Code. And the walls that were referred to by the Attorney here, those fall under the Building Code, Section 16, not 19. Sixteen is Building Code. That's all I deal with.

Mr. Kamai: Right, but they were cited which is why you went in after-the-fact.

Mr. Whitehead: Yes, they – well, he didn't do a formal citation to them. He just told them you need to get a permit for this wall because if you don't, I'm going to shut Mr. Whitehead down with construction of the home. Then they came to me and asked me if I would help them out. I said okay since I'm building your house. As long as the process was going, and the permit was applied for, then I could continue to build the house.

Mr. Kamai: And that's because the wall was in violation of this code?

Mr. Whitehead: No, no, was in violation of Building Code. It exceeded three feet on a retaining wall. These are big, gigantic, two-ton, three-ton, five-ton rocks, and it's a retaining wall. And none of them except a couple of them are in violation of this code, but at the time, I didn't know, but it was already built just like this gentleman down the street that got his in 2007 on that list that she got that shows the Killeets. It's also in violation of this code, but yet it got an after-the-fact permit for the rock wall signed off by Building and Planning, but no exemption from the Director of Public Works.

Mr. Kamai: Okay, which leaves me to questioning Mr. Whitehead about his meeting with Public Works' Director.

Chairman Endo: Sure. Go ahead. Sure.

Mr. Kamai: So your meeting with Mr. Arakawa.

Mr. Whitehead: Yes.

Mr. Kamai: So you met with him in person?

Mr. Whitehead: Yes, I did.

Mr. Kamai: You told him of this Board's advice?

Mr. Whitehead: Yes. That was why – I had to tell the reason before he would agree to meet with me. Once he heard the reason, then he set up the meeting, and I came and attended.

Mr. Kamai: And what was discussed at the meeting?

Mr. Whitehead: Everything that we basically discussed here. And I had the copy that I just read from of the code, and I showed it to him, and he had two like one or two assistants with him. And I showed him pictures. And he said, well, we deal with Section 16, not 19. I said, I understand that, but this says an exemption. So you exempted these retaining walls, and it was no – and he didn't – they didn't have an exemption. He said they issued it because it was a retaining wall and it was

part of a Building Code. It had nothing to do with Section 19. So I said, well, I'm asking because I put a rock wall basically, because I got flooded out every time it rain, and it don't rain that much, but it did. It washed out all that dirt down and destroyed my lot. And so he said we will respond in writing.

Mr. Kamai: And he hasn't so far?

Mr. Whitehead: Nothing. I came back from the Mainland. There's nothing came in while I was gone and I was gone for a month.

Mr. Kamai: And how long ago was this meeting?

Mr. Whitehead: It was before I left on the 22<sup>nd</sup> of October. It was about a week before that when I finally got the meeting with him.

Mr. Kamai: No more questions.

Chairman Endo: Okay. At this point we'll proceed to allow the Department of Planning to present its case.

Ms. Lovell: Thank you. First I'd like to call Kai Wright.

Chairman Endo: You can sit right over here by this microphone. Please raise your right hand. Do you swear that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Mr. Conklin Kai Wright: Yes.

Ms. Lovell: Mr. Wright, by whom are you employed?

Mr. Wright: The County of Maui.

Ms. Lovell: What's your job?

Mr. Wright: Zoning Inspector.

Ms. Lovell: I'd like to show you a photograph that's been introduced into evidence as the Department's first in order. Can I just reach it across to you, if you don't mind? I'd like you to take a look at that photograph and I'll ask you, are you the person who's in that picture?

Mr. Wright: Yes.

Ms. Lovell: And it shows you standing by the Whitehead's wall?

Mr. Wright: Yes.

Ms. Lovell: That's the wall that we're talking about here?

Mr. Wright: Yes.

Ms. Lovell: Okay. Are you taller than four feet tall?

Mr. Wright: Yes.

Ms. Lovell: How tall are you?

Mr. Wright: 5'11".

Ms. Lovell: And the wall that's in place is taller than you are?

Mr. Wright: Yes.

Ms. Lovell: Thank you. I have no more questions.

Chairman Endo: Okay, I'm going to allow Mr. Whitehead to ask questions if he wants to and then the Board.

Mr. Whitehead: I can question him?

Chairman Endo: Yes, you may.

Mr. Whitehead: Thank you. The picture you're looking at, is the entire wall taller than you, or is it just the columns taller than you?

Mr. Wright: In the picture, the columns.

Mr. Whitehead: So did you measure the entire length of the wall, all 225 feet of it?

Mr. Wright: We measured the spots that were higher than four feet.

Mr. Whitehead: And was anything other than the columns higher than five feet?

Mr. Wright: I can't tell from this picture.

Mr. Whitehead: Well, I mean, . . . (inaudible) . . . the wall, so was not – was anything higher than five feet other than the columns?

Mr. Wright: We were looking for things over four feet.

Mr. Whitehead: I understand that.

Mr. Wright: Four feet is the code.

Mr. Whitehead: I understand that.



Mr. Wright: So we weren't looking for five feet. We were looking for over four feet, sir.

Mr. Whitehead: But you're depicting the whole wall is your height. I'm just clarifying that over the columns were at six feet tall and the rest of the wall was at five feet.

Mr. Wright: Okay.

Mr. Whitehead: I don't have any more questions.

Chairman Endo: Okay, Members, questions for this witness. Member Kamai?

Mr. Kamai: Yes, Mr. Wright. So, Mr. Wright, as a Zoning Inspector, do you guys – you look at building permits that's issued as part of your--?

