

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MAY 13, 2010**

(Approved: 5/27/2010)

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, 1:40 p.m., Thursday, May 13, 2010, 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.)

Vice-Chairman 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. The first item on the agenda, Trisha?

B. PUBLIC HEARING - VARIANCES

1. **JAMES and KATHLEEN WISTHOFF, AMY MARTIN-WISTHOFF and DAN MARTIN requesting a variance from Maui County Code, §19.30A.030 to allow an electrical pedestal wall within the 25-foot agricultural setback area to exceed the 4-foot height limit by 2-feet 7-inches for property located at 138 Awaiku Street, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-009:058 (BVAV 20100007)**
 - a. **Department of Planning, County of Maui's motion to intervene; memorandum in support of motion.**

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

Ms. Kapua`ala: And, Mr. Chair, Board Members, for the record, we'd like to – the Department was in communication with the applicant. And basically, we had to cancel and reschedule this hearing. The reason being is that the address and TMK is incorrect. So that's a violation of the Sunshine Law. Because we didn't give proper notice, we're gonna have to cancel and reschedule it to a later hearing date. The applicant is here. And for the Department of Planning, we also have Deputy Corporation Counsel, Madelyn D'Enbeau, representing the Department now. She'll be here for the County's motion to intervene.

Vice-Chairman Tanaka: Okay, because of what Trisha had just explained to us that this matter, I guess, is essentially is a deferral – well – so it'll be on a later agenda, but we will act upon the County's motion to intervene, as well, we will take any public testimony for those who have appeared and wish to testify on this item so that their testimony can be put on record. Okay, I have a list here for public testimony. If you can come up to the podium, speak into the mic., identify yourself, and–

Mr. William Kamai: Mr. Chair?

Vice-Chairman Tanaka: Sorry, Bill, yes?

(Mr. Bart Santiago, Jr. entered the meeting at 1:43 p.m.)

Mr. Kamai: Staff, do we have a tentative date on when this hearing can be rescheduled? Perhaps the testifiers would wanna save their testimony for that date.

Ms. Kapua`ala: Yes, we are looking at August 12th, and the reason being is that the applicant will be away, out-of-state. So the next available hearing date after that would be August 12th.

Vice-Chairman Tanaka: The way we're gonna handle this is we'll hear any of the public testimony if anyone or all would like to offer that testimony today. And when the case comes back to us, I guess, on the 12th of August, we will have open public testimony again on that date. So just to let you know that if you do testify today, and when that August 12th date comes around, the public testimony will be open. So if you have any further testimony to give, you will be able to do so at that time.

Ms. Kapua`ala: Mr. Chair, James, technically, it wouldn't be testimony that would be entered into the record, though, yeah? It would be more like a comment period?

Mr. James Giroux: Yeah, I'll just address the legalities of this. The reason this is presenting a problem is first of all, it was agended with the incorrect TMK or address. The Sunshine Law requires that the public be allowed to know what this property is and to be given testimony at a public hearing. The reason that we have a public hearing is because of the Charter requires this Board to have a public hearing before it makes a final decision on a variance. So that's the reason that we're – out of an abundance of caution, we're trying to cover two bases: one is the Charter, we need to have a public hearing; and two, is the Sunshine Law. In order to have a public hearing, we have to have adequate notice to the public. So if there are people here who have come, and despite the wrong address, know what property this is, and know what the case is about, and they're here because they thought this was gonna happen today, we will allow them an opportunity to give testimony.

Just out of caution that because this is a contested case, your decision is to be based on all of the evidence that is entered into on the record. This may offer some confusion because what you are about to hear is information also. But the information that you are to base your final decision on is what comes in during the contested case process. So if the litigants, you know, if they want the public hearing to be part of the contested case, then they have to take the steps to make it part of the record. But it is part of the record for a public hearing purposes, but it's not going to be used as your substantive decision-making process. That decision has to be made on everything that was entered into the record as part of the litigation.

Ms. Kapua`ala: So, James, to clarify for the public, if the public hearing up until the point that the Board, if they do decide to grant the motion to intervene, and once the Planning Department is allowed into the case as a party, it becomes a contested case and no longer open to the public. Is that clear? Is that correct?

Mr. Giroux: Yeah, that's accurate. That's accurate.

Vice-Chairman Tanaka: Okay, just by the rumblings in our audience here, James, if you can clarify for us that a contested case, if you can define that so that it's – because when the comment was

made that it's out of the – it's no longer public, I think that's a concern.

Mr. Giroux: The issue of a contested case is when somebody's rights are being determined over the objection of others. Right now, the only official party that has been asked to be part of this besides the petitioners for a variance is the County. So no other party has submitted written request to become a party. But the law requires us to hear the opinion of the public before we make our final decision. So that's all we're dealing with today.

Vice-Chairman Tanaka: So it's not a, you know, the public is no longer involved in this. It's just the way that's phrased. That's why it threw everybody off.

Mr. Ray Shimabuku: Mr. Chair, so whatever we hear today, we would have to remember when the next date that we meet this would be submitted as testimony, then?

Vice-Chairman Tanaka: Yeah, because part of our record is our meeting minutes which is verbatim. So that's – I guess you could – it's technically, part of our record because we have it in front of us verbatim, the comments that have been made, but it will not be a part of–

Mr. Giroux: The issue is when you have a contested case, it turns into a judicial, quasi-judicial process. And in order to make a finding of fact, that fact has to be presented to you in a form where there can be cross-examination. Somebody needs to testify under oath. And there has to be an ability to bring rebuttal evidence against that. What we're taking today is not part of that. We're listening to the public, listening to their concerns. And if the litigants want to take up those issues as part of their litigation, they're free to do so. You can ask questions, but it's just not under the formality of an oath.

Vice-Chairman Tanaka: Okay, I have a list here of 12 people who would like to testify. If you could come up to the podium, speak into the mic., identify yourself. We'll be limiting you to three minutes per testimony. Please excuse my pronunciations. The first name is Michael Gronemeyer.

Mr. Michael Gronemeyer: Very good. I have a handout for everyone. I brought 15 copies.

Ms. Kapua`ala: I'll pass it out.

Mr. Gronemeyer: Thank you. Mahalo for your time. I'll try to keep it within the three minutes. I just have a few points. It's my understanding that this Board considers each case on specific circumstances, and looks at all the facts and circumstances to make a decision under the law. I also understand that there are approximately, 29 notices of violation and about 59 – over 59 non-conforming walls based on data I've received from the County. I live on the same street as the pedestal in this matter. And I also have a pedestal that has been cited as non-conforming from my lot. And my hearing is on the 27th of May, so hello everyone.

Immediately after receiving my notice, I began my attempts to comply. In various discussions with the County Planning, I was led to believe that it's a simple matter to cut down the wall or move the meter. My initial reaction was that either mode would be fine. It seemed kinda silly because the pedestal looked very nice, but I was willing to do it in order to comply. I contacted several engineers and Maui Electric, but after over 300 hours and a year of trying to comply, I'm still unable

to get a solution. I've learned that the issues and circumstances are much more complicated than it seems. And I'd like to give this group some examples.

First, multiple meters for multiple lot owners. This is much more complicated than a single meter wall because multiple owners have to agree on the compliance approach even though only one of the owners has a violation. MECO will not take any action to move a meter even if a few feet until the meter owner requests it and has a case number. Since the lot owner where the pedestal is located is not always responsible for all the meters, the other lot owners are not subject to the notice of violation. There is no motivation to resolve the issue and things can drag on for a long time. This also creates some issues moving forward when the question of who's gonna pay for all this comes up.

Secondly, there's a lot more hardware related to multiple meters than to one meter. So squeezing it all down into a four-foot package is a lot harder. I've got a picture example of that later on.

And then third, coordination will need to be greater, and outage times will be longer when you have multiple meters, at least that's what my engineer tells me – my electrician.

Second one, flag lots, there are a number of flag lots in the neighborhood. The flag stems can be over 400 feet long, and are typically, the only access path to the rest of the property. The stems are usually 12 to 15 feet wide. And they – this makes it difficult to determine which lot the pedestal is actually on. And I guess that's probably what happened in this case. But for example, in Photo A on page 3, when I was first contacted by the Zoning Enforcement, they weren't sure if both of these pedestals, or one of them, or none of them were on my property. And so I had to explain which one was actually on my property. And it's the one on the right-hand side, not both of them. So they assured me that both of these pedestals were being complained against. So I told them I would do what I could to comply.

Anyway, there are other issues with flag lots. Because of the side setback, you can't just move it back 25 feet because you're still in violation of the side setback–15-foot side setback on an agriculture wall. It also means there's little available room for utility lines. For example, I have electrical, cable, phone, water and a fire line all going down that 12-foot section of the flag stem. And at this point to go back and rearrange things would be very difficult. And I'm sure that applies to other flag lots as well. This is why MECO has been unwilling to put the meter at my house.

The third area is compliance discrepancies. I've received a few interpretations of the measurement methods for determining compliance. The one that I seem to like, of all the ones I've received anyway, the one that I liked was that it was measured from the slab on the makai side.

Ms. Kapua`ala: One more minute.

Mr. Gronemeyer: Thank you. As that is almost two feet lower than the finished grade on the street side. See Photo B. The actual grade behind the slab, though, is even lower and I'm a little bit concerned without confirmation in writing that the measurement might be determined from some other place. So that needs to be resolved. Issues like this drive the electrician and the MECO people crazy because they don't know high things can be.

When I did hear about one pedestal that had been in compliance, or at least I heard that it was in compliance, I immediately ran over to see how they did it, and that's Photos D and E. As you can see, it's a simple one meter pedestal. But when I looked at it, the eight-inch blocks, there's six and a half of them showing. So where I went to school, that was more than four feet.

Ms. Kapua`ala: Time.

Mr. Gronemeyer: So I was a little bit concerned about that. Anyway, I hope you all consider these complexities and issues when you think about these appeals. Thanks.

Vice-Chairman Tanaka: Thank you very much. Are there any questions for--?

Mr. Shimabuku: I have a question. Mr. Gronemeyer, in Photo E, it shows that the wall or this pedestal is above four feet in height. Do you know if this was done after-the-fact or it was from the beginning?

Mr. Gronemeyer: Oh, no, this was just recently done within the last couple months.

Mr. Shimabuku: Okay, thank you.

Mr. Gronemeyer: It used to be the same height as the MECO standard.

Mr. Shimabuku: So this wall actually was at seven feet or whatever?

Mr. Gronemeyer: It was a little over six feet. It's not my wall, but I drove by there a lot, so I know the people who own the lot.

Mr. Shimabuku: Okay, thank you.

Mr. Gronemeyer: Anything else?

Vice-Chairman Tanaka: Thank you. The next person we have: Richard Lopez.