Mr. Wright: Building permits, sometimes. We'll try to see if there's a permit for something after we – you know, if there's a violation, we check to see if there's a permit for it. And if the permit squashes the violation, then it's squashed.

Mr. Kamai: So most likely it's an after-the-fact violation almost?

Mr. Wright: So to speak.

Mr. Kamai: Yeah?

Mr. Wright: Yes.

Mr. Kamai: That it's already built. You checked the violation and you checked the permit as the procedure?

Mr. Wright: Yes, yes.

Mr. Kamai: So nothing to do with ongoing plan approvals, structural drawings--?

Mr. Wright: As a Zoning Inspector?

Mr. Kamai: Yeah.

Mr. Wright: We're more of – out there on the field. We don't make the decisions. We're the eyes for the rest of the staff. We take the pictures. We – you know – so they can stay in the office and take care what needs to be taken cared of.

Mr. Kamai: Office is Public Works?

Mr. Wright: Office is Planning upstairs.

Mr. Kamai: Planning. So any pre-warning of a potential wall that will be in violation is – who does the screening for that?

Mr. Wright: I'm not sure. Pre-warning?

Mr. Kamai: Yeah, that there's a six-foot wall being planned five feet away from the property line.

Mr. Wright: Sorry.

Chairman Endo: If you don't know, that's fine. Just letting you know.

Mr. Wright: Yeah, I don't really know.

Mr. Kamai: No, no more questions.

Chairman Endo: Okay. Any other questions? Okay, thank you. You can sit down.

Mr. Wright: Okay.

Chairman Endo: Ms. Lovell might have another witness?

Ms. Lovell: Yes, I do. Thank you very much. Next I'd like to call Sonny Huh.

Chairman Endo: Sonny Huh? Mr. Huh, will you please raise your right hand? Do you swear or affirm that the testimony that you're about to give today is the truth, the whole truth, and nothing but the truth?

Mr. Sonny Huh: Yes, sir.

Chairman Endo: Thanks. Please be seated.

Ms. Lovell: Mr. Huh, what is your job?

Mr. Huh: Zoning Inspector for the Planning Department.

Ms. Lovell: How long have you been at that job?

Mr. Huh: About two years.

Ms. Lovell: So I take it you really can't testify as to things that may have happened eight years ago, but you're certainly familiar with what you have done as a Zoning Inspector since you've been with the County, is that fair?

Mr. Huh: Yes, ma'am.

Ms. Lovell: Okay. Now, we heard from a number of people in the neighbor who came in today. I think you were here in the room for most of that testimony and you heard it. There are a number of people in the Launiupoko area who have this problem with their walls. Is that your understanding?

Mr. Huh: Yes.

Ms. Lovell: And in terms of your enforcement efforts, have you discriminated against anybody or have you just issued violations wherever you saw violations?

Mr. Huh: I have not discriminated anybody.

Ms. Lovell: So wherever you saw a violation, you did your best to enforce?

Mr. Huh: Yes, ma'am.

Chairman Endo: The Chair would ask the Department not to lead the witness too much.

Ms. Lovell: Alright. Are there other people in the area who have received variances? I mean, I'm sorry, strike that, who have received notices of violations?

Mr. Huh: Actually, technically, notices of warning for the violations that exist on the property.

Ms. Lovell: What have been the responses from the people who have received notices of warnings?

Mr. Huh: Numerous people have filed variances just like Mr. Whitehead has, and I believe there are five of them. And for the pedestal wall, if I'm not mistaken, possibly there are a few for the perimeter walls.

Ms. Lovell: Has anyone tried to comply with the law?

Mr. Huh: Yes, I believe last time we had a meeting on September 11, I tagged exact number count. Just . . . (inaudible) . . . there had been about 14 or 15 parcels that complied.

Ms. Lovell: And how have these people gone about complying with the law once their violation was pointed out to them?

Mr. Huh: They called us and asked us what the code section that they're violating. We explained to them what the section was, and they simply lowered it.

Ms. Lovell: They lowered the wall?

Mr. Huh: Yes, ma'am.

Ms. Lovell: And there's been a number of people have done that?

Mr. Huh: About 13 to 15 people have done that.

Ms. Lovell: Okay. Now, next I'd like to show you a document, which is attached to our packet here, which is the Department's Exhibit 1 in evidence, and I'd ask you take a look at the list there, please. Can you identify that for us? This is the third page of the Department's Exhibit 1.

Mr. Huh: Well, this is basically a list of after-the-fact permits that was obtained by the applicant . . . (inaudible) . . .

Ms. Lovell: That's Mr. Whitehead's construction company?

Mr. Huh: Yes.

Ms. Lovell: Did you put that document together or did you make that search?

Mr. Huh: I needed help to get this document searched.

Ms. Lovell: Is that something that you asked for?

Mr. Huh: Yes.

Ms. Lovell: Okay. Can you explain what the search was, what you were searching for, what you were looking for?

Mr. Huh: Well, I was just simply looking to argue the fact that Mr. Whitehead stated the fact that for 30 years he has done everything by the code book. And of course, Mr. Whitehead stated today that he was just obtaining these permits for the constituents – help them out. I do not have any evidence to suggest that it is not so.

Ms. Lovell: But in any event, there is a history in your system with respect to Mr. Whitehead's construction company?

Mr. Huh: If you ask me a specific company that occurred back in 2006, yes, I do have it.

Ms. Lovell: Now, are the zoning rules and regulations that you enforce available to the public?

Mr. Huh: I'm sorry, could you repeat the question again?

Ms. Lovell: If a member of the public wants to know if – you know, how high they can build their wall, for example, is that information that's available to the public?

Mr. Huh: Absolutely.

Ms. Lovell: How would a person find that out?