Mr. Richard Lopez: Good afternoon. My name is Richard Lopez, and like the others here in this room, I am a resident in the Launiupoko area, and we also received a notice of violation. We were here in support of Jay Wisthoff's application for a variance of the electrical pedestal wall. And the subdivision is actually called Mahanaluani. Everyone refers to it as Launiupoko. We live in this area and have also received violation notices as I mentioned. You've heard testimony from many owners even previously that these electrical pedestals were built per the direction of Maui Electric Company. Obviously, for legal purposes, they now are denying that they've said this. They've denied that they -- that the pedestals were built per the direction of the Maui Electric Company. Although we do not know the exact number of homes, we have received -- that have received the notice of violation, it's our understanding that the County has issued violation notices that affect approximately, 82 homes. I've heard different numbers from 59. We have not heard a specific, you know, correct number. This is quite a few. Clearly, this is not a case of individuals trying to circumvent the law. And it demonstrates that there were guidelines for the construction of the pedestals which you have seen -- I think you have seen the drawings, if not, you will.

To our knowledge, no one was trying to circumvent the law. And we have yet to find a neighbor who objects to the electrical pedestal walls. Our understanding is that there were a couple of disgruntled neighbors. And, you know, they reported – made multiple reports of people because their wall was found in violation, something to this effect. The pedestal wall serves a practical function. To change, or move the walls, and the electrical equipment will damage many people financially. And Mr. Gronemeyer talked about just the complexities of it. Our wall is seven feet high, 22 feet long, and has four homes on it. It's on our property. And we bought the home as is built. We have neighbors who are on fixed incomes, who are locals, long time residents of Maui. We are still trying to survive in these tough economic times. To make people move the electrical equipment and walls now would be a cost that few can afford.

We understand that the County is insisting that they are simply enforcing the law. However, the law allows for variances. If you have driven in our neighborhood, you will see that the pedestal walls do not block any view plains, nor are they unsightly. West Maui Land Company gave us directions that the walls had to be faced with stone. That was a requirement. What harm would be done if the pedestals remained? If everyone is forced to remove them, it would be a great harm to many innocent people. Most homeowners purchased their homes as built, and even those who had them built believed they were following proper procedures. When the electrical pedestal walls were constructed, they were built per plans and guidelines provided by MECO and West Maui Land Company.

In conclusion, we're supposed to be a government by the people and for the people. You are the "by the people" provision. And we are the people who are asking you to grant these variances. We pray that you make the right decision and decent decision.

Vice-Chairman Tanaka: Any questions?

Mr. Shimabuku: I have a question. Mr. Lopez, you had mentioned that your wall is seven feet high by 22 feet wide.

Mr. Lopez: Correct.

Mr. Shimabuku: Mr. Gronemeyer had provided a photo showing that his equipment pretty much covers the whole width of the wall. Does your wall, the 22 feet, filled with electrical equipment?

Mr. Lopez: That's correct. It is jammed with all the equipment that Mr. Gronemeyer mentioned there as well.

Vice-Chairman Tanaka: How many meters on your wall?

Mr. Lopez: There are four homes on the wall.

Vice-Chairman Tanaka: Four?

Mr. Lopez: And if we had to move em today, we don't know where we'd move them. Our home is over 500 feet away from the road. Our neighbor who shares one of the – is sharing the wall also, is about 750 feet away from the wall.

Vice-Chairman Tanaka: Any other questions? No. Thank you.

Mr. Lopez: Thank you. The next person: Jim Whitehead.

Mr. Jim Whitehead: I think you all know my name is Jim Whitehead. I'm the guy that you stuck it to the last time. Little angry. What really bothers me about this whole thing— I'm in the favor of passing the variance for this electrical pedestal because this is a joke. I told you guys. I put it in evidence in my report that they were issuing illegal permits for the last nine years. The gentleman over there just wrote me a letter confirming that. So I find it reprehensible that they can write permits illegally, violation of their own law for nine years, and they turn around and wanna stick it to us now.

When I was here, I know you gentlemen asked – because I'm on social security disability, my wife's on social security, all we have is our savings to back us up, you asked if we could get a little cooperation from the new Director of Planning so that I wasn't forced to finish it in like three weeks. Well, I got my thousand-dollar a day threat letter. Wrote a letter to that person asking for some consideration, compassion. Got zero response. This administration don't care. You guys gotta understand this. They don't care. They don't care who they're hurting. They don't care if they violated their own law for nine years, but now wanna enforce it up in a neighborhood that now, I've torn my down, okay? I tore it down. I'm sure that . . . (inaudible) . . . on my lot. It's ugly as hell. But now you can see more of the plants that were taller than the wall behind the wall.

So you guys really need to look at this hard when you start looking at these variances especially, on these electrical pedestals, 'cause if you're more than 500 feet away from the street, you have to put your own pipe line and pull your own wire. You have to put the meter down at the street by the pull box. That is Maui Electric code. They will not vary, change, any way, shape or form. They demand 5'-6" to the middle of the meter. That's why the walls are six feet high. Force them to go down to the four feet, you got a meter down here by the dirt.

So I hope common sense can prevail when you guys go through this. You can tell I'm so angry I'm still shaking, but I did it. I tore it down. Now, the Mayor can be happy. The Director of Planning can be happy because they were coming after me. That's why they wanna intervene this case here because they don't want the public testifying. But they acknowledge they violated their own law and they're not – and I quote, "Please be aware that walls that have received permit approval will be allowed to remain." Why? Because they don't wanna be sued by going and rescinding the permits they issued illegally. Thank God I got that off my chest. But really think about it when you start looking at these especially with these pedestals. To hell with me. I'm done. I'm leaving it all ugly and jagged just so that everybody can appreciate what the County did to me. But you need to look at those in a different light.

Ms. Kapua`ala: Three minutes.

Mr. Whitehead: Because they're required to have that meter down there. They can't go to the house. I heard em talking about it. I know about Mr. Gronemeyer. He is definitely more than 500 feet away because I built the house right in front of him. And that meter's also on the same panel as Mr. Gronemeyer, and the other guy that's across from him who's also 700 or 800 feet away. So you need to look at it in a different light than just a plain old wall that ain't bothering nobody,

never had, that the Zoning Inspector— They still have those Zoning Inspectors coming up there every week. It's almost like we're under marshal law driving through our neighborhood. So I said what I wanna say, but really look at it seriously. I'm not coming back again. You don't ever have to look at me again. I'm not gonna testify again, but you need to look at these pedestals in a different light than the walls. Thank you.

Vice-Chairman Tanaka: Any questions for Mr. Whitehead?

Mr. Kamai: Yeah, Mr. Whitehead, can I see that letter?

Mr. Whitehead: As long as you're giving it back because I gotta give it to the *Maui News*.

Vice-Chairman Tanaka: Mr. Whitehead, just one comment from myself as a Board Member, I understand your frustration and your anger, but this Board is acting as – we're bound by rules and regulations that we are attempting to follow. So it's – there's nothing personal that goes on as far as any discussions or decisions made by this Board. We stated when you were before us for your wall and I believe that probably every Board Member agreed, it was something that's not a big deal, but it was not – our hands, as a Board, were tied. We could only do things that legally, we're allowed to do. I just wanted to—

Mr. Whitehead: I understand. I don't blame any of you guys for that. I know you gotta follow your rules. But it's sad that the County can violate their own laws and it's no big deal. And nobody can bring this subject up. Nothing can ever be done to 'em. They just get away with our tax dollars. So I'm angry at the County, not you. You guys are fine. I think most of you wanted to vote in my favor until they took Corp. Counsel down here and say you gotta take – turn him down. By God, that wall might destroy – terrorists might come inside. So I understand. I hold nothing against you guys. You guys did a fair job. You analyzed it. And I think had Corp. Counsel not been here, you probably would've given me the variance. That's my heart. I don't know if you would or not. You don't have to say if you would or not, but I hold nothing against you guys.

Ms. Rachel Ball Phillips: I remember when you last came for your meeting, you were gonna see the County Council about changing— Have you—?

Mr. Whitehead: We did and we had a public hearing. And all the Council, one hundred percent of the Council, agreed the law is stupid and it needs to be changed. And they asked and sent a letter down to Planning to ask them to please hold off on enforcing until they can take, and do a total review, and submit a new revised law. And Planning basically, along with the Mayor said, no, you can't tell us what to do, we're gonna still enforce. So, yeah, it's still gonna get changed. They're still gonna have more public hearing, and they're gonna change the law, but that all happened right after you guys had turned me down.

Vice-Chairman Tanaka: Any other questions? No. Thank you, Mr. Whitehead.

Mr. Whitehead: Thank you.

Vice-Chairman Tanaka: The next name is Dominic – is it Pistillo?

Mr. Dominic Pistillo: Hi. I'm Dominic Pistillo. I live in Launiupoko. I do not have a pedestal, but after following this drama, I kinda felt compelled to comment on it. And the way I look at it, the law is written to safeguard and protect citizens. In this particular case, the law is being used to obstruct and penalize citizens. And that feels very wrong to me. The laws are written by legislative branch. They are only administered and enforced by the administrative branch, the government. But here the law is very, very clear. The walls as these pedestals are being called are by definition, close or border a field or property. Now, these pedestals do not close or border any field or property any more than a light bulb does. So to call them a wall, which is the only way a height limit can be imposed because structures have no limitations at all, and I'll get to structures in a second, but walls, by definition, close or border a field, these are pedestals. They do not close or border any field or property. So they cannot be called walls.

These are, though, I suppose they can be called structures. Now, a common citizen can only go to the law, and go to the Internet, and download and read. And if you do that, as a regular citizen, you'll find no definition for structure even though the law says that there can be no structures within the setback, the 25-foot setback, but there's no definition for structure. There's no definition for setback, which makes it very, very difficult for a citizen to know where the line is or where the structure is. However, there is a definition. The American Institute of Architects has a definition of structures that basically I have it in writing, but basically it says it's a solid construction that is permanently attached. A pedestal is a structure. I would say that meets the definition very clearly. But again, there's no height limitation on a structure. They're, by law, not allowed within the setback.

Now, if you say a structure is not allowed within the setback and you look at any neighborhood on Maui, you'll see a plethora of structures. There's telecom boxes, Maui telecom, MECO boxes, light poles, fire hydrants, utility poles, mailboxes, right? Concrete or stone mailboxes, MECO transformers, irrigation pumps, valves, stand pipes, and street signs, and there's a whole bunch more, but what do all these things have in common? Well, all these structures have in common is they were either—

Ms. Kapua`ala: Three minutes.

Mr. Pistillo: Specified or erected by a State, Federal, or municipal government. They're either specified or erected by a State, Federal, or local government, or a public utility. And I think that's the case of Chad right here. You have a allowable structure, the same as a street sign, or a light pole, or a MECO transformer box. It was – and I'm sure 25 or so people make sworn testimony that they were told and given specifications for what these pedestals were to be by MECO. And they fall in the same category as a transformer. They were in the setback. They are one of those allowable, although undefined structures, not walls.

Ms. Kapua`ala: Mr. Chair, I'd like to— I'm sorry, sir, I have to correct you. I'm looking at 19 - Section 19.04.040 of the County Code. And it defines structure which means, "A combination of materials to form a construction for use occupancy or ornamentation whether installed on, above, or below the surface of land or water." So there actually is in our code with which we're enforcing from, a definition for structures, sir.

Mr. Pistillo: Okay, I gotta get that from you.

Ms. Kapua`ala: Okay, I can–

Mr. Pistillo: Try and do a search on your website for structure, you'll find nothing, which I did.

Ms. Kapua`ala: Oh, it's an external link. It's a municipal code that we– It's a–

Mr. Pistillo: This is one of the problems that a citizen runs into is trying to find out what the law says. I've run into this myself where I read the law. I asked the Department of Planning about the law, and they said, well, it's not – this isn't in the law, this is in our rules.

Ms. Kapua`ala: Yeah, there are those instances where it's not the law, but it's administrative rules which are still adopted by–

Mr. Pistillo: That makes it impossible for a citizen to comply. We can get to that at another point, but that doesn't change my argument whatsoever whether this is called a structure, whatever you wanna call it, it's the same boat as any of these other allowable whatever you wanna call 'em: entities, light posts, telephone posts, signs. It's all the same thing. And there's no height limits on any of those.

Vice-Chairman Tanaka: Any questions from the Board? No. Thank you. The next name I'm guessing is Greg Howeth.

Mr. Greg Howeth: Thank you for the opportunity to testify today. My name is Greg Howeth. I am a resident in the area as well. I've seen many of these walls and meter pedestals being erected. I guess I had the good fortune or luck as it may have been to be the first person to actually close in buying a property in Launiupoko back in 1999. At that time, when we went to set up our stuff with MECO, not only was the wall height, the construction, the materials to be used, but the location was specified by Maui Electric Company. I didn't like where they wanted me to put it. I thought it hindered my use of my lot. I would have rather have moved it. And as it turned out, where we ended up putting it, their instruction actually isn't even on my lot. It's on my neighbor's lot. Again, I had no control over where that was. Fast forward 11 years almost, and now I'm in the same boat again. I have no control over what goes on on the meter pedestal 'cause it's not on my lot, but yet, I can't get power to my house. My nearest structure is 680 feet away from the road. Maui Electric told me that when I originally built, we will not put a meter on a home more than 500 feet from the road. So I said, okay. Went through all the stuff that I just told you about. Fast forward again. I said, look, there's a problem with this meter pedestal thing that you made me build way back when. And subsequently with different owners, it has been changed or modified to add. It wasn't just my house. Now, I think there's four houses on the same one like many of 'em because they don't have a choice. If you're in that area and Maui Electric said this is where we will bring service to, you either put your meter on that pedestal or you don't get service. It was fairly straightforward. So that one meter has now got four for four different houses, three different owners, and at least two of the structures, it's not even on their property. We have no control over it.

Calling them today and saying, "Look, I don't wanna be involved in this mess. Just move the meter to my house." Same answer, "Greg, you're 680 feet from the road. No can." On a flag lot of which the flag portion, I don't even own, I only have an easement to cross my neighbor's lot to get to my place, I can't even put it there. So we really are stuck. We don't have a lot of options. And the

definition of structure as you've heard many people testify, these seem to be things that weren't really an issue back in '99.

And I'm not really sure why when I'm sitting here today and I've been watching this progress, if the County wanted to intervene on this specific – the Wisthoff's Board of Variance, why aren't they here? I took day off from work. I've scheduled, rescheduled numerous times because these things keep getting moved. And I'm appalled to hear that my testimony today may not count towards testimony in their hearing because it's not through the proper channels. I'm a simple guy.

Ms. Kapua`ala: Three minutes.

Mr. Howeth: I'm a diver, by trade. For what it's worth, I'd like to go the record today. My testimony in the case of the Wisthoff is in support of their variance. Please give it to 'em and anyone else in the area that's trying to get this issue resolved. Thank you.

Vice-Chairman Tanaka: Thank you. Any questions for Mr. Howeth? Thanks. Okay, the next person, there's no way I can read this. I guess it's a Susan– I have no clue. Sorry about that. You can state your name for us too.

Ms. Susan Deloria. Deloria.

Vice-Chairman Tanaka: Deloria.

Ms. Deloria: I, too, live in the neighborhood. I actually do not have an electrical pedestal, but we formed a committee just to in response to the number of people that contacted us as they've been getting letters from the County Council. We've taken a number of steps. We've originally wrote to Mr. Milton Arakawa, the Director of Public Works. I can go ahead and leave this. This was written in September 25th, 2009:

It has come to our attention that several homeowners in the Mahanaluani Subdivision have been cited by the Department of Planning that their electrical pedestals are in violation of Maui County Code 19.30A.030 calling for a height limitation of four feet within the yard setback area. In doing our research, we have found that every single individual received not only an electrical inspection approved by your County electrical inspectors, but a call to MECO for electrical hookup under the Department of Public Works, some dating back to 1999. I am sure you're aware in your research that MECO is responsible for designing a pedestal that met with their guidelines as well as the developers for this subdivision, and that in order for owners to even get power to their dwelling, they had to construct, at their own, expense the pedestals that were designed and approved as well as provide an easement to MECO in the area MECO designated for such purposes. I have attached a copy of the drawing for your review.

There are practical considerations as to why the pedestals are designed the way they are. Typically, the meter is mounted at a height of between five to six feet in order for the meter readers to be able to read the meter. Also, a necessary amount of clearance between the ground and the box is in case of any flooding from a burst

pipe or even erosion. As you will note on the attached drawing, a seven-foot minimum working space height is called for.

And I have copies of those, if you'd like them.

In discussion with MECO, we understand that in order for them to come to the individual lot to install the meter, they first must be cleared by the Department of Public Works by way of an electrical service inspection. I've attached several for your review. We would assume at the time of inspection that the inspectors are well versed in all of the current County codes, and in fact, if there was a noncompliance at the time of inspection, none of these would've passed. We understand from an e-mail communication from Mr. Aaron Shinmoto that he believes that these pedestals fall into the category of wall and I quote from the e-mail, "The so-called pedestal wall clearly fits into the definition of a wall as it marks or borders the yard or lot and also limits visibility and restricts the flow of air and light." We believe the first statement needs to be revisited. These pedestals do not in any form mark or border a yard or lot, far from it. Some owners have meters on pedestals that are not even on their own lot. They are shared between sometimes two and even three individual owners, and they were designated to meet the definitive purpose to get power safely to the dwellings and facilitate MECO readings and maintenance. The lot owners did not have an option of the design, or the cost, or in the area in which they were designated to be constructed.

Mr. Shinmoto's e-mail communication continues, "The obvious solution is to lower all the walls within the setback area to four feet or to obtain the Director of Public Works' approval for higher walls." Some of our homeowners have been getting bid quotes to do this and our findings are not as simple as knocking down a wall. Various electricians as well as MECO have been asked to do site visits to see if in fact this can be achieved. And in some cases, it cannot as it poses health and safety issues if the meters are to be lowered and placed closer to the ground. Other owners have found electricians refuse to give a bid quote as they do not believe a lower pedestal will be safe or meet current electric codes. We've enclosed a copy of a recent transmittal from one of our homeowners.

In our research with the County code, we understand that the Director of Public Works has discretionary power to interpret the County Code should there be a conflict or misunderstanding. We respectfully request that you make the determination that these pedestals are not, in fact, walls and allow the utility pedestals to remain within the setback as constructed, some of which, ten years ago. We have discussed this request—

Ms. Kapua`ala: Three minutes.

Ms. Deloria: "With the Planning Office, the Zoning Office, Members of our County Council, and have tried to come to a resolution of this issue." We've gone to the County Council. We went to the Mayor Office. We've been to Ms. Kathleen Aoki. We've actually had a face-to-face meeting. We've gone over all of this information and we keep getting faced with the same reaction: no, just

comply. And as you can see, there's quite a lot of frustration in our community and in our neighborhood on this issue. Thank you for your consideration.

Vice-Chairman Tanaka: Any questions? No? Thank you. The next person: Dave Nutter.

Mr. Dave Nutter: Yes. Good afternoon. Thank you for the opportunity to speak a few words in support of the variance that will come in, I guess, in August, if it's not delayed again. You've heard today the number of problems that will be brought before your Board, 80-some-odd landowners in this area. I am strongly against the County intervening in these hearings. You gentlemen are a peer review made up of peers of also I assume property owners. And it's obvious from the County that their position just from their correspondence, you don't need to even hear one word from their point of view on the direction in which they're coming from. And your Board wouldn't exist other than to look—

A variance means a variance from the law, rules, or the links to the rules, to the laws, to compensate for inequities in the law. This is your whole function as a variance committee. I heard in one previous hearing that there's no such thing as grandfathering. This I find is nonsense. Grandfathering as far as utilizing the shore management act of 1974, you would be busy for the rest of your life moving structures back from the shoreline. So the fact that the legal arm of the County says that there's no such thing as grand fathering, when in my case our meter was put in 2000. Three owners have owned the property during this period of time. At no time was there any disclosure of any problem with the installation. All proper permits were taken out and approved in each of three owners. And there is no – none of us of the three owners I know personally, tried to circumvent any regulations of the County.

So we are presenting 80-some-odd members of that community presenting to you as a peer review organization to look at the problem. And the problem that has been produced by the County, and the fact that they made an error back in 2000, shouldn't be enforced upon the individuals at this time.

Now, from a practical point, we go to change the meter level, you've already heard all the information as far as dangers, and problems, and expense in this situation. Now, we get into the mechanics of removing these meters. And now it isn't one permit for one pedestal. If there's four meters, we have to go to the extent of re-permitting each meter separately. So again, it's not only in compliance, but the complexity of dealing with the County to follow their guidelines which were brought to us ten years prior in apparently, in error, which is fine.

Ms. Kapua`ala: Three minutes.

Mr. Nutter: People can make an error, but I don't feel at this point, they should intercede. I don't think they have any position. None of these 80-odd residents have done anything out of the legal direction of construction.

So my point would be that number one— Oh, the other point is instead of looking at this as problem that covers 87 individuals, your committee or the County has required that we have a variance proceeding for each of the 80 – the same question, they have the 87 or 82 individuals to be brought before this Board. In other words, a blanket decision by your Body could cover 80-odd situations

as far as the pedestals. So I suggest this is an efficient possibility in your deliberation and it also reduce the timeframe. I've been in hearings now – this is over a year that I've listened to these. Thank you.

Vice-Chairman Tanaka: Any questions? No? Thank you very much.

Mr. Aaron Shinmoto: Excuse me, Mr. Chairman, can we ask for a ten-minute recess? We've got some problems with our equipment, recording equipment.

Vice-Chairman Tanaka: We'll take a ten-minute, ten minutes, ten-minute recess.