Mr. Huh: He can simply go to [Mauicounty.gov](http://Mauicounty.gov), and go to online, look at the ordinances, or the County Code, and read about it. Or they can simply call the Planning Department and ask to speak to a Planning-On-Call. And for my understanding is that a few people have called back in the days, and spoke about, and advised them not to build anything in the setback over four feet.

Ms. Lovell: Is there anything else that regarding this application that you would like to share with the Board at this time?

Mr. Huh: Not regarding this specific application.

Ms. Lovell: Thank you. In that case, I have no further questions, but the Board may have some questions or Mr. Whitehead.

Chairman Endo: Okay, I'd like to allow the Whiteheads to cross examine first and then the Board.

Mr. Whitehead: So I'd like to ask you, you went to compile this list. I'm assuming you wanted to find some dirt so you can make me look bad, but that's okay 'cause that's probably your job to do that.

Chairman Endo: Mr. Whitehead?

Mr. Whitehead: Did you – did you talk to any–

Chairman Endo: Mr. Whitehead?

Mr. Whitehead: Oh.

Chairman Endo: Could you please just ask him questions and not–

Mr. Whitehead: Okay, okay, sorry. I'm just a little tense today and a little upset so excuse me. I apologize for my anger. Okay? Did you – you got this list, did you talk to any of these people out there?

Mr. Huh: No, sir, I did not.

Mr. Whitehead: If I was to ask you for that list, 'cause I live up there and drive around that neighborhood a lot, could you give me a list of the 13 to 15 people that have gone and done the correction that you're referring to?

Mr. Huh: I did not give you the list because you have not asked me for one.

Mr. Whitehead: Okay. So if I ask you for one, you can give me addressed for all the people that have come in compliance with your violation notices?

Mr. Huh: Yes, sir.

Mr. Whitehead: Okay, I'd like to get that. And on this list you list somebody named Alba Mina.

Mr. Huh: I did not list this or make up this list. This is queries that was auto-generated by the report that was – that we use, the program that we use.

Mr. Whitehead: Okay, so this is strictly from the computer? You're not really sure that if all these are correct?

Mr. Huh: Yes, sir. As I have stated earlier, it's possible that the violator or the homeowners who

already have created the violation asked you for the help, and therefore you helped to get the after-the-fact permit.

Mr. Whitehead: Okay. I'd like to ask you now that you've been writing all these violations up in Launiupoko, how many have you wrote in Kahana, Kapalua, Haiku, Kula?

Mr. Huh: Sir, we are complaint-driven. I'm sorry. Let me repeat that. We do inspections on request for service. And there had been a request for service at Honolua Ridge where there was a column as you speak holding the gate that spans about nine feet tall, 3x3 in the setback area. I did issue him a violation. Well, this is not a warning that you have received. This is actually a notice of monetary violation, notice of violation, monetary fine, followed after two notices of warnings issued to them. And the constituent neglect to comply; therefore, the violation was issued. If I may explain? There have – you stated that you were the first one to receive this notice of warning for the over height wall. It's incorrect. There had been another wall which actually again, two notices of warnings were issued, and violations was issued, and that person was on Puni Way.

Mr. Whitehead: Okay, but I was one of the first up there.

Mr. Huh: Actually, there was one more prior to you in 2008.

Mr. Whitehead: But you had stated to me personally that this is complaint-driven. You wouldn't have been given notices unless somebody filed a complaint.

Mr. Huh: That is correct, sir.

Mr. Whitehead: Okay, so you did seven of them as you told me verbally. So the other 50 were just done? The 57 you testified last week – I mean, the last meeting that the rest of them were just on your own that there was no complaint-driven to write those people up?

Mr. Huh: Sir, it's not on my own. There was a request for service to follow up all these violations, so I have done that.

Mr. Whitehead: Okay. Thank you.

Mr. Huh: Thank you.

Ms. Whitehead: I know you're the Zoning Inspector. You can't expect the homeowner to know all the laws. Like when you go to court, you get a lawyer. You're supposed to be doing your job. So apparently, you know the law. And apparently the people before you when we were doing, when we built the law – I mean we built the wall, they didn't know the law. Also, since you are the Zoning Inspector now, why would they give a permit for a wall that was in violation?

Mr. Huh: To my knowledge, I don't believe those walls were issued a permit.

Ms. Whitehead: They were, the after-the-fact permit. My husband pulled it up.

Mr. Huh: Oh, you mean those retaining walls?

Ms. Whitehead: Well, it was for landscaping purposes.

Mr. Huh: Was it retaining earth?

Ms. Whitehead: It was retaining earth, but the—

Mr. Huh: I do believe— I—

Ms. Whitehead: It does say that retaining walls are exempt.

Mr. Huh: Ma'am, I do not make a judgement on what walls are allowed and what walls are not allowed. Any walls in ag lots over four feet, approval has to be issued by the Director of Public Works. And they determine that it needs to be granted, so they did.

Ms. Whitehead: I know, but isn't that against the—?

Mr. Huh: Ma'am, you're asking the wrong person the wrong question. I'm sorry. I'm unable to answer your question.

Ms. Whitehead: I think the Zoning and the Planning Department need to be on the same page.

Mr. Huh: Absolutely, ma'am.

Chairman Endo: Actually, I think we need to make sure that when you're in cross examination that you're asking questions and not making statements or arguments. You'll have a later opportunity to make your arguments based on the presentation of the evidence. Also, I think at this point to make it more organized, I'm going to ask just one representative of the applicant speak. So you can choose amongst yourself, but only one of you can cross examine. Okay? Okay.