(A recess was taken at 2:31 p.m., and the meeting reconvened at 2:52 p.m.)

Vice-Chairman Tanaka: Call the meeting back to order. At this time, we'll continue on with our public testimony. The next person on our list looks like Pamela Boyd.

Ms. Pamela Boyd: Hi. My name is Pamela Boyd. And as some people know here, I don't particular like public speaking, so I'm gonna make this very short and sweet. I've lived here on Maui for 30 years. And I got the opportunity to buy into Launiupoko. And I have been living there for the last ten years. When I bought this property, I abided by all the rules and regulations, and I hired a licensed contractor, at which time, he hired licensed electricians and plumbers. We followed every guideline. We had every inspection. And then we get this notice about the walls. MECO actually gave us the rules and regulations. And we felt like we complied to it. I'm just appealing to you today to please take that into consideration. I'm a working person, and a single person, and I cannot afford to tear down a wall and redo it. So please, consider this in your meetings. And I am in full support of Jay and Kathy Wisthoff, who are my neighbors. And I believe that we should all be granted a variance. Thank you very much for your time today.

Vice-Chairman Tanaka: Thank you. Any questions?

Mr. Shimabuku: I have a question.

Vice-Chairman Tanaka: Ms. Boyd?

Mr. Shimabuku: Does your meter – is similar to the rest of those who share with other neighbors?

Ms. Boyd: Yes.

Mr. Shimabuku: So yours is not alone?

Ms. Boyd: No.

Mr. Shimabuku: Okay. And yours is pretty much taking the whole space of the wall also?

Ms. Boyd: Yes.

Mr. Shimabuku: Thank you.

Mr. Bart Santiago, Jr.: I have a question.

Ms. Boyd: You really wanna torture me, don't you?

Mr. Santiago: This is for you and for the other homeowners that have been there from the beginning. Do you have a letter from MECO that specifies the requirements?

Ms. Boyd: When I originally built it?

Mr. Santiago: Yeah.

Ms. Boyd: I would have to go through all my paperwork to see if I do have something. I couldn't say at this time whether I do or not.

Mr. Santiago: Okay. Be interested to know what the language and the specs that they outline as a requirement for that wall.

Ms. Boyd: Right. I don't have – I'm not sure if I have it or not. I'm sorry.

Ms. Deloria: . . . (Inaudible) . . . letter from MECO. Would you like the drawings also?

Mr. Santiago: Yes, please.

Ms. Deloria: (Inaudible)

Vice-Chairman Tanaka: Ms. Deloria, that's copies that you're—

Ms. Deloria: (Inaudible)

Vice-Chairman Tanaka: Yeah, I guess because we're addressing it, we'd like a copy for our records.

Ms. Deloria: Okay. That's the diagram.

Mr. Santiago: And this doc. is from MECO?

Mr. Shinmoto: Mr. Chairman, we need to have them speak in the mic., so we can pick up the minutes.

Vice-Chairman Tanaka: Yeah, okay.

Mr. James Wisthoff: I'm Mr. Wisthoff. And I have copies of that I was going to submit as part of our case. I have enough copies for everyone. It includes the Launiupoko letter and the letter from MECO.

Vice-Chairman Tanaka: Yeah, actually, a single copy would be sufficient for our purposes right now.

Mr. Wisthoff: Okay, so you have it up there. Okay.

Vice-Chairman Tanaka: Thank you. Okay, to continue on with public testimony, looks like James Daugherty.

Mr. James Daugherty: Hello there. I live on Awaiku Street and I pass by their house. And I just wanted to say that their pedestal is attractive and it adds to the beauty of the neighborhood. And it'll be shame if they're forced to tear it down and put up something perhaps less attractive and tacky. Thank you.

Vice-Chairman Tanaka: Thank you very much. The next person: Gordon Firestein.

Mr. Gordon Firestein: Honorable Members of the Board of Variance, I respectfully urge you to approve the Wisthoff's variance. We are in a similar situation in Launiupoko. Our experience with the Planning Department staff to date has been cordial, and polite, and we have found them to be professional and competent. We understand they're trying to do their jobs to the best of their abilities, and enforce the laws as they understand them.

Your role here as our last opportunity for relief is different from the Planning Department's staff. It isn't just to determine the facts of the case. And it isn't just to apply the law in the kind of strict black and white by the book manner that is required at the Planning Department staff. Your role as citizens doing a valuable public service, I believe, is bigger than that. It's to bring a measure of judgement, of perspective, of common sense to this situation. After all, if this weren't part of your charge, what would be the purpose of having a Board of Variance?

I'm sure that if you look at the situation from this point of view, if you step back and consider the larger perspective, and bring your good judgement and humanity to bear, you'll reach the same conclusions we have. The Wisthoffs and the rest of us in a similar situation are innocent bystanders caught in a Catch-22. The Wisthoffs did not build their pedestal. The person who did build it did so in good faith and in accordance with the requirements of the developer and of MECO. And in fact, MECO, as you've heard stipulated at the time that any pedestal that was too low would mean that power would not be connected. All of us in this situation are faced with substantial costs to correct the situation that was not of our making. This is a form of collective punishment.

Now, the Planning Department's intentions may not be to punish us, simply to achieve lowering the pedestals, but nevertheless, that's the effect. And any objective observer, given the same facts, would conclude that this is simply unfair. You have the opportunity and perhaps even a duty using your judgement and common sense to make this right. There's no shame on anyone here in coming to a different conclusion than the Planning Department's staff. Approve Mr. Wisthoff's variance. Send a message to the Building Department that in the future, no building permits or pedestals should be approved in violation of the ordinance, but don't penalize those of us who are, in fact, one step removed from the person who built the pedestal in the first place, and who did so in the belief they were complying in good faith with the requirements imposed on them at the time. Thank you for listening, for your service to the community, and for applying your best judgement and common sense to this case.

Vice-Chairman Tanaka: Any questions?

Mr. Firestein: Any questions?

Vice-Chairman Tanaka: No. Thank you very much. The next person: Debbie Arakaki.

Ms. Debbie Arakaki: Good afternoon. I'm Debbie Arakaki. Thank you so much for listening to our testimony today. I'm just basically reiterating what the majority of the people here have been having problems with. And I'm in support of granting Jay Wisthoff – their variance.

I am one of the original owners that came into the area ten years ago. And I do remember that when we needed to have our electrical pedestal put up, we were given a diagram. It was supposed to be six to seven feet high and "X" wide, I guess. It was designated and it was told – we were told, you know, we needed to put it on a certain area of our lot. And they were requested to be clad in rock so they all looked uniformed, they all looked nice.

After – recently, after being cited, we've gone through the process of trying to comply. We got an electrician out there. We got MECO out there. And after many meetings, we still are hitting the issue of safety. It's because if we drop it down another two feet, which is what we need to do to be compliant, we're four inches off the ground. And the electrician basically said, if get big rain, or sprinkler head breaks, or something, then it probably would be not a good situation. So we've had several meetings and we still have obviously not gotten to the solution yet.

The wall right now that I have, you can't even see it. It's covered in– It's been ten years, so we have naupaka in front of it. We have hao trees. You just don't even see it. So it's not really a point of blocking the view plains of anybody except our trash cans that are behind it. And if we don't comply by the 21st, we will be facing a thousand-dollar a day fine. So of course we are trying really hard to figure out a solution. And the last I heard, we still – the electrician still hasn't figured out how to do this yet. And he has been talking to MECO quite often.

So unfortunately, that's the way it goes, but my pedestal, as with many others, have multiple homeowners on it. And as everyone has a different situation, different view points, the worst part that I see about all of this is, is that the dissension it's taken between our neighbors. And while some of the neighbors are okay. You just wanna be – take it down. Make the problem go away. Some don't have the money. Some wanna go through the variance process to express their view points. And it's a shame because this has put so much pressure on the neighbors and it's been causing strife between them. Because the multiple owners are on one wall, no one person can make the decision to lower that wall. It will affect everyone. And we have tried as a group to go and find the solution. We've gone to the – Milton Arakawa. We've gone to the Mayor's Office. We've gone to the Planning Committees – Planning Department. We've also gone to the County Council.

Ms. Kapua`ala: Three minutes.

Ms. Arakaki: We've seen Danny Mateo, Sol Kaho`ohalahala, Gladys Baisa. We've even contacted a lawyer to see if – you know, can you help us? And Larry Ing was whom we contacted, very respectable lawyer. And he writes that:

And in our opinion that the pedestal structures are not in violation of said code

section and is not applicable to them. The structures do not fall within the definition of a "wall" found in the code. Pedestal structures are not designed to be boundary walls, nor are they a cause of concern for the welfare, health, and safety of the owners or their neighbors as they do not limit visibility or restrict the flow of light and air. We are not aware of any other complaints from the neighbors.

In conclusion, you know, as a homeowner, we did what we thought was right. We thought we did things the right way and as we were told to do them ten years ago when we were building. We're not inspectors. We're not lawyers. We're not electricians. We are relying on those people in the County that review and approve these electrical meters to know their own rules. They should've brought this to our attention ten years ago and not now. For the County to come back now after all this time, and draw this hard line in the sand, and wanna start citing us a thousand dollars a day is kinda crazy. We're hoping that your committee can see the logical path that as homeowners we took to get to this point, and why we feel it should be allowed. Thank you.

Vice-Chairman Tanaka: Any questions?

Mr. Shimabuku: I have a question. Do you have documentation from Maui Electric for your pedestal?

Ms. Arakaki: Just this— You mean the diagram thing?

Mr. Shimabuku: Diagram or a letter from Maui Electric.

Ms. Arakaki: Kinda like Pam, we all got the same one. I would have to go through and look. I know that we do have the somewhat— Well, I know I have a diagram. I don't know if I have a letter.

Mr. Shimabuku: Okay, thank you.

Vice-Chairman Tanaka: And last on the list, I'm sorry, I can't read the name. Jim—?

Mr. Jim Riley: Riley.

Vice-Chairman Tanaka: Riley. Thank you.

Mr. Riley: My name is Jim Riley. I was a member of the corporation or the company that developed the Launiupoko Subdivision, originally. I'm kinda here to voice support for the request for a variance. I can answer some questions if you have questions about the original — how this concept of a pedestal wall was originally — how it originally came about.

I guess what I would like to comment on is the bigger picture of why these pedestal walls are being declared a nonconforming structure. When the agricultural zoning law was passed, I think it was in 1998, 1999, there was discussion at the public hearings that on large agricultural pieces of property, people were building walls that were blocking the view to the ocean. Specifically, they were talking about long stretches of agricultural, the Spreckelsville area, and other areas going out towards Haiku. And they were fearful that as land got developed, you would lose your view, view plains of the ocean. So this part of the law was written to restrict walls to four feet in height. And

you can actually build walls, if you stagger 'em. You can build another wall behind it and another wall behind it. And you can put any plants of any height that you want. The original intent of this was because of view plains, and that was why this got into the law.

I did copy what I think is the current law, the definition of a wall. And it's a two-part– I'm not an attorney, and I'm really not very good with semantics, so I'm not gonna pretend to be the end-all on this, but there's a clause that states that it's two parts. It must meet a first part and it must a second part. So it has to meet both tests. And the wall is defined as something that either closes, marks, or borders a field, yard, or lot. And you have to go to a dictionary to define each one of these clauses, each word in this sentence. And if you do that, you're gonna be hard-pressed to come up with a final answer as to whether a structure that is somewhere between 11 and 20 feet long actually is, by definition, a wall. This – I went to the hearings when this law was passed. I was at virtually every one of the hearings when the agricultural zoning law was passed. I listened to the testimony. We developed this subdivision virtually right after that. And I never in my wildest dreams thought that this concept of an electrical pedestal was in any way – had anything to do with what was passed defining a wall.

Ms. Kapua`ala: Three minutes.

Mr. Riley: Thank you. So I guess my testimony is, this gets to be an interpretation of an ordinance that appears that they're taking the most restrictive interpretation that they can possibly take. They could easily have taken the definition or the interpretation that these pedestals are not a wall. That they don't border, or close, or mark. And then they are, in essence, not by definition, a wall. I'm really kind of amazed that it's come to this point. I just don't understand why this became such a big issue, but obviously, it has, and obviously, it's got to this point. So some place, somewhere somebody has to first of all decide legally whether these pedestals that are electrical utility are, in fact, a wall; and then if they are a wall, then whether you're willing to grant them a variance. I honestly can't imagine this became an issue. It just boggles the mind that this is what we've come to that this is really an issue. Thank you.

Vice-Chairman Tanaka: Any questions?

Mr. Santiago: Yeah, I do have a question. I'm an accountant. I'm not an electrician. So just so I understand how this pedestal is structured, are the meters mounted to the wall?

Mr. Riley: Well, the actual meter itself is part of a–I'm not an electrician either–but the meter itself is part of a splice box or a receptacle box, and the wires come through the conduit into the box, and then they go out the top after they go through the meter.

Mr. Santiago: So the mandate is to lower this wall by another three feet, and these boxes would be–?

Mr. Riley: Lowered also.

Mr. Santiago: Will need to be lowered also?

Mr. Riley: Yeah.

Mr. Santiago: Okay.

Mr. Riley: And again, as it's been discussed. The actual reading of the meter, that circular glass that spins, Maui Electric would like to have that at a specific height so their meter readers can read it. And if you lower the top of the wall to four feet, then this meter drops from five, five and a half feet, down to about three feet or slightly less than three feet.

Mr. Santiago: But all indications is that MECO will not allow that because of the – or is it the electricians not wanting to do it because of the problem with flooding?

Mr. Riley: I think each individual – each individual meter wall has its own individual issues. It has been done. Somebody has taken these walls down—at least one or two of them. So in some cases, it can be done. If it's an individual that only has one meter on it servicing one property, then he has a much better chance of addressing this than if this meter wall is a collective meter wall servicing more than one owner.

Mr. Santiago: I guess the question I have for the gentleman that left—he tore down his wall. What's happened to the meter?

Mr. Riley: He had a different issue. His variance was on a wall that stretched the entire front of his property. So he had a wall about 200 feet long. And I do not know where – whether it included his meter or not. I don't know that particular case, but his variance was for a long wall that was about 200 feet long.

Mr. Santiago: Okay, thank you.

Mr. Shimabuku: I have a comment.

Vice-Chairman Tanaka: Question? Go ahead.

Mr. Shimabuku: I have a comment. I am a licensed electrician by trade so I know what these guys are talking about. And I do have a problem with lowering the meters to a lower height. I thought I just want to bring that up.

Vice-Chairman Tanaka: Okay. Thank you.

Mr. Riley: Thank you.

Mr. Shinmoto: Mr. Chair?

Ms. Kathleen Ross Aoki: Mr. Chair, just for your folks' information, the Whitehead variance was on a boundary wall that was within the setback with no meter. Whitehead does a pedestal wall with a meter but it is built outside of the setback.

Vice-Chairman Tanaka: Okay, moving on, we have a motion to intervene as well as a memo of support of the motion from the Department of Planning. Oh, I apologize. Is there anybody else from the public who would wish to testify? Seeing none. Thank you.

Ms. Madelyn D'Enbeau: Good afternoon. I'm Madelyn D'Enbeau from the Office of Corporation Counsel. With respect to the motion of the Department to intervene, we have had some discussions and decided that probably, we would need to re-file our motion to intervene because of that tax map key discrepancy. So we'll just be asking, I guess, to defer this matter and we'll re-file with the correct number on the – it's supposed to "23" instead of "58" or something like that. And we – I think it would be preferable to have our motion to intervene heard as quickly as possible on the BVA's agenda. In this particular case, it was the same day as the hearing was supposed to be. So I think it's probably preferable to have it separately and earlier, if that works with your agenda.

Mr. Giroux: Madelyn, my discussions with the Chair were that first of all, I wanted to confirm with the Wisthoffs of whether or not they actually received your intervention. Can we get that on the record if they actually received it?

Mr. Wisthoff: We received it and we came here today with the intention of opposing the motion. We won't be in town for the next two months, and so if she wants to move it to the next available date then that means we won't have that opportunity unless we do it today.

Mr. Giroux: Okay, I just procedurally, wanna get this on the table for both the attorney and for the intervenor. We had an issue. The issue was that the TMK is posted wrong.

Mr. Wisthoff: We also would oppose that. We wanna discuss that.

Mr. Giroux: Okay, so it's a factual issue, then, whether or not if it's wrong or not?

Mr. Wisthoff: Correct.

Ms. D'Enbeau: Excuse me. We have no problem with going forward with the motion to intervene. I appreciate that the Wisthoffs are here to oppose the motion to intervene and they're not gonna be here. The only reason I had suggested putting it earlier, and I had forgotten that you said you were gonna be out of town for a couple of months was just so that there would not be the same day as the hearing, and then having to hear the motion, and proceed with the hearing. Our way of resolving that was to be ready to go forward with the hearing. And then if intervention were to be denied, of course, we just wouldn't go forward with it. But it's fine. It's really up to your Counsel, I think, to decide whether it would be appropriate to go forward with the motion this morning because – excuse me, this afternoon, because of the notice issue. So either way, it's fine with the Department.

Vice-Chairman Tanaka: Okay, my understanding was – I mean, basically, it came down to whether we could move forward on this as a result basically, of a typo. But apparently, you're disputing the fact. Somehow I'm confused. I have a TMK number of 4-7-009:058.

Mr. Wisthoff: That's our TMK number.

Vice-Chairman Tanaka: Which I have been informed that that is the wrong TMK number. That is the reason why we are not moving forward with the full public hearing process.

Mr. Wisthoff: Well, that's our TMK number. And I mean, I guess, for the record, is the Department

of Planning saying that I should not have received a notice of violation? Because this shouldn't come as a surprise to anyone in the Department of Planning. We've discussed this issue over the last year. And they have steadfastly refused to notice the other person on the lot below me, and said that it was my problem. Because I got the notice of violation, I had to deal with this.

Ms. Kapua`ala: May I respond? May I respond?

Vice-Chairman Tanaka: Please, please.

Ms. Kapua`ala: Well, the TMK is incorrect, sir. The TMK that's cited on your public hearing notice and the – it is your TMK, but the wall is located on the property below you which is another TMK. So actually your – should be applying for a variance for–

Mr. Wisthoff: So you're telling me I should be applying for a variance on my neighbor's property?

Ms. Kapua`ala: And that's why we asked you to get his authorization, or he can apply for you.

Mr. Wisthoff: Well, but you refused to – you refused to give him a notice of violation.

Ms. Kapua`ala: We will. We were gonna – we're in the process of that now.

Mr. Wisthoff: A year ago, I explained the situation to 'em. I told him how my lot was laid out. That my neighbor was below me. That the pedestal was on an easement at the bottom of the driveway, which is 500 feet from my property line. And I said – I suggested that they notice my neighbor with the violation, and that we proceed together. And they refused saying that if I want to provide them more information, they would consider it, but other than that, I was the one with the notice of violation, and I either had – I had until July 17th to file for an appeal, or to file for a variance, remove my wall, or receive criminal and civil penalties. Those are the three options I was given.

Vice-Chairman Tanaka: Okay, Trisha, the notice of violation was – there was only one notice of violation?

Ms. Kapua`ala: I'm not sure how many.

Vice-Chairman Tanaka: Well, for specifically–

Ms. Kapua`ala: I know that there's no notice of violation, but as far as notices of warnings, Mr. Wisthoff, did you receive one or two?

Mr. Wisthoff: I received two.

Ms. Kapua`ala: Two, okay, so the next notice would be a violation. And I wanted to clarify, in Launiupoko, in this subdivision, there have been many re-subdivisions. And some of those re-subdivisions of the original lots, original four-acre lots became flag lots. And some like we heard from testimony are – have easements. Mr. Wisthoff has an easement. So when we notified him that he – you know, by a warning, that he had a violation on what we thought was his property is what we thought was a flag lot. And that's why we notified him with the wrong TMK. So now in the

process of processing this case, we realized that it wasn't a flag lot. It was an easement. And therefore, he technically, does not own the property where his meter is located. That's the problem. So because this subdivision, meaning the greater subdivision has many re-subdivisions, a four-acre lot into two two-acre lots with different shapes, it's— It was our fault.

Mr. Wisthoff: Well, it's actually shocking to me, though, that this comes up two days before – or less than two days before the meeting. I sent out two notices to my neighbor, both of which were approved by the Planning Department before they were mailed out, and they included this plot plan clearly showing a flag lot, clearly showing the easement, clearly showing the pedestal at the bottom of the easement. And there shouldn't have been any – there's no confusion there of what type of lot I have and where this pedestal is located. And then less than two days before the meeting, they tell me there's an error in the filing. And I'm – you know. I've been at this for over a year. I'm getting ready to leave town for two months. I'd like to see it done. We also have over a thousand dollars spent in notifying – in meeting the notice requirements for this meeting.

Ms. D'Enbeau: I'm wondering if it would be appropriate to hear the opposition that Mr. Wisthoff has to the motion to intervene in the same spirit that we heard the testimony of the people who've come here today to testify since he won't be here. I don't know. It's up to—

Mr. Giroux: Well, I— No, I'm gonna have a problem with that.

Ms. D'Enbeau: Okay.

Mr. Giroux: Look, this is all— As far as the petition to intervene, this has to be clarified. As far as the County serving this petition to intervene on Mr. Wisthoff, I think the fact that there's an error in the TMK itself that we can't proceed hearing this petition to intervene.

Mr. Wisthoff: Are you referring to the TMK issue that Trisha just discussed? Or are you referring to the error in their typo in their filing of the motion to intervene?