Ms. Lovell: (Inaudible)

Chairman Endo: Okay. Then at this point, the—

Mr. Tanaka: I have a question. Sorry, Randy. You said "request for service."

Mr. Huh: Yes, sir.

Mr. Tanaka: Please define that. Request from who?

Mr. Huh: Well, we — it's a ethics — it's unethical to reveal the requestor's name or the identity. So we do not reveal those information.

Mr. Tanaka: Okay.

Mr. Huh: But basically if you're asking what a request for service is, it's a request by the constituent

for us to inspect any possible violations that may occur at any parcel or any place on County of Maui that involve zoning ordinances or zoning code.

Mr. Tanaka: Okay.

Chairman Endo: Any other questions? No? Thank you. Oh, sorry. Go ahead.

Mr. Kamai: So, Mr. Huh, is there any place else on this island with as many request for services close to Launiupoko in numbers?

Mr. Huh: Well, we have request for services – well, the entire of County of Maui receives a lot of request for services. I cannot say for other areas, but the West side area, the West side area is my area, and Launiupoko do receive the most request for services. And I do believe as we speak, it's still coming in.

Mr. Kamai: In Launiupoko area, you're talking about?

Mr. Huh: Yes, sir.

Mr. Kamai: Would you say that's about half of your requests on the West side?

Mr. Huh: For the last one year?

Mr. Kamai: Yes.

Mr. Huh: Actually, I had more than that. I think my total number last counted was about 130 for this year.

Mr. Kamai: And all with the similar letter of violation, notice of violation?

Mr. Huh: I'm sorry. I didn't understand your question.

Mr. Kamai: All these people were given that notice of violation?

Mr. Huh: Actually, that was a notice of warning to comply with the code section, code. And when I do receive a request for service, I go out and verify. And if there is no zoning, Planning code violation, I will not issue a notice of warning. If I do observe a Planning code violation, I do issue a notice of warning. And most of the people that I come across with, they do comply, or I do help them to obtain permits, go through the process. And if the permit is not obtainable, they comply by removing the violation.

Mr. Kamai: An after-the-fact permit?

Mr. Huh: There is no after-the-fact permit because if they're removing the violation, an after-the-fact permit has not been issued.

Mr. Kamai: But along the way of helping them to comply–



Mr. Huh: Yes.

Mr. Kamai: How do you help them?

Mr. Huh: Show the process by showing the applications. And of course, when I first encounter with Mr. Whitehead, is there any other way, we also advise them there's a variance process.

Mr. Kamai: Okay.

Mr. Huh: And that's what he did. Among any others, they do ask us what other process possibly there without removing the wall – oh, wait, without removing the violation which violation that cannot obtain permit for, then we advise them to go to the BVA.

Mr. Kamai: Did you know about the option of obtaining a letter from the Public Works' Director as an option?

Mr. Huh: Yes, I did after reading the code quite thoroughly, yes, I did.

Mr. Kamai: Did you give anybody that advice?

Mr. Huh: Not that I remember at this point, sir, because it states any wall over four feet that retains earth, water, or block the drain, erosion, or something like that are allowed to. Any other wall that are over four feet does not fall into that category.

Mr. Kamai: Thank you.

Mr. Tanaka: One more question regarding request for service, is it site specific or situation specific?

Mr. Huh: Mostly site. It's addressed to a parcel.

Mr. Tanaka: Okay.

Mr. Huh: Sometimes coastal lines.

Mr. Tanaka: Okay.

Chairman Endo: Okay, just to clarify one prior thing that you said, you said you had 180 requests for service for Launiupoko?

Mr. Huh: No, sir. There have been 50 and over and it's still coming in. And what I said was about the West side. My area is the West side. And my entire – I would say the majority of the complaints all Launiupoko, and I say that I think I totaled up– It's just a habit going through the RFS. And I think I have about close to 130, 140 this year as to this day the complaints.

Chairman Endo: For the entire West Maui?

Mr. Huh: Yes.

Chairman Endo: I see. So about 50 out of—

Mr. Huh: Of which 50-something is from Launiupoko where it's still coming in and— I don't know. It's other than just the wall issue so— Our computer receives RFS from everywhere.

Chairman Endo: Okay. Thank you.

Mr. Huh: Thank you.

Chairman Endo: Any other questions? No? Thank you, Mr. Huh.

Mr. Huh: Thank you.

Chairman Endo: You can go back. Okay, I guess, at this point, the applicant could make a request to put on rebuttal witnesses if they choose otherwise, we will just move to give summary arguments from both sides. Did you have any witnesses you wanted to call, Mr. Whitehead? Okay, in that case, we'll allow — okay, so we'll allow the County to go first, the Department of Planning to make their argument, and then followed by the applicant. Is there any objection to that procedure?

Ms. Lovell: I'm just thinking to myself the applicant for the variance has the burden of proof as the first one who initiated this proceeding. Maybe he should go last, first and last?

Chairman Endo: Why don't we let him go first and then have a short rebuttal after you're done, yeah? That would sound better.

Ms. Lovell: That's what I think would probably be the right thing for the person who has the burden.

Chairman Endo: Okay. That sounds good. Mr. Whitehead, why don't you go first? Just summarize and bring up your arguments based on the evidence.