Mr. Giroux: On this issue, I'm only addressing the petition to intervene because it's the County now who is starting to use TMK:4-7-009:058.

Mr. Wisthoff: That's our TMK number.

Mr. Giroux: Okay, so that is your TMK number.

Mr. Wisthoff: It is.

Mr. Giroux: And the problem is, is that the pedestal is not on—

Mr. Wisthoff: It's on an easement owned by that lot. I mean, we own the easement. It's our – our pedestal wall is on an easement. It's connected to our property. And like I said, there shouldn't be a surprise to the Planning Department. We've discussed this in length over a year. I have copies of e-mails where he told me he didn't care.

Mr. Giroux: So, Mr. Wisthoff, did you get any written, I guess, authority to ask for a variance from

your neighbor?

Mr. Wisthoff: I have – my neighbor lives out-of-state. I've only met the man once in six years. And so I – had no way. I didn't have a phone number for him or anything. He responded to my first notice of variance. And he sent me – and I said it would be helpful to send a letter. And so he sent a letter saying that he agrees with the variance application and of his recollections of what happened when the lot was originally subdivided.

Mr. Giroux: Okay. I mean, I haven't seen that, but I'm gonna assume the County--

Mr. Wisthoff: The County has not seen it. They've never asked for it. It didn't come up until yesterday.

Vice-Chairman Tanaka: It appears as though as far as – for one, regarding the motion to intervene, we will not move forward on that, both for – because apparently, with evidence – well, documentation that shows one TMK number versus another, the only action that we'll move forward with today would be the reschedule of public hearing for this item.

Mr. Wisthoff: Okay. Well, let me get one thing clear—you want my neighbor's TMK number of this variance application. Does that mean that I'm no longer a part of this process? I mean, I think you should dismiss my variance request and dismiss the notice of violation, if you're saying I can't apply for it with my lot number. I mean, you're saying it's not my land, then it's not my problem.

Vice-Chairman Tanaka: Well, apparently what's happened – what my understanding is right now is that you are able to act, to request a variance from – for this issue even though – yeah, with the permission of your neighbor.

Mr. Wisthoff: And what's the reason why it has to be deferred then, from today? Because the same neighbors are still gonna be required to be noticed. The address is the same because the meter is right in front of my mailbox. There's absolutely no way that anybody that got noticed could be confused that that's not the pedestal that's being discussed.

Ms. Kapua`ala: Mr. Wisthoff, I argued the same thing because of all this time and effort that we wanted to have this hearing today. And I had to ask Corp. Counsel because he is the Board's Attorney.

Mr. Wisthoff: Right. Well, now, I'm asking.

Ms. Kapua`ala: Yeah, it's a Sunshine Law. This came up before with Maui County Council. And they actually called the Office of – the OIP, Office of Information Practices, and they said it's a violation of the Sunshine Law. So I'm sorry, it's something that's beyond--

Mr. Wisthoff: Well, I disagree. I think we've made all the notices for the wall. I think that we got the notice of violation. We applied using our TMK number. It's our wall. I just don't understand why – I feel like one of the motivations here is that I know that there are a number of people that are up against a drop-dead date in the next two weeks before your next meeting that if they don't have their wall down, they start getting fines. And I would not be surprised at all to find out the

County is trying to defer this so that there's no decision made here today and some walls have to come down.

Vice-Chairman Tanaka: I've got to disagree with you there. I understand your frustration and that's anger speaking, but I in no way would believe that that would be the case. The reason for this is it's a mistake that is – any actions taken with this documentation as is, later on down the line would be considered null and void. So we would not want to move forward and take some kind of action for or against an avid moot–

Mr. Wisthoff: If it truly is a mistake, then it's one that I had pointed out to the County over the past year on more than one occasion. And it's an odd that they would wait until two days before this hearing to bring it up.

Vice-Chairman Tanaka: I can address that. We've been looking at the materials for the last week and–

Unidentified Member of the Audience: (Inaudible)

Vice-Chairman Tanaka: I apologize, but as far as for today's meeting, our public testimony, we have moved forward and moved on to the motion to intervene. So as far as public testimony, I'm sorry, but we wouldn't be able to hear what you have to say. To the applicant, we apologize, but specifically, the one piece of information that is on the application form, your application form, is a specific TMK number that was processed along the way using your TMK number. And for whatever reasoning, we now know that that's the wrong number in there.

Mr. Wisthoff: But you understand what I'm saying? If it's not my TMK, why am I the one getting the notice of violation? And why am I the one that's standing here today? And why did they refuse to notice him, give him a notice of violation earlier?

Mr. Giroux: Mr. Wisthoff, I'm not gonna argue with you. I hear you and I understand your argument. That's as clear as I can say it under my duty that I'm the Attorney for this Board where we handle variances. We also handle appeals. You filed the variance. We're trying to process your variance. What we have is an application that has a variance for your property where you're telling us your wall – the wall that you want a variance from doesn't exist. So we're having trouble processing your variance right now. You can withdraw your variance. That's up to you. But what we can't do is we can't withdraw your violation. You are under a separate process that you, by law, have the right, if the County has made a mistake, and has given the wrong person a violation, you, by law, have the right to appeal that, and that we just so happen to be the same Board that would hear that appeal. But right now because of what you filed, we're trying to handle your variance. We have not any jurisdiction over your notice of violation until you file an appeal from that. So I just– I understand you. I hear you. I sympathize with your argument today. I just want you to understand that this Board is not the County enforcement arm. We are a separate adjudicatory Body that must process what comes before us, and we have to look at the paper work, and what jurisdiction we have over that property once the paper work is filed. If we were to go forward, we would give you a variance on a wall that doesn't exist. We would be violating any sense of common sense per what we're trying to deal with.

Mr. Wisthoff: And you can't just make a change to the TMK number?

Mr. Giroux: What we're saying is, yes, we can, but we are governed by State law. We can have you amend this and we can continue to process it. The problem is that today, we couldn't say that we have fulfilled our duty, the Board's duty, to the Sunshine Law. We didn't write it. We follow it. We cannot curtail it. We cannot change it. We have to follow it. Because of the TMK number, the Office of Information Practices has told us that if there's any confusion as to the property that we're dealing with, then we need to re-notice, and we need to continue to allow the public, if they wish so, to testify on the subject matter. So that's all we're dealing with. And again, I'm gonna say it for the third time, I hear your argument. I sympathize with it.

Mr. Wisthoff: Well, in the process, you're given the advantage to the Planning Department against the citizens.

Mr. Giroux: The variance – the citizens that we're trying to protect are the ones who have the right to testify on the subject matter.

Mr. Wisthoff: Well, they're all here.

Mr. Giroux: You know what? I would take your word for it and I would believe you. However, we cannot proceed with the wrong TMK in the application, in the pleadings. If there's a mistake that's been made, this Board – we can receive amendments, but we have to follow the process of re-noticing. That's all we're saying. Okay? And the County needs to go back, and file, and re-serve you too. Right now, they are not a party to this case. In fact, we're looking at a case that even if we wanted to take action today, and give you what you wanted, you would walk out of here with nothing. Okay? And that's all I'm saying. We cannot address your notice of violation at this time.

Mr. Wisthoff: Okay. I probably know the answer to this already, because I think I understand what your role is here, but I'm wondering if there isn't any way to pass – for this Board to pass a referendum asking the Planning Department to defer enforcement until you have a chance to hear a variance on one of these walls, on one of these pedestals. Because they keep pushing it off and then in the meantime, they're pushing people to the wall, and this is another case of here we are. We've been at this for a year. We're ready to go. We brought all our documents. Two days before this comes up, and you have to wonder what the motivation is to all of a sudden find this error that's been there for a year, and everyone's known about. And the fact that there was an error in the filing for the notice to intervene that I think gave us grounds to oppose their intervention, which won't be available to us next time.

Mr. Giroux: No, you will. As far as the issue of – we're not gonna go forward to hear this intervention.

Mr. Wisthoff: I know, but there's an error in their filing that–

Mr. Giroux: Right, you need an opportunity to be properly served, and you also need an opportunity to properly respond, and we're going to try to give you that.

Mr. Wisthoff: Right, but have we been able to have our hearing today, there's an error in their filing

that I think would've had a chance to exclude them from the hearing, and that won't be available to us next time. You're taking that away from us.

Ms. D'Enbeau: Well, I think the error is the wrong tax map key. And the reason it's there because that was—

Mr. Wisthoff: No. They used a template for the Whitehead's filing to send us our notice, and on the last page, they left the Whitehead's name, address, and TMK number on the sheet.

Vice-Chairman Tanaka: If we had the power to do so, trust me, we would do that, but this Board does not have that power. So— I mean, we can only apologize and say I feel for you, but basically, we cannot move forward on this item at this time.

Mr. Wisthoff: Okay, and so my case is deferred till August 12th?

Vice-Chairman Tanaka: Trisha, is that the next available—?

Mr. Shinmoto: We'll check the schedule. Tentatively, we can use that date, but we'll contact the Wisthoffs and have a—

Mr. Wisthoff: I just wanna make sure they're not gonna schedule one while I'm out of town.

Mr. Shinmoto: No, we'll talk to you and make sure you're there.

Mr. Wisthoff: Okay.

Vice-Chairman Tanaka: Okay, so it's tentatively for the date of August 12th.

Mr. Giroux: Trish, this application, if what we've heard is accurate today, then the application needs to be amended so we know we're talking about the parcel in question, and you need to have the written authority from the property owner saying that they have that right to ask for a variance from that property.

Ms. Kapua`ala: Okay.

Mr. Wisthoff: And does this mean that the Department is actually gonna give a notice of violation to my neighbor? Because they refused to do that up to this point, unless I file a complaint against him.

Ms. Kapua`ala: No, no. Mr. Chair, I'll answer. The Department has the authority to — we will rescind your notices of warning. We will re-issue the notice of warning to the proper TMK. And because you are responsible, you will also receive that same warning. So the warning now will be a new one with the proper TMK and not just one violator or responsible person, but two: the owner of the proper TMK, and then you, because that is your pedestal or electrical meter.

Mr. Wisthoff: It's a shared wall with him.

Ms. Kapua`ala: Okay. So he has–

Mr. Wisthoff: I'm just not sure why you guys insisted on pursuing me so doggedly for the last year.

Ms. Kapua`ala: From the Department, we're sorry that this had to – no, I mean, the confusion. If we had done the right thing from the beginning, you would still be here. So the confusion is – for the confusion.

Vice-Chairman Tanaka: Apparently, at the very least, there will be no fines on the date that you had stated.

Mr. Wisthoff: Well, not for me but– Okay.

Ms. D'Enbeau: So if I understand, we'll be re-filing our motion to intervene. The Department will be re-filing the motion to intervene. And we'll go ahead and have it heard on August 12th rather than as I'd earlier request that it be done sooner because Mr. Wisthoff isn't going to be here at any case. Is that what I'm understanding?

Vice-Chairman Tanaka: Yes.

Ms. D'Enbeau: Okay, thank you.

Vice-Chairman Tanaka: Thank you very much.

Mr. Wisthoff: Can we ask why the County is intervening?

Vice-Chairman Tanaka: At this point– Legally, if I were a lawyer, I– No, but anything stated at this point that's not a part of the record would be – it wouldn't make sense.

Ms. D'Enbeau: Thank you very much. Okay, let's move on. Trisha, Item No. 2, please.

2. **MICHAEL MUNEKIYO of MUNEKIYO & HIRAGA, INC. representing the COUNTY OF MAUI, POLICE DEPARTMENT requesting a variance from Maui County Code. §19.31.020(B)(4) to allow the construction of the new Kihei Police Station to exceed the 35 feet Public/Quasi-Public height limit by approximately 11 to 17 feet for property located in the vicinity of Piilani Highway near its intersection with Kanani Road, Kihei, Maui, Hawaii; TMK: (2) 2-2-002: 070 (por.) (BVAV 20100005)**

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

Ms. Kapua`ala: And I do have a – something I can show so you can get orientated with the property. This is Piilani Highway and this is Kanani Road. The subject property is here. Yeah, I know. This is Google Earth. Have you ever seen those cars where they have the camera on the top? The cameras–they take a 360-view everywhere they go. They have many pictures, so if at

any time you'd like to see any area, I can always bring it up. So right here is Monsanto. They have some warehouses and offices.

Mr. Santiago: How tall are those buildings--the Monsanto buildings?

Ms. Kapua`ala: I wouldn't have it in the County records. I can pull up building permit records, but I don't believe they put height in there, but I can go ahead and research that while the applicant--

Mr. Santiago: (Inaudible)

Ms. Kapua`ala: Yeah, let me go ahead and find the zoning of the property, and then I'll try and see if I can find out the height. And then I'll go ahead and let the applicant present. So those are basically the only buildings mauka in this vicinity. And again, this is the property in question. So Mr. Munekiyo is here and Ms. Erin Mukai who has been working with us on behalf of the applicant. And also we have Mr. -- Captain Lawrence Hudson here on behalf of the Police Department. Okay? Thank you.

Ms. Erin Mukai: Good afternoon, Vice-Chair and Members of the Board. My name is Erin Mukai. I'm with Munekiyo and Hiraga. And I'm here this afternoon on behalf of the County of Maui, Department of Police, who is requesting a variance from the Maui County Code relating to height regulations in the public/quasi-public district for their proposed Kihei Police Station. As Trisha mentioned, we have a few members here today from the project team: Captain Lawrence Hudson from the Police Department is available, as well as the project's architect, Aaron Fujii from Mitsunaga and Associates. Also here is Michael Munekiyo and myself from Munekiyo and Hiraga.

This is a project location map. The project site is outlined here in bold and shaded in gray. It's approximately ten acres, and is part of a larger parcel that totals 150 acres that is owned by the County. Access to the project site is provided off of Piilani Highway off of an easement that runs through Parcel 69. In the vicinity of the project site is the Kihei Wastewater Reclamation Facility, Kamalii Elementary School, and the Monsanto Agricultural Facility that Trisha had pointed out. To the northeast and south are agricultural pasture lands. And to the west beyond Piilani Highway is all residential areas. Recently, the County Department of Police secured a State land use district boundary amendment from agricultural to urban, a community plan amendment from park to public/quasi-public, and a change in zoning from agricultural to public/quasi-public.

The request today is from the Maui Police Department who is requesting a height variance from Maui County Code, Section 19.31.020(B)(4) to allow the proposed construction of a new police station at a height, which exceeds the 35-foot standard in the P-1 public/quasi-public zoning district. The proposed police station will sit at 44 feet tall, unfinished grade. The highest portion of the building sits on approximately, eight feet of fill. So therefore, the variance request is 17 feet: nine feet for the building structure, so 44 minus 35, plus the eight feet of fill.

Specifically, the Police Department is proposing to construct a two-story police station totaling 46,934 square feet on approximately, ten acres. The facility will include offices, meeting space, training areas, holding cells and storage space. Site grading, landscaping, installation of underground utilities, detention basin, roadway access and vehicle parking are also proposed

bringing the total estimated project cost to \$40 million dollars.

This is a site photo of the southeast view of the project site. You can see that the project site is primarily overgrown with shrubs and kiawe trees. This is another site photo: the south view of Piilani Highway standing on Kanani Road. The project site is located in the left of the photo. This is our last site photo standing at the intersection of Kanani Road and Piilani Highway looking into the project site.

This is the site plan. I'll run through some of the key landmarks here. This is Piilani Highway. Here's the main building of the police station. You can see that it's set back approximately, 65 feet from Piilani Highway. Also proposed is an equipment building, car wash, central plant. Public parking is located in the front. Employee parking and vehicle impound parking is located at the rear.

The next few slides are architectural renderings of what the police station will look like after construction. So this is what you would see from Piilani Highway: the main police station building here with the public parking in the front. Again, another angle of the police station looking at the station from Piilani Highway. So at this time, I'd like to pass over the presentation to Michael Munekiyo.

Mr. Michael Munekiyo: Good morning. Good afternoon, Board Members. I'd just like to continue the presentation to review the justification for the variance. And before I do that, however, I'd like to just run through the definition of height as set forth in the Maui County Code. The definition of height says that it is the vertical distance measured from a point on a top of a structure to a corresponding point directly below on the natural or finished grade, whichever is lower. And we do have attached, a code requirement under the public/quasi-public zoning district, which provides for a 35-foot height limit. So the defining parameters for this variance is the 35-foot height standard, which is permitted in the public/quasi-public zoning district.

The request then, as Erin mentioned, is to seek your favorable consideration to allow a variance for height which would allow the building to stand up to 17 feet above the 35-foot height standard. And again, of that 17 feet, eight feet would be attributed to fill, and nine feet to the building height itself.

So if I may, Board Members, just briefly run through the justification for the variance which you will be considering as you deliberate this matter? The first criteria involves an explanation of the exceptional, unique, or unusual physical or geographical condition with a combination that the uses sought will not alter the essential character of the neighborhood. And so we've broken this up into two parts. And so let me just run through very briefly the exceptional, unique, or unusual physical or geographical condition which this site presents for the Department of Police.

First of all, we do have a ten-acre site. It slopes from east to west. And within that ten-acre site, however, it is a fairly irregular surface undulating in many parts with some areas having slopes of up to 20%. So topographic conditions are quite rugged within the site itself. And so with this type of topography, we are required to provide a cut and fill type of condition where excavation will be needed and fill will be needed to establish the finished floor elevation for the building. And as we mentioned, the highest point of the building would sit on approximately, eight feet of fill. So again,

with respect to the physical condition, there are topographic constraints which need to be considered.

The other part of it relates to the geographic condition. And as we look at it, geographic conditions relate to human settlement patterns as is the case with cities or structures such as this. And human settlement patterns are governed by performance standards set forth by government: height, being one of those. So we look at this as a geographical condition. And how is that we address this geographic condition when we have a building which may not necessarily fit within that specific height parameter? In other words, some public/quasi-public buildings may not be able to be constructed within the 35-foot height limit because of its requirements of the governmental entity itself. And we've seen these kinds of examples on numerous occasions. Several of the classroom buildings at the University of Hawaii, Maui College, is an example. Exceeded height limits just because of the requirements of the – for height for the classroom buildings, and roof slopes, and so forth. We've seen this kind of public facility for the Maui Memorial Medical Center, I think, Kaunakakai Fire Station, so forth. So there are a number of examples where because of functional design requirements for the public facility itself, there was an accedence of the height standard. And so, those are the two things which create an exceptional and unique physical geographic condition which this particular facility faces.

Secondly, the use sought will not alter the essential character of the neighborhood. We saw the presentation by Trisha, as well as the photograph that we showed at the earlier part of this presentation that the site is surrounded by agricultural lands, Piilani Highway, single family buildings across the street, or uses across the street. These uses, we believe, or the proposed police station, we believe, would be consistent with these uses. And I might note that as we went through the land use entitlement process, we went through a change in zoning, a community plan amendment, and a State district boundary amendment. We took these processes through the County's Urban Design Review Board. We went before the Maui Planning Commission, and we went before the Maui County Council. And through those processes, we alerted those Bodies that we would be coming before this Board to seek a request for a variance given the unique circumstances that this particular site offers. And so through those processes, these Bodies understood that we would be coming before you today. And there were no objections raised with respect to the notion that we would be seeking a variance.

So let me go to the second standard. And basically, in summary, compliance with applicable provisions would prevent reasonable use of the property. Again, what we look at is a ten-acre site which has requirements for – spacial requirements for parking. It has requirements for a retention basin, setbacks, the building footprints themselves. And these again, present the limitation based on what programmatic requirements need to be addressed from a design standpoint. As an alternative, for example, we could've designed a one-story building to meet the height standard. However, operationally, a one-story building would have two limitations. It would not be able to integrate the functions within the police station itself to allow for efficient operations. And secondly, you'd probably have a site development limitation in terms of parking areas, and roughly, a little over a one-acre footprint. So again, we are looking at conditions that are unique. And I might just cite as an example of why some of these – what some of these operational requirements might be. We do have meeting rooms and training rooms within the station. We have fitness areas for the staff. And these kinds of functions would not normally be accommodated in a building such as this as an example. There are special requirements both in terms of – well, specifically, in terms of

operations that the department tends to on a day-to-day basis. So again, we are faced with the unique condition with respect to the site itself, and functional requirements of the building which would preclude reasonable use of the property.

And finally, the last criteria which you will need to consider as you deliberate this request is that the conditions that we face are not a result of previous actions of the applicant. Just to recap, we are dealing with the site which has topographic constraints, which requires a cut and fill condition, which requires, therefore, a placement of buildings at the top, approximately, eight feet of fill. Again, the functional requirements as governed by the zoning performance standards of 35 feet, those are in place. And again, may not necessarily always be compatible with the types of facilities that government facilities require. So those are the criteria that we've been able to discuss or address as we defer this application, and we request your favorable consideration of this type of variance. And we do have our architect and Captain Hudson to answer any questions that the Board Members may have.

Vice-Chairman Tanaka: Any questions from the Board?

Mr. Santiago: Just a quick question: is there any consideration for a flat roof as opposed to the – from the roof line to the top, what's the height of that roof?

Mr. Munekiyo: I wonder if I may ask the architect to respond to that question?

Mr. Aaron Fujii: My name is Aaron Fujii. I'm with Mitsunaga and Associates. We did take that into consideration. So at the very top is a flat portion, the very top of that. Going to a full flat roof just in that area will not be very efficient for air-condition to cool down. A lot of the air-conditioning equipment will be in the attic space, and that's what was designed for . . . (inaudible) . . . protected.