Mr. Whitehead: Can I take a deep breath? Maintain. I just wanna reiterate that I in no way, shape, or form built that wall just to spite the code that I didn't know exists. I felt I was being straightforward and honest with it. I had the Building Inspector stop by. Believe it or not, they didn't even know this code existed, the ones that I talked to. So I built the wall. And I figured as long as I didn't do anything wrong, I was just moving on with my life. And I'd like to ask this Board to approve my request. I've gone and done everything I possibly can. I've spoken to the Director of Public Works. He agreed my wall was because of the flooding issue that I had. I couldn't put landscaping. I could put up something that would be a permanent barrier, but other people that did it was not for health and safety reasons. And he couldn't explain why they hadn't issued exemptions for them. But I'd like to ask this Board to please approve my request for my variance for my wall taking all into account what has transpired and what you've heard in evidence as far as the County issuing permits that shouldn't have been issued, or if they did issue them and they were okay, then mine should be okay, too. Thank you.

Chairman Endo: Thank you. Ms. Lovell?

Ms. Lovell: Thank you. The Board has in front of it or should have in your packet the report from staff, and the report is recommending a denial of this variance. And certainly, that is the action that we're asking the Board to take. In order to get a variance there are specific criteria that have to be met. And in fact, if you issue a variance, I believe your practice is to issue a decision in which you state how and why each of the criteria are met, but here they are not met.

The first of the criteria is that there is an exceptional, unique, or unusual physical or geographical condition existing on the subject property which is not generally prevalent in the neighborhood or surrounding area, and that the use sought to be authorized by the variance would not alter the essential character of the neighborhood. Well, really there's been no evidence presented that there is any unusual, physical or geographical condition. All we're talking about here is whether the wall should be four feet high, which is what's allowed by the law, or whether it can be five feet, or six feet high, or some other height. So that criteria, criterion, has not been met.

You also need to find in order to give a variance that strict compliance with the provisions of the title would prevent the reasonable use of the subject project. But you haven't heard any evidence on that either. There is nothing about this wall, if it were taken down to the allowable height of four feet that would change the use of the property in any way. So that criterion hasn't been met.

And finally, the applicant for a variance has to show that the conditions creating the hardship on the applicant were not the result of the applicant's own previous action. But as you've heard Mr. Whitehead said, he was the one who built the wall in the first place.

Now, you've heard both him and Mrs. Whitehead say that they didn't know about this law, and that they built the wall in ignorance of the law that was applied to them. But we've also heard that Mr. Whitehead has been in the construction and building trade for over 30 years that he's not only built his own house, but he's built many houses for many people, including throughout this subdivision. So it's really not an excuse for anyone to say they didn't know about the law. People are presumed to know the law. And as Mr. Huh testified, the applicable rules and regulations are available on the County's website. Also, people can call and find out if they have a question. They can call the Planning Department and so forth. So ignorance of the law is never a legal excuse. And particularly in this case where you have a person and builds and, you know, does construction for a living, it's even less of an excuse.

So under all of these facts and circumstances because none of the criteria for a variance have been satisfied, really, the only thing that this Board can do that would be appropriate in this instance would be to deny the variance. Now, I know that there are other people who are seeking variances but those cases are not before you today. It's just this one. We've heard threats of litigation or lawsuits, but those are not before this Board either. If any of those things happen, we'll take them one-by-one as they come up, and we'll deal with each case on its facts and on its own merits. This is just one case. You have the evidence in front of you. The evidence does not support the variance. And therefore, I ask that you deny it. Thank you.

Mr. Kamai: Question?

Chairman Endo: You want to ask questions? I want to— Let's let them finish up their closing remarks first. I want to allow the applicant to do basically a rebuttal closing limited to the testimony,

the closing remarks of the – yeah. You want to respond specifically to something that Ms. Lovell said, you have the opportunity, Mr. Whitehead. You can do so now.

Mr. Whitehead: Yes, ignorance of the law is no excuse, but being a general contractor and working under one set of codes which I truly believe I followed, I think helping those people with those after-the-fact permits, shame on me, because I didn't do the work, but I was trying to help somebody. I shouldn't have done it. I should've told them, hey, tough. But I would've had to stop my job and stop their home, so I felt it was the right thing to do. But hardship, I'm on social security. Hardship is shelling out \$20,000 or possibly more to take the wall down 12 inches that is not bothering nobody. You heard people testify up here. My five neighbors around nobody complained. So, yes, I just wanna say it is a true hardship on me and my wife financially because what we do have we have been luckily enough to set aside to supplement our social security is got to go – I mean, we just don't want to have to blow that money and tear that wall down. But if you do decide against me, you gotta allow me about a year because me and a chisel out there, I can't – I just can't afford to give up that kind of money at this time in my life that I need every cent that I've got saved up to supplement my social security. So that is a hardship. Thank you.

Chairman Endo: Thank you. Okay, at this point, we will now deliberate, but as we deliberate, I believe we are permitted to ask further questions. If either of the parties want to object to the – essentially, taking more evidence, you can make an objection at the time, and we can decide, but that's what I think we should do. So you want to ask questions, go ahead, Mr. Kamai.

Mr. Kamai: This is for Ms. Lovell in regards to Ms. Lovell's comments.

Chairman Endo: Okay.

Mr. Kamai: So, Ms. Lovell, in your opinion, you know Condition No. 3 that the conditions regarding the hardship were not the result of previous actions by the applicant, so if any of these testifiers who bought a property with an existing condition on it, will this apply to them?

Ms. Lovell: Well, the three criteria apply to anybody who's asking for a variance, any kind of variance, as you know, because you hear variance applications all the time. Let's just take a hypothetical situation. We're not talking about any of these specific situations that you've heard about here, but let's just assume hypothetically, somebody buys a house. There's a wall when they buy it. Then I think what you would have to ask when you were looking at that particular situation was what does the person know when they bought the property, what did the seller tell them, and was it reasonable or not for the person to make inquiries or not make inquiries. But that isn't the situation that we're in here. So, you know, that case might come up and somebody might be able to make a good case under that particular criterion in some other case. But here we have, you know, the people who built the house, built the wall were in the construction trade. So I think it's a cleaner case, and we'll have to worry about the other case, you know, when the other case comes up. Does that help?

Or I could give some other examples if it would help maybe something even not having to do with a wall. For instance, sometimes people come in and they need – you know, maybe they have a ten-foot setback, and they wanna build a garage next to their house, but they can't actually build it ten feet back because there's a big gulch that runs along the side of their property line. So they

come in and they ask for a variance. There, they have a hardship, but it's not a hardship they created. It's just kind of the way their lot looks and, you know, they didn't have anything to do with it. So that would be a situation where they didn't create the hardship for themselves, but they have a hardship.

I know that this Board has heard other cases. There was a case a few years ago where a lady built an illegal apartment above her garage and there were notices of violation issued. She came in for a variance. She didn't get it. The Board decided that in that case, she had built an illegal apartment when she was supposed to only be building a storage shed. So that was a situation where it was found that she actually created the problem herself. Does that help?

Mr. Kamai: Yeah, but I think that it doesn't matter if the applicant had 50 years of construction. It doesn't matter if he built an illegal – ten illegal houses. I think today the fact was clear that because somebody had a request of service that we're here today.

Ms. Lovell: Yes, that's true. You know, it would be – in – I don't want to say in a perfect world, but in a different world, every law would be enforced all the time. Every time you went over the speed limit, you'd get a speeding ticket. Every building of violation would be caught by the Inspector and you'd get a violation. We don't live in that world. We have very few hardworking Inspectors. They do their best. And the County has decided more or less to do enforcement by complaints. Somebody calls in and says I think there's an illegal situation here. I think this wall is too high, or I think someone's building something without the right permit, or I think that there's some other condition of the property, then the County sends an Inspector out to look at it. Then if the Inspector that the situation is not legal, or is not according to the code, or doesn't have a permit, or whatever, then it's the Inspector's duty to write it up, to issue warnings. And if the person can come into compliance, great. And if the person does not come into compliance, then it proceeds to a violation.

Mr. Kamai: Okay.

Chairman Endo: Any questions, Members?

Ms. Sandra Duvauchelle: I have a question.

Chairman Endo: Sure.

Ms. Duvauchelle: For Ms. Lovell, what about–? We all– I mean– And I'm a general contractor. I've been in construction a long time, but what about the grandfather clause. Is there such a thing?

Ms. Lovell: No, there is no grandfather clause. There is no grandfather clause. I mean, your wall is either legal or it's not. And the fact that you might've gotten away with it being illegal for eight years doesn't suddenly make it legal. I mean, if I add onto my house tomorrow, and nobody sees me or catches me, and then ten years down the road someone says, hey, that looks like a strange addition on that house, and I'm in violation, then I'll have to either – you know, I'll have to come into compliance. It's not like you get away with something for enough years, you get away for it forever.

Ms. Duvauchelle: Well, excuse me, but I think getting away with it and not just having the

knowledge of it is two different things, but– So thank you. That answers my question.

Chairman Endo: Just to clarify, I believe when Ms. Lovell said there's no grandfathering, she meant there's no grandfathering involved in this case.

Ms. Lovell: In this case, yes.

Chairman Endo: Yeah, I mean, if they had built their wall before the law was created, then they would be grandfathered.

Ms. Duvauchelle: Okay, that's what I was asking.

Chairman Endo: That's normally grandfathered. You build it before the law changes.

Ms. Duvauchelle: Okay. Thank you.

Chairman Endo: Yeah, just to clarify.

Ms. Duvauchelle: No, you're right. That's what I was asking.

Ms. Lovell: Thank you.

Mr. Kamai: One more question for Mr. Whitehead.

Chairman Endo: Okay, Mr. Whitehead, could you please come up to the podium?

Mr. Kamai: Mr. Whitehead, have you any future scheduled meetings with the Public Works' Director regarding his letter?

Mr. Whitehead: No, I don't. I just got back from the Mainland on Monday afternoon, Monday evening, and I went straight through all my mail, and there was nothing from him. He said he would respond by writing so there was nothing here. So I haven't called him, no. I knew I had this meeting today.

Mr. Kamai: May I suggest you call him as soon as possible?

Mr. Whitehead: Okay.

Mr. Kamai: No more questions?

Chairman Endo: Any further questions or deliberation? I guess I would like to state a side comment. I think it's a difficult case to rule on. But regardless on which way the vote goes in this particular case, I don't think it should affect how we would rule any potential future case on a pedestal wall because to be frank, I think a pedestal wall case where Maui Electric said you had to do this and do that, and so everybody assumes Maui Electric is quasi-governmental, and they comply, it's a much stronger case for a special situation. So not to prejudge, but I would say those, you know, would be a different – much different factual scenario than the case today. So

regardless on how we vote today, I don't think it should give any kind of indication to those other cases as to how we would vote on that case.

Mr. Kamai: For myself, I just would hate to vote on this today, and like Ms. Lovell touched on, another 57 applications coming before this Board, and have to judge each one individually. The thing about it, the Building Inspector says, yes, go ahead. After-the-fact permits for walls that was being built is one thing. The fact that it's a complaint-driven inspection again, after-the-fact, I would like to see Mr. Whitehead get a decision from Public Works before us deciding on something that is – I mean, one Inspector tell you yes. One Inspector tell you no. One Inspector is there while you're building it. It's okay with him. One Inspector comes out after somebody complains about it. That's just my thoughts.

Chairman Endo: Okay, just to follow up on that train of thought, maybe the Planning Department should give us an update on the timing issues that apply to this case in terms of deadlines for us to take action, or did we extend those?

Ms. Lovell: I think it would be contested case deadlines.

Chairman Endo: Oh, okay so deadlines would change since we granted the intervention. Okay. So we have more time than normally. Okay. So while Mr. Giroux is looking that up, you can continue to deliberate, but I thought we should – the Board should know what our time limits are.

Mr. Tanaka: If the Director of Public Works says – gives them an exemption, if this Board – what's in front of us would go away.

Chairman Endo: That's right. Is that correct, Mr. Cerizo? They would just withdraw their application. They wouldn't need a variance at that point.

Mr. Cerizo: That's true because that would allow the additional height. So even if the case if you denied the variance today, and Public Works would approve his wall height, then the variance action would not apply because Public Works would have allowed the additional height.

Chairman Endo: Okay, so you're saying one scenario is that even if we deny the variance, but prior to your getting around to issuing notice of violation, they could try – still try and get an exemption from the Director of Public Works?

Mr. Cerizo: That's right. And with that exemption, the additional height would be allowed.

Chairman Endo: Since we're still deliberating, I've noted that Mr. Whitehead's last request was if we did vote to deny his variance, he requested a delayed enforcement. My question would be whether or not you folks had any opinion as to whether we could say we deny the variance— No, actually, I don't think we can do that. We can't deny the variance and say but you have one year to come into compliance because once we deny the variance, it's over already. If we were to grant the variance, we can give conditions and modify things.

Mr. Cerizo: That's true. Yeah, denying the variance, there's no conditions.

Chairman Endo: Well, I guess since we're just waiting for James, another thing is I guess we could grant the variance but have a time limit on it. That would have the same effect. We'd say we give you the variance but it would only last two years. So that means from two years from now, you gotta make the wall into compliance. In fact, I think we have done that for like parking variances. We would give them variances, but they only last for three or five years.

Ms. Lovell: If I could suggest one thing on the timing? Maybe two things. My vague recollection is that the time limits on when you have to issue a decision are driven by HRS 13 – 91-13.5, which says that everyone who issues permits, etc., must do so within a specified period of time or else the permit is deemed approved, but there is case law that says that that does not apply to contested cases. However, given that the applicant have asked you in effect for time to get a response from the Department of Public Works I believe the applicant could, if they wanted to, ask that this be held open, waive any time period for a certain period of time such as say, you know, four weeks or something like that while they try to straighten things out with the Department of Public Works. So that would be another way to go, and I wouldn't object to that.

Mr. Cerizo: Mr. Chair, I believe that the last time that we had the meeting that the applicant did – because there were concerns on the timing that I believe he waived the meeting the requirements as required by the code. And if that's something that can be allowed or extended maybe Counsel can answer.

Mr. Cerizo: Yeah, Francis, just to clear stuff up. Sorry it took so long. Usually I'm really speedy with this stuff. There's two sections: 12-801-60, Decisions of – Issuance of decisions and orders. After oral argument, the decision and orders have to be filed 45 days after oral argument. And that would basically what we'd be looking at because if you look under 12-801-22 under Voting, it says the Board shall render a decision on a variance within 60 days from the close of public hearing, but then it goes on in Subsection 1. It says it shouldn't apply in the foregoing when review of the variance application is conducted pursuant to the intervention, contested case and post hearing procedures. So because we allowed intervention, that 60-day rule is off the table. The applicant for the variance did waive for the period from the time of the last hearing till now because the inquiry into Public Works' decision. Now, granting intervention wipes away that 60 days. And so the only thing you have to be concerned on now is because both parties have given their oral argument is now we have 45 days to have a decision and order served. So that's kind of the timing issue.

Chairman Endo: Okay. So at this point, we can either defer the matter for a short period of time to see what happens, or we can take a vote right now up or down on the variance.

Mr. Tanaka: Just my opinion, you know, your public testimony and it's 12 inches of wall. It's not a big deal, but it's 12 inches of wall that's non compliant. And I understand. And it is a shame if you had to – in order to comply, you'd be a contractor, \$20,000 and just flush that down the drain. But this Board has this dilemma. As much as if all of us agree with you and it seems like so minor, I know none of your neighbors are complaining about it, it's 12 inches, but in order for this Board to approve of this variance, it's clear cut that we would need the evidence to side with you. It's not – this Board cannot act on – emotionally. So there is our dilemma. On that, that's why looking into this option of maybe the Director of Public Works, I would – and as much as I hate to defer anything, and make people go away and come back later, that's what I would be thinking, I would



be leaning towards. Just my feelings out to the Board.

Mr. Shimabuku: I would like to mirror your comments regarding this wall. It is such a beautiful wall and it's a shame. Twelve inches is 12 inches. I agree. My question is, was this according to the law that it was made? And it was also mentioned that no one complained about it, but that's not the truth because there was a service call and that is a complaint. So somebody's out there not happy with what happened to this property. And we gotta look at if they did it according to the law. The law is the law. We gotta follow as citizens. So we might have to at this point probably let if they want to go through the exemption process, let's look at that option first.

Chairman Endo: Okay, well, it's getting late. So my thinking would be – although I'd rather just make a decision, since we're actually short, too, we only have six Members, it would also be in the interest of doing substantial justice to have more Members to the extent we have a vote, we can have a better vote. So I would support a motion to defer for a short period of time. We can allow them to try and get their response from the Director of Public Works, and also if they don't get one, we can have more Members. We can get a better voting of the Board that way.

Mr. Tanaka: I agree.

Mr. Kamai: As long as it's within that 45-day period.

Ms. Lovell: Or maybe we can get a statement on the record from Mr. and Mrs. Whitehead whether they're okay with a further delay?

Chairman Endo: You want to – why don't we get proposed dates from the Planning Department?

Mr. Cerizo: Our staff is – I think she's retrieving the – here she comes – she's retrieving the agenda dates. The next available hearing date would be December 10<sup>th</sup>.

Chairman Endo: Okay, so is December 10<sup>th</sup> okay with the parties? It's probably too short actually, though, yeah?

Mr. Cerizo: And then the next available meeting after that would be in January of 2010, the second Thursday, which would be the 14<sup>th</sup>.

Chairman Endo: 14<sup>th</sup> of January?

Mr. Cerizo: 14<sup>th</sup> of January 2010.

Ms. Lovell: I'm actually scheduled to be in trial then, but you know how trials – they don't always go, so I'll try to get someone from the Department to, you know, . . . (inaudible) . . .

Chairman Endo: So you're okay with that date?

Ms. Lovell: Yes.

Chairman Endo: Okay. And Mr. Whitehead?

Mr. Whitehead: January--?

Chairman Endo: January--?

Mr. Cerizo: 14<sup>th</sup>. One last option would be that you folks like – you folks could have a special meeting since there's only one meeting in December. Christmas Eve would be the next available date.

Chairman Endo: Okay, if January 14<sup>th</sup> seems like it's okay, then I'd like to get on the record. Mr. Whitehead or Mrs. Whitehead, if you could come up to the podium? If you agree to January 14 and you also agree to waive your rights with regards to the time deadlines for us to – for this Board to take action such that the 45 days wouldn't begin to run until January 14<sup>th</sup> – or, yeah, till January 14. So basically, either you – we'll make some decision on the 14<sup>th</sup> and then we have 45 days to write up the order and everything.

Mr. Whitehead: I agree.

Chairman Endo: You agree to that?

Mr. Whitehead: I agree.

Chairman Endo: Okay. And, Ms. Lovell?

Ms. Lovell: Yes, that's fine with me. As I say, if I'm in trial on that day, I'll try to find someone else to come. Ms. Johnston from our office actually . . . (inaudible) . . . With that proviso. we'll come.

Chairman Endo: Okay, thank you. In that case, then the Chair would request that somebody make a motion to defer this matter to January 14.

Ms. Phillips: I make a motion that we defer till to January 14<sup>th</sup>.

Mr. Tanaka: Second.

Chairman Endo: Okay, it's been moved and seconded to defer this agenda item to January 14, 2010. Any discussion? Seeing none, all those in favor of the motion, please say aye. Opposed, please say no.

**It was moved by Ms. Phillips, seconded by Mr. Tanaka, then**

**VOTED: To Defer this Agenda Item to January 14, 2010.**

**(Assenting: R. Phillips, K. Tanaka W. Kamai, R. Shimabuku,  
and S. Duvauchelle)**

**(Excused: J. Shefte, H. Ajmani, and S. Castro)**

Chairman Endo: **The motion is carried and this matter is deferred until January 14, 2010.**

Thank you. Do you have anything else, Trish? Oh, sorry, we have the meeting minutes of November 12, 2009.

**D. APPROVAL OF THE NOVEMBER 12, 2009 MEETING MINUTES**

Mr. Kamai: Move to approve.

Ms. Duvauchelle: Second.

Chairman Endo: Okay, it's been moved and seconded to approve the minutes of November 12, 2009. Any discussion? Seeing none, all those in favor of the motion, please say aye. Opposed, please say no.

**It was moved by Mr. Kamai, seconded by Ms. Duvauchelle, then**

**VOTED: To Approve the Minutes of November 12, 2009.**

**(Assenting: W. Kamai, S. Duvauchelle R. Phillips, K. Tanaka,  
and R. Shimabuku)**

**(Excused: J. Shefte, H. Ajmani, and S. Castro)**

Chairman Endo: **The minutes are approved.** The Director's Report on BVA contested cases?

**E. DIRECTOR'S REPORT**

**1. Status Update on BVA's Contested Cases**

Ms. Kapua`ala: The only thing that has happened since the last meeting is that we had a status conference today for the Maui's Best Gift and Craft Fair. And they finally scheduled a hearing for December, and it'll be at Corporation Counsel's conference room. The – Ms. Goo also sued the County and that was settled. Counsel settled it with Ms. Goo and that was Ms. Goo suing the County because she felt that the County interfered with the purchase of the property. So that's settled. Now all they have – we have to deal with here is the notice of violation, the fines, and the improper use of the property. So December, we'll have the hearing and I'll be able to update you further.

**2. BVA Meeting Schedule for 2010 Year**

Mr. Cerizo: In addition, we have the BVA meeting schedule for next year. Please note that December next year, there'll be only one meeting unless you want two. And in November, both meetings are on Wednesdays.

Chairman Endo: Okay. Thank you.

**F. NEXT MEETING DATE: DECEMBER 10, 2009**

Chairman Endo: So our next meeting date is December 10, 2009?

Ms. Kapua`ala: Yes.

Chairman Endo: Okay. Is there any further business of the Board? Hearing none, this meeting is adjourned.

**G. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at 4:38 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairman (1:35 p.m. - 4:38 p.m.)  
Kevin Tanaka, Vice-Chairman  
William Kamai  
Sandra Duvauchelle  
Ray Shimabuku  
Rachel Ball Phillips

**Members Excused:**

James Shefte  
Stephen Castro, Sr.  
Harjinder Ajmani

**Others:**

Francis Cerizo, Staff Planner, Planning Department  
Trisha Kapua`ala, Staff Planner, Planning Department  
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel  
Lesli Otani, Civil Engineer, Department of Public Works, Development Services Administration