Mr. Santiago: So you have the air-conditioning unit on the top of the flat roof?

Mr. Fujii: No, within the attic space. So that'll be protected. The attic space–

Mr. Santiago: But isn't it a possibility to have air-conditioning units on the roof top on a flat roof so you don't have that attic space?

Mr. Fujii: So you're talking about a complete flat roof system?

Mr. Santiago: Correct.

Mr. Fujii: Yeah, that would be a possibility, but what it'll do is it'll change the efficiency in cooling down the building because that second floor now would be in a direct sunlight. So as you know, heat rises. You got heat there. So the cooling requirements would change drastically. So this way, with the attic space in itself, you've got two floors that are protected because down Kihei is I think 90% of the time, it's hot. And it's just 24-hour operation, so we need the equipment to run as efficiently as possible. So to help insulate the building, the attic spaces is what we feel that is required.

Vice-Chairman Tanaka: Any other questions from the Board?

Mr. Santiago: I have one financial question: the \$40 million-dollar price tag, has that been appropriated? Is that the original price tag of the project?

Mr. Fujii: As far as I know, yes, it has always been \$40 million dollars, and we've stuck within that parameters.

Vice-Chairman Tanaka: Any other questions? I like what I see. Nice job. With that, any discussion by the Board? No discussion. Then I would entertain a motion.

Ms. Phillips: I'd like to make a motion that we approve the variance, and that we submit the Department of Planning's staff report and recommendation as support of the variance.

Mr. Shimabuku: I second.

Vice-Chairman Tanaka: Okay, it's been moved and seconded to approve as presented. I'll call for a vote. All in favor, please say aye. Any opposed?

It was moved by Ms. Phillips, seconded by Mr. Ray, then

VOTED: To approve the variance, and submit the Department of Planning's staff report and recommendation as support of the variance.

(Assenting: R. Phillips, R. Shimabuku, W. Kamai, B. Santiago, R. Tanner.)

(Excused: S. Castro, R. Endo.)

Vice-Chairman Tanaka: **So the application has been approved.** Thank you very much. It's been approved. Nice job. Thank you very much. Next item on the agenda, Communications, Trisha?

C. COMMUNICATIONS

- 1. Letter dated April 6, 2010, from James & Elizabeth Whitehead to Kathleen Aoki, Deputy Planning Director, requesting the waiving of fines and additional time to comply with a notice of violation to lower an existing wall approximately, five (5) feet in height to four (4) feet in height, in accordance with Maui County Code §19.30A.030(F), for property located at 701 Kai Hele Ku Street, Laniupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-010:017.**

Mr. Francis Cerizo: On the letter from James and Elizabeth Whitehead, that's just a letter for your information that the wall that was denied, the wall height was denied previously, has been removed. And this letter is just to provide that they have complied with the code. It's just for your information.

Vice-Chairman Tanaka: Okay, thank you.

Mr. Giroux: Trisha, just on the matter we just went over with Wisthoff, looking at the variance rules, and I want the Department to look at that, because we advise them to get permission from the

owner, but the rules state that it has to be the owner or a lessee who holds the recorded lease with an unexpired term. Has the Department looked at that rule?

Ms. Kapua`ala: Well, I'm aware of that rule. And then we also use Title 19. – was it 520 or 530? And it says that you go to another section of the code that deals with applications in general. And then that's where it says authorization from the owner can be used.

Mr. Giroux: I just want that to be clear because I don't want him to go through this whole process again, and then come back here, and then we say, oh, mistake again. I mean, this is ridiculous. This is absolutely ridiculous. This Board has jurisdiction has over what is submitted to it. And if we're getting all these errors after public notices, after agendas, after Sunshine Law, Chapter 91 notice requirements, and then the applicant has to stand there and wonder what we're doing, that's not efficient use of this Board's time. Okay? So I'd like that clear, clarified, looked at, because when stuff comes before this Board, we need to be able to take action.

Mr. William Kamai: I second.

Vice-Chairman Tanaka: Yes, that was an interesting couple of hours there. How come when Randall's not here. Okay, next, as far as approval of April 22nd's meeting minutes?

D. APPROVAL OF THE APRIL 22, 2010 SITE INSPECTION AND REGULAR MEETING MINUTES

Mr. Shimabuku: I make a motion to approve the minutes as stated.

Mr. Rick Tanner: I second.

Vice-Chairman Tanaka: It's been so moved and seconded to approve. All those in favor, please say aye. Any opposed?

It was moved by Mr. Shimabuku, seconded by Mr. Tanner, then

VOTED: To approve the April 22, 2010 site inspection and regular meeting minutes as stated.

(Assenting: R. Shimabuku, R. Tanner, R. Phillips, W. Kamai, B. Santiago.)

(Excused: S. Castro, R. Endo.)

Vice-Chairman Tanaka: **Thank you.** Next, Director's Report, Status Update.

E. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: There's no update to report.

F. NEXT MEETING DATE: May 27, 2010, Thursday

Vice-Chairman Tanaka: Okay. The next meeting is scheduled for May 27th. Do we know what's forecasted for then?

Ms. Kapua`ala: Yes, there is Mr. Gronemeyer's Launiupoko wall variance, and also a DSA Public Works variance for, I believe, street – a variance for street improvements.

Vice-Chairman Tanaka: Okay. A question regarding all of these pedestal walls that'll continually come to us: so apparently, it's not possible for the homeowners association to come in, in one swoop and approve all of them?

Ms. Kapua`ala: No, because variances are for specific properties. You have to identify the facts individually.

Vice-Chairman Tanaka: You know what I mean? I know as far as the Board is concerned, it's not – we're not setting precedence. We're not – but in this case, it's gonna be almost rubber-stamped over and over again. So it's the first few that's gonna pay the price and suffer, but as we go through – well, you know what I mean? As we go through it, it should get easier.

Mr. Giroux: Well, I don't wanna make blanket statements. Again, every structure is going to have to be analyzed under its own merits. And I think we saw enough from the public testimony– I mean, the difference between Whitehead– A pedestal, a four-foot pedestal wall, a wall that's next to a slope, I mean every, every property is gonna be analyzed for its application to the variance criteria. And I think what we have to be aware of is that they're going through simultaneous procedures. And it's just so happens that we're the Board that would follow or rule ultimately, on both. So it's – without saying any more, we have to understand that it's not necessarily precedence, but if it comes down to a ruling on the law, then it may be, you know, it may be. But usually a ruling on a law would be on an appeal, and that would be an appeal of a violation, because they would have the right to appeal a notice of violation. And if it's not a wall, or it's not on their property, you know, these situations are arising, then we're gonna hit by all of these situations. And we need to look at the facts like I said on the record as they are presented to us. So I think that's all I can say about that.

Vice-Chairman Tanaka: Well, because today for the first time we heard statements that there may be arguments that it's not a wall. So we're gonna hear arguments that says it's just a pedestal, it's a monument, but it's not a wall. So definition will be argued.

Mr. Giroux: Yeah, and we're gonna need to hear from both sides on where they're taking this position.

Mr. Santiago: Can I make a comment? It's ironic. We just listened to this police station, this 35-foot variance for an eight-foot addition or nine feet. We stamped it readily and it's for a public/quasi structure. So now we've got 82 independent cases in an agricultural zoning, and we're holding them to a very high standard. Just a comment or observation. And this is all public knowledge, obviously, of what we've decided. It's very ironic.

Vice-Chairman Tanaka: Well, specifically to these walls, anyway, the problem is, and I'm not too sure if you know the procedure, the reason it's coming up is because somebody calls the County and says, "Eh, seven-foot wall." So that guy gets upset. So he calls the County and says, "Eh, that guy's seven-foot, and that's seven-foot wall, seven-foot wall." I mean, that's not – so it's not the County going out there and picking on these guys. It's somebody calling.

Mr. Santiago: No, I understand. I mean, someone had to blow the whistle for bringing it to our – someone's attention, but I'm just – the irony of the two cases that we just listened to seems problematic on the surface.

Mr. Kamai: One more comment: Commissioner Santiago asked Mrs. Boyd, one of the testifiers for this letter regarding communication between MECO, and the landowners, and Launiupoko . . . (inaudible) . . . Is there any way we could – that can be included in the next case?

Mr. Giroux: Yeah, what would happen is – you mean the Wisthoff or the one that said he's coming up next?

Ms. Kapua`ala: Yeah, the one coming up next–

Mr. Kamai: It was from Mrs. Boyd, which was neither.

Vice-Chairman Tanaka: Yeah, she was testifying in favor for Wisthoff.

Ms. Kapua`ala: I'll forward it to Corp. Counsel, and the litigator can decide if they wanna enter it into evidence or not, yeah?

Mr. Giroux: I think it's more actually the Wisthoffs that would want that. And what I'm trying to do is just preserve that in the County record because if anybody needs it, it's there. That's why we're preserving our public hearing so there is a file with the County that that document should be in there for them to–

Mr. Tanner: Now, they were tentatively put off until August 12th. Theoretically, if there maybe not a quorum, then they would be put off again. How often do we not have a quorum?

Vice-Chairman Tanaka: No, Tremaine does a very good job of making sure that we have a quorum.

Mr. Tanner: Because the next meeting, the 27th, I've got an annual board meeting, I can't make that. So I was just curious as to–

Vice-Chairman Tanaka: I don't know. How many times have we--? It's never been part of my experience that there hasn't been a meeting because of no quorum.

Mr. Santiago: If it doesn't happen, there's going to be the conspiracy theory.

Mr. Tanner: Exactly, yeah. That's what I'm wondering. How is that gonna work?

Mr. Shimabuku: No, but they would be notified that the meeting would be cancelled, right?

Mr. Shimabuku: Unless at the very last minute, we don't have a quorum.

Vice-Chairman Tanaka: Yeah, then that is a possibility. That could happen.

Mr. Kamai: So save your minutes just in case you gotta be Chair at the next meeting.

Vice-Chairman Tanaka: And I apologize to the— I'll put this on record. I apologize to staff. When Mr. Whitehead was speaking, and when I addressed him, I kinda defended our Board, and not the County, and I meant to. After he walked out, I wanted to make it clear that I am sure that it's not the County's intention to intentionally do anything unscrupulous. So I apologize for that. Okay, anything else? Is that it? Okay, so next meeting May 27th. Meeting is adjourned.

G. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 4:20 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Vice-Chairman
William Kamai
Rachel Ball Phillips
Ray Shimabuku
Bart Santiago, Jr.
Rick Tanner

Members Excused:

Randall Endo, Chairman
Steven Castro, Sr.

Others:

Kathleen Ross Aoki, Planning Director
Aaron Shinmoto, Planning Program Administrator
Francis Cerizo, Staff Planner, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel

Others:

Kathleen Ross Aoki, Planning Director

Aaron Shinmoto, Planning Program Administrator

Francis Cerizo, Staff Planner, Planning Department

Trisha Kapua`ala, Staff Planner, Planning Department

James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel