

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
AUGUST 26, 2010**

(Approved: 9/23/2010)

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Randall Endo at approximately, 1:36 p.m., Thursday, August 26, 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.)

Chairman Randall Endo: This meeting of the Board of Variances and Appeals will now come to order. It is 1:36 p.m. on August 26, 2010. Let the record reflect that we have a quorum present of five Members of the Board of Variances and Appeals. In addition, we have Deputy – I'm sorry, we have the Director of Planning here present today, Director Aoki, who is attending.

Ms. Kathleen Ross Aoki: Good afternoon, Chair, Members.

Chairman Endo: At this time, I will call our first item on the agenda: Item B-1.

B. PUBLIC HEARING

1. **JEFF HINKLE of the MAUI RESIDENCE TRUST, ROBERT and CASSANDRA STERNTHALL of the STERNTHALL FAMILY TRUST, and LINDA CASTANO and GORDON FIRESTEIN and DORIS LANG of the GORDON FIRESTEIN/DORIS LANG LIVING TRUST requesting a variance from Maui County Code, §19.30A.030(F) to allow two (2) electrical pedestal and decorative walls located within the twenty-five (25) foot front and fifteen (15) foot side yards to exceed the four (4) foot height limit by up to four (4) feet located at 170, 172, 186, 202 and 220 Paia Pohaku Place, Launiupoko, Lahaina, Maui, Hawaii; TMK: (2) 4-7-009:011, 13; 062, 063 and 064 (BVAV 20100014)**
 - a. **Department of Planning, County of Maui's Motion to Intervene; Memorandum in Support of Motion**
 - b. **Department of Planning, County of Maui's Hearing Memorandum**
 - c. **Department of Planning, County of Maui's Exhibit List**
 - d. **Department of Planning, County of Maui's Witness List**

Chairman Endo read the agenda item into the record.

Chairman Endo: Does the Planning Department have an initial video for us?

Ms. Trisha Kapua`ala: Yes. This is described as the north wall in your staff report. Now I'm on the subject property, which is the roadway lot. Again, this is described as the northern wall, so this is actually one of the pedestals of the decorative wall, and then another pedestal wall on the southern

wall. Tremaine was so kind to come with me, she's about 5 feet, to give you a perspective of how high these walls are. So behind this and the southern wall is where the electrical meters are located. This is from the street. These are the electrical meters that are located behind the southern wall. It has the best view. The second shot will be of the northern wall, which is a little bit more difficult to see. And one more view. That's the best you're gonna get. So along here is the decorative portion of the wall, and then you'll see the pedestal here. That's about it. And other than that, if you'd like to see the property again, we have a map that's available. And it's a 3D aerial view, so you can actually see the wall in relation to the neighborhood.

Chairman Endo: Trisha, if it's going to take a while, we could take care of some motions first.

Ms. Kapua`ala: Sure. Well, it comes up real quick. These are the walls that are the subject of today's proceedings: the pedestal wall and then the decorative walls. We can get different views, if you'd like. Thank you.

Chairman Endo: Okay. At this time, I think we have a motion to intervene filed by the Planning Department.

Ms. Madelyn D'Enbeau: That's correct. Thank you. Madelyn D'Enbeau appearing on behalf of the Planning Department in the motion to intervene, requesting permission to intervene in this action.

Chairman Endo: So I take it you're not asking for a continuance should the motion be granted. You want to be granted intervenor status and then proceed with the hearing?

Ms. D'Enbeau: That's correct, Mr. Chair. We're ready to go with the hearing.

Chairman Endo: Okay. And would somebody from the – a representative from the applicant let us know if you have any objection to that, to the motion, or–?

Mr. Gordon Firestein: No, we have no objections.

Chairman Endo: Okay. In that case–

Mr. Aoki: I'm sorry, Mr. Chair, could the applicant identify himself for the record?

Chairman Endo: Oh, sure. Sorry.

Mr. Firestein: My name is Gordon Firestein.

Chairman Endo: Thanks. Okay. Discussion on the motion? Mr. Firestein, so you understand what the motion is basically about? Have you had a chance to read the–?

Mr. Firestein: Yes, we have, yes.

Chairman Endo: Okay. So you understand that basically, the County, the Department of Planning wishes to become a formal party to the proceeding, and to put on witnesses, and present more documentary evidence, and to have a bit more formal process than would be had otherwise?

Mr. Firestein: Yes. We understand. We prefer it wasn't a contested case, but we don't have any grounds to object.

Chairman Endo: Okay. Alright. In that case, the Chair would request a motion from the Board to grant or deny the motion to intervene.

Ms. Rachel Ball Phillips: I'd like to make a motion that we grant the Department's motion to intervene.

Mr. Rick Tanner: I would second.

Chairman Endo: Okay, it's been moved and seconded to grant the motion to intervene. Discussion? Hearing none, all those in favor of the motion to grant the motion to intervene, please say aye. The Chair also votes aye.

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

VOTED: To grant the motion to intervene.

**(Assenting: R. Phillips, R. Tanner, R. Shimabuku, B. Vadla, R. Endo.)
(Excused: W. Kamai, S. Castro, K. Tanaka, B. Santiago.)**

Chairman Endo: **The motion passes, and the motion to intervene passes.** So the County Department of Planning is now a party to the matter and we will proceed with the hearing today. Before we do that, though, I think we can ask the public if they wish to testify. So if anyone wishes to testify in the public as a person not necessarily a party to the matter, but just wishing to testify, you can sign up on the sign-up sheet. And I see we already have five people signed up. Keep in mind, though, that if you are actually somehow related to the applicant, and wish to be called as a witness by the applicant as part of the contested case hearing, you could actually speak through that procedure also as opposed to your three minutes.

Mr. Firestein: Is that an either or option? If there's a party to the application, who would prefer to make a comment as opposed to being called as witness, is that okay?

Chairman Endo: Yeah, it's perfectly fine, if they want to testify right now and give their three minutes. And actually, if you as the applicant or the County wish to call them as a witness, you could actually do that also.

Mr. Firestein: Okay.

Chairman Endo: So it's either or both, although according to our Counsel, Deputy Corporation Counsel Giroux, because it's a contested case hearing, when we call you up as a witness, we swear you in, and your testimony is sworn, and that's part of the record, whereas your public testimony, if you're just an ordinary person from the – well, not – if you just come up and testify to begin with, and give your three minutes, that might have some lessor – or might not be considered part of the record. Mr. Giroux, maybe you should answer if that's correct.

Mr. James Giroux: By law, because the Charter requires us to take public testimony, it's kind of a bifurcated process. We take public testimony and then we close the public hearing part, and then we go into the formal contested case. So anything taken as evidence during the contested case is used in weighting the credibility and the weight of the evidence given during the contested case. And that's what the Board Members will be balancing while trying to figure out whether or not the variance meets the criteria for a variance. So just so you're aware of the difference of the weight of testimony versus the weight of having somebody sworn and taken as evidence.

Chairman Endo: Okay. With that in mind, the first person who signed up is Robert Sternthall.

Mr. Firestein: Mr. Sternthall is a party to the application. And so I think I will call him as a witness so his testimony can be on the record, if that would be okay.

Chairman Endo: Okay. Sounds good.

Mr. Firestein: Thank you.

Chairman Endo: The second person is Dr. Dominic Pistillo.

Dr. Dominic Pistillo: Hi. I'm Dominic Pistillo. And I'd like to thank you for the opportunity to speak on behalf of the constituents facing this dreadful and unfair situation. The problem here in my opinion is clear. It's an overly aggressive, but distorted slant on the definition of walls by erroneously defining these utility pedestals as walls, and thereby attempting to impose an unlawful height restriction. By County definition, a wall is a solid barrier that "closes or borders a field." These typically, ten to 20-foot long utility pedestals in no way close or borders any field. The pedestals here are in the same class as a plethora of other allowed structures such as MECO transformers; light poles; street signs; fire hydrants; Maui Telcom boxes; utility poles; irrigation pumps, filters, valves; standpipes; and mailboxes. These are all government service or public utility required structures that in fact have no dimensional restrictions.

In this case, there's no ordinance violation, and there's no risk, detraction, or inconvenience to the neighborhood. And I speak as a neighbor. So please continue to do the right thing, the just and sensible thing, by granting this variance.

Chairman Endo: Any questions for Dr. Pistillo? None? Thank you. Next we have Richard Lopez.

Mr. Richard Lopez: Good afternoon. I think you're all familiar with me. I've been here so many times. Obviously, I'm here to speak in favor of granting the variance to the Firesteins et al. I'm reminded again how unusual this situation is. I read somewhere that I believe there's approximately, 23,000 homes on Maui, not to include the hundreds of condominium associations. And for the number of – for our neighborhood to have the situation and only eight others, we were told at the last hearing, in all of Maui, it makes it a very unusual situation.

I don't – I'm not too happy to see this described as a decorative wall, the fact that it was made decorative as a utility pedestal. I know that the contractor builder who developed this house—a very careful man who has gone through all the permitting process. I believe there's a letter that they wrote saying that they were present at a meeting between the County, West Maui Land, and MECO

when they built this. Not only that, but we do know that heavy waters come down that road. There's no drainage until it hits the ditch, very large ditch, to the south of this property. So it does also help deflect flooding of the property. Again, what we had in our hearing was the fact that lowering the electrical meters is a hazard. We established that at the last hearing.

So we are speaking in favor of them having this pedestal. It is an aid, an asset, to the community. It is no way something that detracts. I don't know of anyone who has been present to object to any of these pedestal utility walls. So we, as a community, seem to be as one voice. There may be one or two people for some unknown reason that objected to this, and have filed a complaint, and it's very unfair. So again, we speak in favor of supporting the Firesteins. Thank you.

Chairman Endo: Any questions for Mr. Lopez? Seeing none. Thank you. Next up we have Greg Howeth.

Mr. Greg Howeth: Thank you, Mr. Chair, for the opportunity to testify. My name is Greg Howeth. I've lived in Launiupoko probably longer than most of anyone else. Our home was actually the third house built in phase one. We started in 1999. Subsequently, we – the lot that my house sits on, my meter pedestal isn't even on my lot. It's on a neighbor's lot. So I have no control, no say. All we have is easement rights from the standpoint that the electricity runs up the driveway and that's it.

When we originally built back in '99, it wasn't optional where those meter pedestals were placed, the size, the height, any of those things. That was dictated by Maui Electric. And I applaud what they've done with theirs because quite frankly, I thought they were ugly to begin with. When they were first told to put up, they had to be a concrete structure. They had – the meters themselves had to be a minimum of 5 feet off the ground. And so you had all these bare, just concrete blocks sticking up. So the developers at the time and the homeowners took it upon themselves to put decorative rocks. And I applaud what these guys have done 'cause it's not such an eyesore. And in fact, I think it looks nice.

I think that this thing's gotten way out of hand. For the amount of effort, and I count the number of County employees sitting in this room, and the difficulty for those of us that work and try and come to these hearings, if there were some way to expedite this as a group to take care of the subdivision, I think it would be a much better use of all of our resources. I understand that may be beyond what this group can do, but for the record, I was a little bit dismayed to hear that my public testimony is weighted less than that of those that may be called in the contested case hearing because I gave up a day's work to come do this. So please take the weight that it's intended. Grant the variance. And please look at anyone else's that may be coming down the pike to help conserve our County's resources, as well as the public's use of time to get this thing resolved in a quick manner. Thank you.

Chairman Endo: Thank you. Any questions for Mr. Howeth? No. Thank you. Last on our list we have Susan Deloria.

Ms. Susan Deloria: Hi. Good afternoon again. Susan Deloria. I just want to say I'm a neighbor in the subdivision. I am definitely in favor of granting this variance. We've been here many times. As you can see the amount of effort that's gone into this. We've tried various forms of

communication with meetings with the Mayor, meetings with the Planning Director. We lobbied the County Council. We were very successful with the response we got there. And it seemed to be at the time that this was something that could be possibly, in an organized effort be a solution instead of having to come in front of you time and time again to go through this process. So I just would again would like to thank you for your time and please consider granting this variance. Thank you.

Chairman Endo: Thanks. Any questions for Ms. Deloria? Seeing none. Thanks. Does anyone else in the public wish to provide public testimony? Seeing no one approaching the podium, we will close public testimony as to this agenda item, and now proceed with the formal contested case hearing. We do have the witness list from the County with three primary witnesses, as well as the Department of Planning's exhibit list and exhibits. Does the applicant have a witness list or can you tell us who you'll be calling?

Mr. Firestein: I don't have a list prepared, but there is one witness I would like to call: Bob Sternthall. He's a party to the application.

Chairman Endo: And do you have any exhibits you wanted to submit?

Mr. Firestein: Yes, I do. I brought copies to distribute, and there's also a power point presentation. There's some similarities between the two, but I'll pass out the handouts at this time, if that's alright?

Chairman Endo: Sure. Okay. Mr. Firestein, just before we begin in earnest, the rules for a contested case procedure allow for a lot of additional things such as pre-hearing meetings with the hearings officer, if one were appointed; settlement negotiations; limited discovery where you can request documents and interrogatories from the other party; subpoenas; and various pre-hearing motions. So basically, we're asking you if you're ready to proceed right now or if you have some desire to avail yourself of those procedures.

Mr. Firestein: Thank you for explaining that. I wasn't aware of all of that, but we're prepared to proceed nonetheless.

Chairman Endo: Alright. And the County, are you ready to proceed, the Department of Planning?

Ms. D'Enbeau: Yes, we are. I would like to point out, I guess the applicant wasn't aware of the requirement to submit their exhibits ahead of time. The County will be objecting to the admissions of the letters because unless these people are here to testify, they're not really appropriate evidence because there's no opportunity for cross examination. But in terms of the other documents, I assume that aside from that, there will be people, a witness, be called to testify as to what these documents represent, and that won't be a problem.

Chairman Endo: Just for clarification, you're referring to the letter dated August 23, 2010?

Ms. D'Enbeau: There are several letters in here. That one from Debbie Arakaki, and also there's a letter on page 7, I guess. It appears to be a letter of support from Dennis and Mary Ann Schober. We have no objection to these being submitted in the public hearing part of the process, but not as

evidence to be considered by the Board for the request for a variance because these people aren't here to be cross-examined. There's another letter – well, actually there's several letters, I guess: page 7; page 8 appears to be another letter; page 9, likewise a letter.

Chairman Endo: Do we know if these letters were already previously submitted to the Department of Planning?

Mr. Firestein: No, they were not. Many of these letters I've just received too late to include with the other exhibits. And if I could have a moment? One of the authors of one of these letters is present. If I could just consult with her off the mic. to see if she would prefer to have it submitted as part of public testimony, or if she'd be willing to be called as a witness.

Chairman Endo: Well, the public testimony phase is over already. So your only option is to call the person as a witness or to introduce them yourself. If you're the one who collected these letters, although it's technically, hearsay under the rules of court, we're an administrative Body, not bound by the rules of evidence; therefore, we can technically, accept them if we feel that they're relevant and are satisfactory. So basically, we can decide whether or not to accept them based on your testimony.

Mr. Firestein: So it would be permissible for me to read portions of these letters as part of my—?

Chairman Endo: Yeah, you can call yourself as a witness, and say you collected these, you received them, talked to these people, or somehow give us a sense that they are real letters received by real neighbors, and that we should consider them as evidence.

Mr. Firestein: Okay.

Chairman Endo: You can do that if you like, or the County could just say they don't care, and we could just submit them all.

Mr. Firestein: I'd be happy to call myself as a witness if that's one of the options.

Chairman Endo: Okay. Okay. So we will not actually rule on whether or not we'll accept them into evidence at this time. We'll wait until we hear some of the testimony, but we do note the County, the Department of Planning's objections. Does the applicant have any objections to the exhibits proffered by the County?

Mr. Firestein: No, no objections.

Chairman Endo: Okay, so we will then accept all of those into the record. And actually, I guess we'll accept all of the non-letters that you gave to us since the County didn't object to those. Is that correct?

Ms. D'Enbeau: Well, some of them I can't really tell what they're supposed to be showing, so I'd prefer if like on page 12A is a picture of a curb. I don't know if that's near the property, before the property, after the property. I'd just prefer that somebody talk about the pictures before they're admitted. There are documents that are the same as what we have, which is no. 11, the map,

subdivision map. No problem with that. The pedestal wall pictures, we've seen those before. That's page 4 and 5. And 6, no problem with that. And like I said, I don't anticipate this is going to be a problem, but I think for the record, we need to have more identification of what these pictures represent before they're admitted into evidence. And I assume that you're planning to do that in any case. And no. 16, again, no objection. We know what that represents. So in summary, the County would not object to the immediate admission right now of 4, 5, 6, 10, 11, and then we'll just wait for the testimony on 12, 12A, 13, 14, 15; and 16, no objection.

Chairman Endo: Okay, so we'll admit all of those that the County had no objections to, and the rest, we'll make the ruling after we hear your testimony. Okay. So at this time, we would usually allow an opportunity for the applicant and the County to give an introduction or an opening statement, if you so choose to, otherwise, we'll jump right into your witnesses.

Mr. Firestein: Thank you. Yes, I would like to make an opening statement. And, Trisha, I wonder if—

Ms. D'Enbeau: If this is to be testimony, I think it would be appropriate – I'm not sure if he's gonna testify about what the contents of these pictures are because we'd like to cross-examine, or if he's just gonna make the presentation as part of his opening statement.

Chairman Endo: Yeah, that's a good point. Mr. Firestein, were you about to present your power point presentation at this time, or were you just gonna give us a brief introduction?

Mr. Firestein: I was planning on going through our story. It's a little longer than brief, but given the previous two hearings on this topic, I was hoping to, you know, keep it as short as possible. I could break it up into a short opening statement, then a longer set of testimony, if you would prefer.

Chairman Endo: I think what would probably be most appropriate at this time would be to just swear you in and have you testify the whole time. That way everything you say is under oath. And then the only thing is, of course, then there'll be an opportunity from the County to cross-examine everything that you say. Is that okay?

Mr. Firestein: It would be fine to be sworn in, but after that, do you want me to just give a brief introduction, and then come back to a longer explanation with photos of our situation, or—?

Chairman Endo: You can just jump into your long version.

Mr. Firestein: Okay.

Chairman Endo: Okay. So please raise your right hand. Do you swear or affirm that the following testimony you're about to give is the whole truth?

Mr. Firestein: Yes, I do.

Chairman Endo: Okay. So please proceed.

Mr. Firestein: Thank you. I think the video that you saw at the beginning that Trisha presented

gives a good sort of physical overview of our situation. There's one key aspect of our physical and geographical situation that I intend to highlight in my remarks. And a lot of the photos that are in the exhibits speak to that. Our particular situation is similar in a lot of ways to the two previous cases that you've heard on pedestals in Launiupoko, but there are some few differences, and I'll try to focus on those as well.

There are four of us who are parties to this application. There are five electrical meters on the back of these pedestals. There are three on the back of the north pedestal, and two on the south. That's because one of the owners has an ohana that is separately metered. And none of us among the four built these pedestals. We all bought the properties with the pedestals standing. They were built by Don and Kat Johnson. And one of the letters in the packet is from them.

None of us received any disclosure in our purchase contracts that our pedestals were not in compliance with the ag ordinance, understandably, given the lack of awareness of the four-foot height limitation until this whole issue arose last year through the request for service system. And all of us who were affected were quite surprise, if not shocked, to find out that these pedestals were considered to be not in compliance, and that we were potentially liable for civil and criminal penalties as a result.

So our situation is very similar to the two previous ones in which variances were granted in the following ways. The builders of the wall are both pedestals. The Johnsons were given to understand in correspondence from the developers and MECO that they had to build the pedestals at the street, and build them a minimum of 6 feet high to receive electricity. You heard testimony previously there are documents in our application that speak to this. And if you're willing, I hope you'll stipulate to those facts. We've spent a lot of time here listening to the evidence about that.

Like the previous two cases, our houses are also a long way from the street. In our particular case, we're more than 400 feet away from the street. And in fact, our property doesn't actually touch the street. Our property boundary is at the western end of the driveway lot. Our portion of the street is very steep. And this came up as well on the Lopez case, if there is a concern about the integrity of the electrical equipment, if it's required that they be moved much closer to the ground.

And I would like to illustrate what I believe makes our situation not just unusual or exceptional, but really unique. As far as I am aware, there is no other situation in Launiupoko that compares to ours. And that's what a lot of the photos intended to show.

Just to describe it verbally, our pedestals are located at a curve in Paia Pohaku Street. It's about 1,500 feet from the top of Paia Pohaku to where our pedestals are. It's a straight run all the way down from the 600-foot elevation mark at the top of Paia Pohaku to the 400-foot elevation where our pedestals are. So it's a drop of 200 feet in elevation over a distance of 1,500 feet straight, paved, impervious, asphalt and concrete without any storm drains along the way. And in fact, the storm runoff is diverted into a gully as Mr. Lopez indicated in his public testimony downhill of our pedestals. So the full force of any storm runoff coming down is really directed straight at our pedestals. And if I can find the photographs, this is at the downhill edge of our pedestals. And you can see all the cane grass there. And there's a slight indentation there where the runoff is intended to go and then down over the edge into a gully. That's in the best of circumstances. This is a view looking from that ditch uphill. Our pedestals are behind that cane grass on the left over there. And

now we're headed up the curve. That's a view of the non electrical portion of our pedestal. And now we're looking downhill. And you can see it's steep. There's actually a traffic sign there warning of the grade.

Our pedestals start right about there. So this is the straight portion of Paia Pohaku and it curves around aiming for our pedestals. This is what I'm referring to as the leading edge, the northern most edge, of the pedestals. The electrical equipment is behind this pedestal wall. This height here is about 5 feet. And you can see there's quite a severe drop-off from there all the way down.

This is a view mauka. I'm standing a little bit uphill from our pedestals. And I'd just like to point out, and we'll have some testimony in a few minutes, when it rains hard, we actually get waterfalls on these – on the West Maui Mountains. We've seen as many as three waterfalls. And Paia Pohaku, which is just straight up the hill from here acts as a very efficient watershed.

These are cable utility boxes. And in the two years that we've lived in our house, shortly after we moved in, we did have a heavy rainfall sufficient to flood these boxes, and the cable service went out in the neighborhood until the storm stopped and we could get Oceanic Time Warner out there to replace the electrical gear that was in there. So we are quite concerned about the situation, if the gear on the back of this pedestal should become inundated. And it's not just the risk of water, but as you know, it's a very rocky terrain. We could have rocks, hopefully, not boulders. But as you know, the meters are faced with glass. It's a serious concern for us, if these are placed close to the ground as would be required for strict compliance.

Also, I'd like to point out that there's a curved portion of the wall here that heads down along for a short distance along the driveway lot. And this portion does provide some protection to the electrical gear that's behind the pedestal there should there be a large flood.

This just gives you kind of the map view of this long run on Paia Pohaku that I've been referring to. And you can see we're right there. It's very easy to envision a river headed straight towards us. That's just a topo map just showing the change in elevation. And again, just to give you sense of where we're located, these are the four properties bounded within the red border that are party to this application. This is the driveway lot and the pedestals are right in there.

Just as a reminder of some of the testimony that we've had, Mr. Kauhi from MECO who testified, I guess, a couple of sessions ago, he testified that MECO still requires meters to be at least 5 and a half feet aboveground for safety reasons. That is still the MECO standard. He did say that MECO is willing to waive some of those requirements as an accommodation to homeowners like us who are caught in this bind, but in terms of safety, that is still the recommendation.

As far as the hardship aspect of this, I think that's probably pretty easy to understand. It's very expensive to lower the walls, and of course, remove the electrical gear. We've gotten quotes in the thousands of dollars. We've had one quote for just the masonry work alone for the two walls of as much as \$21,200.

So in summary, we believe and assert that like the two previous cases where variances were granted, we also meet all three criteria, and for some of the same reasons. There is an exceptional, unique or unusual physical or geographical condition existing on the subject property not generally

prevalent in the neighborhood. These include the long distances from the street to the house, the steep topography, and the potential for inundation from the long watershed uphill of our properties, and the curve right at our properties. And I am not aware of any other properties in this situation in the neighborhood.

The other part of that first criterion is that the use sought to be authorized by the variance will not be alter the essential character of the neighborhood, and we believe that as well as in truth, the walls don't block any views. As you've seen, we've gotten several letters of support from our neighbors. We have not heard any complaints about the walls.

Strict compliance would prevent reasonable use of the property, the second criterion. While certainly, strict compliance at the time the pedestals were built would've prevented reasonable use, and you've heard lots of testimony about that, these pedestals were built the way they are built basically, under duress. The builders at the time were told that unless they built them like this, they would not get electricity from MECO. They had no choice, as you've heard. Strict compliance now raises the safety risk from placing the electrical equipment so close to the ground potentially, resulting in power being interrupted.

And the third criterion, the conditions creating a hardship were not the result of previous action by the applicants, well, I've spoken about the hardship. And as far as it not being the result of previous action by the applicants, I think that's fairly self-evident since none of us built these in the first place.

If I may, I would like to just read a short portion of one of the letters that was introduced as an exhibit. And also, I just wanted to apologize and maybe explain about the handout. As I had said earlier, a lot of these letters came to me at the last moment, so there wasn't time to introduce them properly as exhibits. And then as far as the photos were concerned, I wasn't sure whether the power point presentation was going to be available. So I included those letters in the printed packet just as a backup and for your reference.

Ms. D'Enbeau: Before the letters are read, could I state my objection?

Chairman Endo: Sure.

Ms. D'Enbeau: Again, I would think it's inappropriate to— I don't know which letter the applicant was planning to read but these are perhaps appropriate for testimonies. There can be cross examination. But just to be read into the record as factual statements that we have no ability to contest, I think is inappropriate especially, given that there's been no notice of these documents. As far as the pictures, I think that at this point, we understand what the pictures represent. And the County would withdraw their objections to introducing the photographs of the areas around the applicant's home. So our objections now are to the letters, the hearsay letters. Thank you.

Chairman Endo: Okay. So Photo Exhibits 12 through 15 submitted by the applicant are accepted into the record. Mr. Firestein, you can proceed to discuss the letters.

Ms. D'Enbeau: Excuse me, 10 and 11 as well, or maybe we already admitted those. I think you're right. Sorry. Okay.

Mr. Firestein: I just wanted to read an excerpt to the first letter, if that's okay. It's on page 3. This is a letter from Debbie Arakaki who's a neighbor of ours. She lives on Kai Hele Ku. And what she says, she described to us and to you in this letter, to the Board, of her experience in attempting to comply. And she said:

The electrical code required that the guts of these meters need to be a certain height above the ground. In the case of my own meters, various electricians said to lower it would put my own electrical too low, and close to the ground, and be a danger. They recommended that we do not lower our meters. To simply drop our meters would put the bottom at 4 inches above the ground. In case of a water sprinkler break, a heavy rain, or whatever water issue that comes up, it is then our problem when and if the water damages these electrical units.

That's the advice that she was given. Her particular situation, she is on a straight part of Kai Hele Ku. She is not in exactly the same kind of geographical situation that we are. One that just from my untrained eye looks to be potentially, a little bit safer in terms of runoff than the situation that we're on – that we find ourselves in. But nevertheless, it was enough of a concern even on a straightaway to an electrician to recommend against lowering the electrical gear.

Ms. D'Enbeau: And if I might amplify on our objection now that I know what portion the applicant wanted to read, this is not just hearsay once because Mrs. Arakaki's not here, but hearsay twice, because she's writing a letter about something that some unidentified electrician– Well, if she's here, then she should be testifying. I didn't realize she was here. Sorry. Again, the letter is hearsay, and then the electrician who told her this, that's her relating something someone else told her, so that's hearsay within the letter. It's not a letter from an electrician making these statements. It's a letter from Mrs. Arakaki saying she was told by someone. And finally, I don't know what the relevance would be because it's a completely different property.

Chairman Endo: The general guidance under our Administrative Rules, we're not bound to preclude the admission of hearsay evidence, but we are, in order to expedite and be efficient, we are charged to preclude redundant and irrelevant information or evidence. So at this point, Mr. Firestein, do you want to call Debbie, or do you want to try and submit it with what you've stated?

Mr. Firestein: Could I have a moment to consult with her?

Chairman Endo: Sure. Okay. And just for the Board's own edification, on these evidentiary rulings that I'll be making, I'm going to make the initial ruling, but as a Board Member, you can appeal my ruling, which then we'll put to a vote on the Board. If you don't appeal what I say, then it stands. Okay.

Mr. Firestein: So we are choosing not to call Debbie Arakaki as a witness.

Chairman Endo: Okay. Were you going to put on any more evidence with regard to these letters?

Mr. Firestein: With regard to the letters, only to note that I do testify that they're real letters from real neighbors that I have received and submitted to you as in support of our application.

Chairman Endo: Did you tell these neighbors what to write in their letters?

Mr. Firestein: No, no, I did not. In fact, one of them, I haven't met these neighbors yet. They must've read about the hearing from the classified ad that we needed to put, and I was really touched to receive it, so I wanted to include it in the packet.

Chairman Endo: Okay. The Chair will admit all of the letters into evidence, although we'll duly note the objections from the County. And the Board Members can consider the weight to be given to these letters given the objections by the County that they're hearsay, and in some cases, double hearsay. Okay.

Mr. Firestein: There is one witness I would like to call. I don't know if this is the time to do it.

Chairman Endo: Oh, no. First, we have to allow the County to cross-examine your testimony, and then you call your second witness.

Mr. Firestein: Okay.

Ms. D'Enbeau: And in certain terms, the cross examination, I don't know what would be the most convenient. Should we ask the witness to sit over here, and I'll stand up there, or what would you prefer?

Chairman Endo: Either way, whatever you folks want to do.

Ms. D'Enbeau: Yeah, why don't you go sit over there? Yeah. And, sir, I was going to ask you some questions about some of the exhibits, so if you want to grab your copy of the exhibits. If you would look, please, at Exhibit 12, which is a picture, I gather, of three of the four structures. As I understand it from viewing the photograph, you have— Did you find it? Twelve, no. 12 at the bottom of the page?

Mr. Firestein: I have a page 12 and a 12A. Is it this?

Ms. D'Enbeau: No, it's not that one. It's this one. I don't know if I'm reading the number incorrectly. It's a picture of some walls.

Chairman Endo: That's actually 13. The number's cut off on the top.

Ms. D'Enbeau: Oh, I see, so it looks like a 12. Thank you. Okay. Sorry about that. Alright, no. 13. And I'm looking at what appear to be— Let's see if we can bring that up. If it's on your power point, we can probably see it better, too. That's the same picture, yes. Now, what I'm looking at the far left of this photo, I believe there are some meters on the back of that portion of the wall. Is that correct?

Mr. Firestein: That's correct.

Ms. D'Enbeau: And what's the little thing that comes – is that the decorative portion of the wall that kind of slopes downward from it?

Mr. Firestein: Yes.

Ms. D'Enbeau: Are you seeking for that decorative portion as well, or just for the pedestal wall?

Mr. Firestein: Yes, for all of the wall-like structures.

Ms. D'Enbeau: Okay. And so your testimony, there are no meters attached to that decorative portion. Is that correct?

Mr. Firestein: No, there are not.

Ms. D'Enbeau: And then I believe from the earlier pictures that the Planning Department showed us, at the end of that decorative portion, there's kind of a pedestal. Is that correct?

Mr. Firestein: Trisha referred to it as a pedestal. That may be a little confusing given the terminology that we've been using. It's a light column. It's a column with a light on top of it.

Ms. D'Enbeau; I see what you're saying. It's more like what you'd think of as a pedestal for a plant or a sculpture.

Mr. Firestein: Right, right.

Ms. D'Enbeau: So we can't see that in that picture, but that's part of what you're asking for the variance for?

Mr. Firestein: Yes.

Ms. D'Enbeau: And then am I correct that this is duplicated on the other side even though we can't see it in this picture? That from the pedestal, the wall that has the meters going down the other direction, there's also one of those sloping kinds of walls?

Mr. Firestein: Yes.

Ms. D'Enbeau: And you're seeking a variance for that as well?

Mr. Firestein: Yes, we are.

Ms. D'Enbeau: And your reason for seeking the variance for the decorative walls is because they help deflect the water? I wasn't clear exactly.

Mr. Firestein: Well, the curved portion that you can see for this south pedestal that you can see in this photograph does serve, in our view, that function of potentially, deflecting water protecting the electrical gear on the back of that south pedestal. I'm not sure that the same would apply to the one across the driveway from it.

Ms. D'Enbeau: Now, these decorative portions, if I might call them that, you understand what I mean when I say the "decorative portions?"

Mr. Firestein: Yes.

Ms. D`Enbeau: The part that doesn't have any meters on the back of it.

Mr. Firestein: Right.

Ms. D`Enbeau: Okay. Are they part of what you were instructed to build by the developer and by MECO?

Mr. Firestein: Well, once again, we purchased, all four of us who are a party to this application, we purchased our properties with these structures in place. So we had no say in what was, or was not built, or how it was built.

Ms. D`Enbeau: I guess my question was simpler than that. You are making an argument, I gather, because you submitted drawings, and we've seen those drawings in other cases that show what MECO or someone had told the original owners to put up.

Mr. Firestein: Right.

Ms. D`Enbeau: You're not claiming that the decorative walls fall into that category as something we were told – somebody was told to put up by MECO or the developer?

Mr. Firestein: No, we're not claiming that.

Ms. D`Enbeau: So we actually have sort of two separate arguments here on your part. You have your argument about your pedestal wall and then you have an argument about your decorative wall.

Mr. Firestein: Well, we're not making separate arguments. We see this as all of a whole. These walls are designed to be integrated whole. They're aesthetically pleasing that do not block views. In some cases, provide a function other than just the aesthetic attractiveness that they include.

Ms. D`Enbeau: And you did go over the criteria, so I know you know what they are, but hold on a second. So with respect to the decorative portion of the walls, if you will, are you claiming that strict compliance with the requirement to bring those walls down to the four-foot level would prevent reasonable use of the property?

Mr. Firestein: Well, as I've said, we've made one application, and we've received one letter from the County that started this. So these pedestals/decorative portions have from the beginning been taken as a unit.

Ms. D`Enbeau: What I'm asking you to do in your mind as it appears on the picture to – you've got the pedestal wall where the electrical meters are, and then you have the decorative portions of the wall. I'm asking you mentally, you can see them as two separate things, whatever your application might've said, and you're asking for a variance for the whole thing, I understand.

Mr. Firestein: Right.

Ms. D`Enbeau: But I`m asking for the grounds for your variance for the decorative portion of the wall. Are you saying that you can`t make use of your property without this decorative portion of the wall?

Mr. Firestein: No, no.

Ms. D`Enbeau: And in terms of the wall where the meters are, you are aware that the number of people in your subdivision have, in fact, brought their metered walls down to the compliance level, are you not?

Mr. Firestein: Yes, we`re aware of that.

Ms. D`Enbeau: So it wouldn`t be true that this can`t be done because it has been done. Would you agree with that?

Mr. Firestein: It has been done. It can be done. And my understanding is that when it has been done, it`s been under extreme coercion.

Ms. D`Enbeau: In the sense that it was in violation and there was a threat that there would be fines? Is that what you mean?

Mr. Firestein: A thousand dollars upon receipt of the letter and a thousand dollars a day.

Ms. D`Enbeau: And generally speaking, obviously, you`re a well-educated, thoughtful man, you do understand that you`re responsible for knowing what the law is, and your ignorance of the existing laws would not be an excuse for say, speeding or any other kind of infraction? That`s correct?

Mr. Firestein: Sure, ignorance of the law is no excuse. We understand that.

Ms. D`Enbeau: And so in this case you feel like that – well, maybe you can put it in – why do you feel like the fact that somebody apparently went ahead and put walls up that were in violation of the County Code that somehow that`s a situation that isn`t appropriate for a notice of violation?

Mr. Firestein: Well, I mean, this was obviously quite a unique and confused situation when the walls were built. And since I didn`t build them and none of us who are a party to the application built them, I don`t feel that we`re in a position to talk about the state of mind, or the level of knowledge that anybody had at that time other than what has been testified to here previously, in the two previous cases.

Ms. D`Enbeau: Well, maybe you can explain a little further, the fact that you were a purchaser, you said there was no disclosure that there was any violation.

Mr. Firestein: That`s right.

Ms. D`Enbeau: But in your due diligence, you would have somebody check and make sure that the zoning requirements were met for your house and so forth, I would assume.

Mr. Firestein: We didn`t check. Our real estate agents didn`t check. Nobody checked, including

one of our neighbors who was a Planning Director who of all people on the planet ought to have known. Even he didn't know. So to expect us as buyers of the property to have done a level of due diligence to that extent I think is unreasonable.

Ms. D`Enbeau: And that's because there's something different about the wall – the restrictions than other parts of the zoning code?

Mr. Firestein: In my view, there was no practical way for us to have known that we were purchasing a property that had walls that were considered in violation of the ag ordinance.

Ms. D`Enbeau: And that's because—?

Mr. Firestein: Because I'd like to think that we're smart and well informed, but I don't think we're that much smarter and better informed than everybody else in the neighborhood, including the former Planning Director. It's a lot to ask.

Ms. D`Enbeau: You're not saying it's not in the County Code?

Mr. Firestein: It's in the County Code, so we discovered along with everybody else at the time, years later, including the MECO representative.

Ms. D`Enbeau: You did hear the testimony of the MECO representative when he testified in the previous cases?

Mr. Firestein: Yes, I did.

Ms. D`Enbeau: So you understand that the problem arose because the subdivision was designed for four-acre lots and the electrical infrastructure was put in for four-acre lots?

Mr. Firestein: Yes.

Ms. D`Enbeau: You understood that?

Mr. Firestein: Right.

Ms. D`Enbeau: And that the decision to subdivide the lots into two acres doubling or at least doubling it, it turns out probably quadrupling with the condominiumization, but in any case, increasing the load on the electrical system that at that point then, MECO, having learned of that plan to subdivide all of the four-acre lots into two-acre lots said, hey, you don't have the infrastructure you need. You remember that testimony?

Mr. Firestein: Right. Right.

Ms. D`Enbeau: And at that point, the developer and MECO came up with an agreement where essentially, it becomes a private electric system from those walls back to wherever your houses are instead of the meters being on houses as they normally are. You understood that from the testimony?

Mr. Firestein: Right. Right.

Ms. D'Enbeau: Okay. And so that situation as you understood it, arose from the fact that the developer had not informed MECO that these would be two-acre lots, and had not put in the infrastructure for two-acre lots?

Mr. Firestein: Right.

Ms. D'Enbeau: Alright. So reasonable use of the property, would you agree would've been perfectly possible if the lot had been left as a four-acre lot because the meters could've been put on the walls? It wouldn't have been an overload in the infrastructure.

Mr. Firestein: I guess, yes.

Ms. D'Enbeau: That's all the questions that I have. Thank you.

Chairman Endo: Okay. Does the Board have any questions for Mr. Firestein?

Mr. Ray Shimabuku: Mr. Chair, I do. The section that we're talking about previously with that wall coming down from the pedestal, do you know the height of that section? I know earlier you said that from the mountain side of the pedestal it was like 5 feet.

Mr. Firestein: Right. Right. And that's for the curved portion that goes down the driveway. It's about 5 feet, in that neighborhood, until it reaches the light column—the light column, we'll call it—and then it bumps up a little bit.

Mr. Shimabuku: So you know the height of the column?

Mr. Firestein: I don't offhand, but just from my recollection say on the order of maybe 6 and a half feet at the base of the light. It's taller than I am by a little bit.

Mr. Shimabuku: Thank you.

Chairman Endo: Any other questions?

Ms. Bernice Vadla: I have a question. So in accordance with the variance justification, it does say that there's exception due to unique or physical or geographical condition. You understand that?

Mr. Firestein: Yes.

Ms. Vadla: Is the decorative wall – is there a reason physically, as you had mentioned the flooding and extreme safety hazard of that, is there a reason that that wall was put in because of that?

Mr. Firestein: I wish I could tell you. I had hoped that the original builder would've been here to talk about that or to provide some information. I just can't tell you what the design thinking was about that portion of the wall.

Ms. Vadla: That's what I'm curious about, if there's a drainage problem or a safety problem, that

would be the reason to put that up.

Mr. Firestein: I don't know.

Ms. Vadla: Thank you.

Chairman Endo: Any other questions, Members? Hearing none. Thank you. So at this point, you can call your next witness.

Mr. Firestein: I'd like to call Bob Sternthall, please.

Chairman Endo: Do you swear that the testimony you're about to give is the whole truth?

Mr. Bob Sternthall: I do.

Chairman Endo: Thank you. Please have a seat and state your full name for the record.

Mr. Sternthall: My name is Robert Sternthall. And I own with my wife part of our trust the Lots 11-D, 170, 172 Paia Pohaku Place.

Mr. Firestein: Bob, would you please tell the Board what you've seen and experienced in heavy weather on our street?

Mr. Sternthall: Well, it hasn't been lately. I think we've had two inches in the last year, but previously, we've had some very heavy rain days where water rushes down the street. Could we get the photo, the one showing the utility structures or whatever they wish to call them?

Mr. Firestein: Trisha, can you bring up our power point, please?

Mr. Sternthall: On some heavy rain days, the water is rushing down at such a force, it forms a wave over those utility things. The last big one we had, it was like a creek bed out here. There were so many rocks, not huge boulders, but a lot of rocks. I had to sweep them off the driveway. And, I mean, if it was any heavier, it was just gonna flow right over and then down into that little pass there to the right of the pedestal. If those things are low, they're gonna get swamped. And as Gordon said, they could get hit by rocks because those rocks move fast. I mean, you can hear the rocks moving when the rain's heavy. And there's a lot of water that comes down here. I mean, even when somebody's sprinkler breaks up the hill, there's a considerable amount of water that comes down. So, yeah, the water comes down quite forcefully. And if I had known that we were gonna get cited, I'd have taken pictures of it. That was before all this came up.

Mr. Firestein: Bob, would you tell the Board what you do? Your work?

Mr. Sternthall: I'm a teacher at Lahainaluna High School. And we talk about hardship, I mean, this would be a financial hardship. I mean, we've just come off a year of furlough days with almost a 20% pay cut. And we still have six furlough days. So I'm still not working at full pay. The expense of just preparing for this hearing, which I still owe Gordon is considerable enough let alone we have to now spend thousands of dollars to fix everything. It would be a financial hit.

Mr. Firestein: Is there anything else you wanted to add about the situation?

Mr. Sternthall: No, just to reiterate that when we purchased our lot, we were told that the electric goes in. That's it. We didn't have a say as to where – that we had any options. I mean, I know the old a-s-s-u-m-e thing, but nobody told us it was illegal. I mean, how – I'm sorry we didn't check every bit of the code before we moved in. Terrible ignorance on my part and I really apologize for that, but I don't – how many people do? I mean, I could ask anybody in here if you checked the code before you bought your houses, every aspect of every bit of the code. And I'm sure none of you would, if you were in the same situation as we were. So that's pretty much all I have to say.

Mr. Firestein: Did you have the impression when you bought the property that all the applicable permits had been signed off on, that the property had been inspected by the County before you purchased?

Mr. Sternthall: Well, I would think otherwise, why would those electrical meters be there, number one? And number two, when we were able to move into our house, things were signed off. I was looking for my permit—I couldn't find them—just to see if Zoning had signed it, too, but Electrical had signed it, Building had signed it, Health, everything, and yeah, everything was okay. I would assume that if the powers that be said it was okay, it was okay. I'm a layman. I'm not well versed in the legal aspects of the County Code.

Mr. Firestein: Thanks, Bob. I don't have any more questions.

Ms. D`Enbeau: Mr. Sternthall, now, I'm a little unclear from the previous testimony. You're looking at your lots there.

Mr. Sternthall: Yes.

Ms. D`Enbeau: What's the uphill and what's the downhill? Is it from the cul-de-sac that it comes down or—?

Mr. Sternthall: The cul-de-sac's at the bottom of the hill, the circle's at the bottom of the hill. Where it says "Po" up there, that's looking up. That's looking mauka.

Ms. D`Enbeau: So whatever water, when you have a big water event—?

Mr. Sternthall: Yeah, it comes just flying down, right.

Ms. D`Enbeau: And you aware or I should ask you, are you aware of the fact that because this was deemed to be an agricultural subdivision, the normal requirements for the drainage, gutters, and curbs and so forth weren't enforced or weren't in force, I should say? They were not required.

Mr. Sternthall: You mean in terms of what the developer put in?

Ms. D`Enbeau: Yes.

Mr. Sternthall: As far as I know. Again, I mean, a street's a street. Did you check your street before

you moved in to see that it was all complied with? I mean, it's like there has to be a bit of good faith sometimes when you're moving in. But I mean, what's there was there, and how could I change that?

Ms. D'Enbeau: No, actually, my question was, were you aware that it was an ag subdivision?

Mr. Sternthall: Oh, I was totally aware it was an ag subdivision.

Ms. D'Enbeau: And the requirements, because ag is considered a different kind of use than residential that the requirements are somewhat less residential, if you will?

Mr. Sternthall: No, I didn't know that because I really am not well versed, and the difference between residential and nonresidential, but I did know it was an ag subdivision.

Ms. D'Enbeau: And you testified that you owned which lot? I'm sorry, sir.

Mr. Sternthall: 11-D, this one here.

Ms. D'Enbeau: The one that has the zoned number as 13, but it says 11-D-F in the corner?

Mr. Sternthall: Right, right there.

Ms. D'Enbeau: Alright. So the water that comes down the hill, are there other lots above that are affected by the flow of the water coming down the hill as well?

Mr. Sternthall: I don't know. You'd have to ask them. But I know there's been rocks all up and down the street. I mean, I think the last big rain we had, I had to go out and actually physically move rocks so I could back out of the driveway.

Ms. D'Enbeau: So this is a condition in the neighborhood that these roads don't have curbs and gutters? Is that true? It's not just your section?

Mr. Sternthall: There's kind of a – I mean, there's not a high gutter. There's like a little "V."

Ms. D'Enbeau: A little swale?

Mr. Sternthall: Yeah, where the water can run through.

Ms. D'Enbeau: But that's a condition in this entire subdivision. Isn't that correct?

Mr. Sternthall: Right; however, on a big rain, just like in a normal residential street, on a big rain where there's a lot of heavy rain, it's gonna overflow that.

Ms. D'Enbeau: That, being the swale, you mean?

Mr. Sternthall: Yes.

Ms. D'Enbeau: That's all the questions I have. Thank you.

Mr. Sternthall: Thank you.

Chairman Endo: Board Members, do you have any questions for the witness?

Mr. Shimabuku: I have a question. So when you purchased your property, all of these structures were all completed?

Mr. Sternthall: They were all completed, yes. That was almost like a selling point because it was there. And it's, oh, you can just get your temporary electric in, get building real quick because it's already there.

Mr. Shimabuku: Another question is, looking at the pictures and the video that was shown earlier, would you agree that the slope of that road actually goes away from your entrance?

Mr. Sternthall: That's not my entrance. The entrance to my – our home driveway is above those things, but when these start to get waves on them, I mean, I've had rocks on the driveway of our cottage driveway, which is here that has – I've had to remove those rocks.

Mr. Shimabuku: Can you point to the big picture?

Mr. Sternthall: Sorry. I'm sorry.

Mr. Shimabuku; So that's your driveway right there?

Mr. Sternthall: This is the driveway of our cottage. Okay. And the waves that come up here have pushed rocks onto the driveway. And I've had to remove rocks from the driveway, but I don't – yeah, sure, the natural slope is going away, but when there's a lot of water and rocks strewn all over the place, I mean, that can redirect flow of water as well, I would think.

Mr. Shimabuku: So the rocks would go all the way down to the south side of that wall, on the lower side of the wall?

Mr. Sternthall: Yeah, there were rocks – I mean, there was rocks all over the street. My neighbor across, Tom, somebody had promised to come and get a bulldozer and move some of them out. They never did, so he did it all by hand. Next time I'll take pictures.

Chairman Endo: Any other questions from the Board?

Ms. Vadla: Yes, I'd like to ask again. Did you understand the code that we are looking at, right? The variance code, right?

Mr. Sternthall: Yes, I do now.

Ms. Vadla: And you know that – you understand that it's our responsibility to make sure that code is met, correct?

Mr. Sternthall: Correct.

Ms. Vadla: There are exceptions. And so I'm trying to get an idea here. In the variance, there's an exception for unique and unusual physical or geographical condition. And now are you saying because of the water, because of the natural – or the flow or the extreme conditions during storms that you're asking for this variance?

Mr. Sternthall: I think that's part of it. There's a potential for that to happen. I'm not saying it's happened, but there is a potential that–

Ms. Vadla: And that's why those walls are there?

Mr. Sternthall: On heavier rain, it could happen. Oh, no, the actual – you know, well, the electrical part of it is there for the electrical. The other, again, I don't know. I moved in and they were already there. So I have no idea of the reasoning behind putting them in.

Ms. Vadla: Okay. I'm just trying to get the geographical condition as part of the variance. Thank you.

Mr. Sternthall: Yeah, I understand. Yeah, I understand. I'm telling you – yeah, exactly.

Ms. Vadla: Thank you.

Chairman Endo: Please don't speak while the other person is speaking. We have to transcribe everything, and it makes it difficult for the transcriber.

Mr. Sternthall: Okay. Sorry.

Chairman Endo: Any further questions?

Ms. Vadla; No.

Chairman Endo: Thank you.

Mr. Sternthall: Thank you.

Chairman Endo: Mr. Firestein, do you have any more witnesses?

Mr. Firestein: No, I do not.

Chairman Endo: Then we will go to the Planning Department. And you can start with an opening statement, if you like.

Ms. D'Enbeau: Yes, thank you. And I would like to emphasize the standards that are – the Board must be looking at, because it sounds like there are two different things happening in here. There is a feeling on the part of the residents here that there shouldn't be this particular restriction of the four-foot wall in the setback. No structures are allowed in the setback at all, but under the ag

ordinance, there's an exception, and you can put in a four-foot wall. So a setback ordinarily, is an empty space, as I cited in the citations in my memo. It's ordinarily, an empty space in certain dimensions around your house or whatever structures you have. In the ag ordinance, you may put up a four-foot wall. So to argue that these aren't walls doesn't avail you anything, because if they're not walls, they're not permitted at all. The only thing that's permitted is a four-foot high wall.

Whether that's a wise policy or not a wise policy, or whether you think the Council did a good job or a bad job in passing that is not, of course, for the Board of Variances and Appeals. That's why the requirement that someone coming in for a variance have a unique situation. In other words, you're not being asked, and nor do you have the power to say, you know, I don't know what the Council was thinking about, but we don't want this law to make any sense, so we're not gonna apply it. That's not the request. The request is, alright, there's a requirement of a 25-foot setback, but look at my lot. My lot has a huge gully in the back. If I had to do a 25-foot setback, my house isn't gonna fit because there's not enough space. That kind of thing. There's an unique situation where I can't comply with the setback requirements, for example, or any other zoning requirements. And that's why I'm coming to the Board for a variance.

So the unique situation is very important. And as you know, you've already heard two requests and this is the third for a variance. So at some point, it becomes, in my view—in the view of the Department, I should say—a problem because really what's being requested is not individual variances based on individual circumstances, but rather just for our neighborhood, we'd rather you didn't apply this part of the zoning code. And so that's, in terms of your responsibility, of course, your Corp. Counsel will advise you on that, but that's why those criteria are there, and there isn't any ability on the part of the Board to ignore those criteria. You have to make the findings appropriate to each of those criteria.

I think it's clear that you'll hear from the evidence we're putting on that it's perfectly feasible to bring the walls down to the four-foot height, and has been done by a number of residents of the neighborhood, and you'll see pictures of those walls that have been brought down to the four-foot size. So that particular criteria, I don't think, can be met where there's no reasonable use of the property if you have to comply.

And this is all – even if you were to find unique circumstances, you have to find all three. It's an “and,” not an “or.” So unless you find that they can't reasonable use their property if they have to bring the wall down, and you find that it's a unique circumstance not prevalent in the neighborhood, and that it wasn't caused by the applicants, you have to find all three of those. And that's why we believe that the request for a variance should be denied.

I'll go ahead and call our first witness?

Chairman Endo: Yes, please.

Ms. D`Enbeau: And we had listed Sonny Huh as our first witness. He's ill today, and we had asked to be able to use Kai instead because he accompanied Mr. Huh with taking the measurements and describing the wall.

Chairman Endo: Okay. Please proceed. Please raise your right hand. Do you swear or affirm that

the testimony you're about to give is the whole truth?]

Mr. Conklin Kai Wright: Yes.

Chairman Endo: Thank you. Please be seated and state your full name.

Mr. Wright: Conklin Kai Wright.

Ms. D`Enbeau: Thank you very much. Did you participate—? First, I'm sorry, describe your position with the County.

Mr. Wright: I'm a Zoning Inspector.

Ms. D`Enbeau: And did you participate in measuring the walls that are involved in this variance?

Mr. Wright: Yes.

Ms. D`Enbeau: And you've shown me some colored photographs here, and I'm gonna hand them back to you, and ask you if you could identify what they represent.

Mr. Wright: Somebody from the Board was asking earlier about the height. And so I had a picture of the height. And this one shows that it's 7 feet, 7 inches for part of the wall.

Ms. D`Enbeau: And that would be the part of the wall where the meters are on the back of the wall?

Mr. Wright: This would be the part of the wall at the street front of the up side.

Ms. D`Enbeau: So we're looking again at the power point presented by the applicants, and it would be that—

Mr. Wright: The street front of the up side would be over here.

Ms. D`Enbeau: So that wall according to measurements you took would be 7 feet high?

Mr. Wright: Seven-foot, seven inches.

Ms. D`Enbeau: And in terms of the second picture which apparently shows a portion of the decorative wall— I'll show you that picture.

Mr. Wright: It's the same part of the wall. It's just in overall of me actually measuring.

Ms. D`Enbeau: And next to you there, you have the measurement up, and next to you, would that be the decorative wall that curves off to the side right behind your head there?

Mr. Wright: I believe so.

Ms. D`Enbeau: And how tall are you?

Mr. Wright: I'm almost 6 feet. I'm 5'11".

Ms. D`Enbeau: So can you estimate the height of that decorative wall?

Mr. Wright: So it's probably about 6 feet because of where I'm standing in the foreground compared to the height of the wall.

Ms. D`Enbeau: And can we go ahead then and ask if these – we only have the one copy right now, but we can pass it around and make copies for the record, if that's acceptable to the Board.

Chairman Endo: Have you shown them to the applicant?

Ms. D`Enbeau: I will do that.

Chairman Endo: And does the applicant have an objection to these photographs being introduced as evidence?

Mr. Firestein: No.

Chairman Endo: No? Okay. So it'll be admitted.

Ms. D`Enbeau: If we could just pass them around to the Board Members so they'll all have a chance to see?

Chairman Endo: You wanna call them County Exhibits L and M since you ended with K?

Ms. D`Enbeau: That would be fine: L and M. And if I can refer the Members to the exhibit list and the attached exhibits that we submitted? I've shown a copy to the witness. We're starting with Exhibit F. The photo in the lower right-hand corner of Exhibit F– And I apologize. It had been my understanding that you were going to get colored copies of these photos, but apparently, they're black and white so it's very difficult to see. I apologize for that. But in any case, the one in the lower right-hand corner appears to be the same photo as the one that you showed us the large colored copy of. Is that correct– where you're standing holding the tape measure and the decorative wall is behind your head?

Mr. Wright: Yes.

Ms. D`Enbeau: So the pictures that follow in Exhibit F are pictures of these particular walls that we're discussing today. Is that correct? If you turn the page, you'll see one that has the mailbox, 202 Paia Pohaku Place, and so forth?

Mr. Wright: Yes.

Ms. D`Enbeau: And the third page, is that the same thing? Those are again, pictures of the walls in question until we get to Exhibit H. And these again, seem to be – would you agree, these are pictures of the walls similar to the ones that you shown in color?

Mr. Wright: Yes.

Ms. D`Enbeau: And then if you skip on to Exhibit J, which is labeled— Oh, boy, without being in color, these are fairly useless, I would admit, but "15 E. Huapala Place, Launiupoko. Pedestal wall before picture," are you able to discern enough of that picture to tell if you're taking a measurement of a wall at that address before the—?

Mr. Wright: That appears to be before.

Ms. D`Enbeau: So that would be at a different location. These are not the locations that we're talking about?

Mr. Wright: No.

Ms. D`Enbeau: Okay. And then the next page, which fortunately, is a little more visible, again 15 E. Huapala Place, this picture shows – it's labeled "Pedestal wall in compliance." Does that show that same wall once it's been brought down to 4 feet?

Mr. Wright: Yes.

Ms. D`Enbeau: Then going on, we have 605 Kai Hele Ku Street, a before picture, and again, this fortunately, is a little easier to see showing the height at 7 feet?

Mr. Wright: Yes.

Ms. D`Enbeau: And who is the gentleman in the photograph?

Mr. Wright: That would be me.

Ms. D`Enbeau: Alright. So you remember taking these pictures?

Mr. Wright: Yes.

Ms. D`Enbeau: I mean, excuse me, taking these measurements and having your picture taken?

Mr. Wright: Yes.

Ms. D`Enbeau: Okay. So that shows a pedestal wall at a different address, not the one that we are talking about here today, but that was over height. Is that correct?

Mr. Wright: Yes.

Ms. D`Enbeau: And then the next page, you see a picture of the wall brought down to the appropriate height—the one at 605 Kai Hele Ku Street? Is that correct?

Mr. Wright: Yes.

Ms. D`Enbeau: So here's another one showing a wall in compliance with the meters on it. The following page is labeled "This wall is in compliance. This wall is 10 feet 8 inches wide and 4 feet in height." So that's showing a wall with meters on it, but it's 4 feet in height?

Mr. Wright: Yes.

Ms. D`Enbeau: And then the following picture at 701 Kai Hele Ku Street, Exhibit K, is showing a "Pedestal wall outside the setback." At least that's what it's labeled. Are you familiar with that location?

Mr. Wright: Yes, I am.

Ms. D`Enbeau: What does it mean, "Pedestal wall outside the setback?"

Mr. Wright: The pedestal wall in this case was outside of the 25-foot setback.

Ms. D`Enbeau: So it didn't violate any setback zoning--?

Mr. Wright: Correct.

Ms. D`Enbeau: And that was a wall that contained the meter box?

Mr. Wright: Yes.

Ms. D`Enbeau: And then again we have a picture following that that's a property located at Pua Niu Way, and showing, although hard to see, a meter box on the house itself. Are you familiar with that property?

Mr. Wright: Yes, I am.

Ms. D`Enbeau: And there is a meter box on the house itself on that--?

Mr. Wright: Yes, there is.

Ms. D`Enbeau: So there's no problem there with pedestal walls or setbacks?

Mr. Wright: No.

Ms. D`Enbeau: Okay. And then the next to the last picture, Kai Hele Ku Street, the end of it, in this one it's a little easier to see the electrical meter that's on the side of the house. Are you familiar with that property?

Mr. Wright: Yes, I am.

Ms. D`Enbeau: And there is an electrical meter on the side of that house?

Mr. Wright: Yes, there is.

Ms. D`Enbeau: So no problem with compliance in that case?

Mr. Wright: No, there isn't.

Ms. D`Enbeau: And then the last picture is labeled, "Deep and large lots without any pedestal walls in front of the property." Are you able to recognize these properties from these pictures? If you can't, that's alright. They're not very good pictures.

Mr. Wright: Not off the top of my head, no.

Ms. D`Enbeau: Okay. We'll just pass on that last one, then. They've already been admitted into evidence, but you can take the last one for what it's worth since we can't really identify it.

Mr. Wright: Okay.

Ms. D`Enbeau: Okay. Thank you very much. That's all the questions I have.

Mr. Wright: Thank you.

Chairman Endo: Cross examination?

Mr. Firestein: Thank you. Nice to meet you, Mr. Wright, after all these many months of corresponding, and e-mailing, talking on the phone. I do have one question for you about one of the photographs. It would be helpful to have it on the screen, if we could.

Ms. Kapua`ala: Ours?

Mr. Firestein: Either one. It was one of the first ones, one of the first exhibits that shows Kai measuring the height.

Mr. Wright: Oh, it was one of the colored ones right there?

Mr. Firestein: One of the colored ones along the . . . (inaudible) . . . I think. Well, this doesn't show it as well as I'd like, but we can still use it. This shows you measuring the top from ground level to the top at the downhill side.

Mr. Wright: Yes.

Mr. Firestein: Did you by any chance measure the degree of slope?

Mr. Wright: No, we did not.

Mr. Firestein: So the – I'd just like to point out that these pedestals are horizontal at the top. And as we've seen, the ground slopes down along the bottom. So it would be helpful to have some sort of measurement to show – and they need to be horizontal at the top to be able to fit the equipment in behind them. And so I just wanted to make that point.

Another question for you, which is partly for my own – out of my curiosity, can you tell me how the

violation that has brought us to this point, how is that initiated?

Mr. Firestein: For the record, I object to that on relevance grounds.

Chairman Endo: Overruled. Go ahead. You can answer.

Mr. Firestein: Thank you. Do you know how our violation was initiated?

Mr. Wright: I received an RFS, a request for service, to go out and take a look at the property to see if the complaint was valid.

Mr. Firestein: If an Enforcement Officer, such as yourself, is driving through a neighborhood, and sees a wall or a pedestal that is in violation, do you have the power to initiate enforcement? Or can it only come through a request for service?

Mr. Wright: If health and safety is a factor, then we definitely can start something on our own. If there's something that I see, if part of the wall is falling down and it's gonna hurt somebody or something like that, then I most definitely can. Other than that, we usually just don't have the time because we have so many RFSs that we are taking care of.

Mr. Firestein: So am I to understand then that if you had the time, as an Enforcement Officer, you could initiate an enforcement regardless of whether it's just a health and safety issue, if it's just simply a violation of the ordinance?

Mr. Wright: I haven't come across that yet.

Mr. Firestein: Because you've just not had the time?

Mr. Wright: I honestly don't have the time.

Mr. Firestein: Okay. Alright. Thank you. No further--

Chairman Endo: Any questions from the Board?

Mr. Shimabuku: I have a question. The measurement that you had shown on the colored pictures--

Mr. Wright: Yes, sir.

Mr. Shimabuku: I was looking at more of that wall that's up there now. I guess there's a red bush. Do you know the height of that wall that's right there?

Mr. Wright: That part, not off the top of my head, but I did happen to have a secondary picture.

Chairman Endo: For the record, you're pointing to the curved portion of the wall.

Mr. Wright: This one, which is this area down here, and that would be Sonny. He and I are roughly the same height.

Mr. Shimabuku: Yeah, I was kinda looking at that top of the wall.

Mr. Wright: Right in here?

Mr. Shimabuku: Yeah, right in there.

Mr. Wright: Yeah, that, we didn't take a measurement of, no.

Mr. Shimabuku: Okay. Would you say that the area would be close to 4 feet right where that red bush—?

Mr. Wright: That area in there?

Mr. Shimabuku: Yeah, right where that curvature is.

Mr. Wright: Within a foot or two. Right off the top of my head, I can't remember if it's four-foot, five-foot, but it's definitely high enough that we would've noticed that part of it as well. I mean, standing next to this, the rest of it all being in violation.

Mr. Shimabuku: So your citation would be only for that part or for that curvature also?

Mr. Wright: It would be for the entire part of the wall that is over 4 feet.

Mr. Shimabuku: Which obviously, shows on that picture, I guess, 7 feet or so, but now we don't know the height of that curvature wall.

Mr. Wright: Of the curvature wall, no.

Mr. Shimabuku: Would you say it could be less than 4 feet?

Mr. Wright: From recollection, I don't believe it's less than 4 feet.

Mr. Shimabuku: Okay. Thank you.

Chairman Endo: Trisha, you had anything you wanna add?

Ms. Kapua`ala: Yes, in the staff report on page 7, item no. 4, there's a statement there saying the decorative portion of – sorry, that's the south wall. I'm sorry, page 8, no. 5, the south wall, talking about the south wall, the decorative portion of the south wall is located along the southern and side boundary of Parcel 64, and varies from 4 feet to 6 feet, 7.5 inches. The 4 feet would be the lowest portion, so around the section that you're talking about, Ray. And then the 6 feet, 7.5 inches would be the highest portion, meaning the column which is at the end with the light on top. If you look at the screen where my mouse is pointing, the 4 feet would be kinda like right about there—the lowest portion.

Mr. Shimabuku: So in that area would be in compliance, then?

Mr. Wright: If it's 4 feet or less.

Ms. Kapua`ala: If it's 4 feet, yes.

Chairman Endo: Trisha, don't we have the video with Tremaine standing next to the wall like it's way above her head? Or is that only the front section?

Ms. Kapua`ala: That's the southern wall that we're speaking about. Would you like to pause?

Mr. Shimabuku: Is that the same as in no. 13? Is that the red bush?

Ms. Kapua`ala: Yes.

Mr. Shimabuku: Mr. Chair, is that the same picture as this?

Chairman Endo: Yeah, I think that's supposed to be, although it doesn't look so curved in this video, yeah? And in any case, we cannot really tell the height on the low end by looking at this video because it kinda disappears into the middle of the screen, yeah? So it's possible—

Mr. Shimabuku: So try pause again. Go back. Can you go back? So right where Tremaine is standing, if she's 5 feet, that portion would be 6 feet then, about? Right where that end of that horizontal part is, yeah, right there, would that be 6 feet? Because in this picture it looks like much lower, yeah?

Ms. Kapua`ala: I'm not sure if this is appropriate, but I went out there and made my own measurements. This is not something's that in your record, but using the applicant's application, I wrote on my notes that this tip right here is 7 feet, 6.5 inches.

Mr. Shimabuku: Similar to the height that the Inspector had, pretty much.

Ms. Kapua`ala: He measured the other side wall, the north wall. And the corner of that wall, which is the symmetrical – if you flip this, and have the symmetrical, you know, corner tip, innermost corner tip of the north wall, I got the exact same measurement of 7 feet, and I got 7.5 inches.

Mr. Shimabuku: Okay. Thank you.

Chairman Endo: Yeah, it's hard to judge height because the perspective of this photo is from higher up looking down. So things will always be a little bit distorted as you – due to the angle of the camera. So that's one possibility as to why it looks real short in this one, I think.

Ms. Kapua`ala: Yeah, and this is taken today, so the tree has – it might've been higher now versus when this picture was taken or trimmed. It's hard to judge.

Chairman Endo: Okay. Any other questions for the witness? No? Thank you. Do you have another witness?

Ms. D`Enbeau: Yes. Excuse me. I'd like to call the Director, please.

Chairman Endo: Do you swear or affirm that the testimony you're about to give is the whole truth?

Ms. Aoki: I do.

Chairman Endo: Thank you. Please state your name for the record.

Ms. Aoki: My name is Kathleen Ross Aoki.

Ms. D'Enbeau: And Director Aoki, could you state your position with the County, please?

Ms. Aoki: I am the Director of Planning.

Ms. D'Enbeau: And I'm going to show you a document which you submitted to the Board entitled, "The Department of Planning's Recommendation Report to the Board of Variances and Appeals." I'm sorry. I'm not able to see the date immediately, but I'll hand you the document. I'd like to show a copy of it to the applicant. Is there a spare copy of the report? So you have a copy that you're looking at now?

Ms. Aoki: Yes, I do.

Ms. D'Enbeau: And what are the conclusions of law that you're recommending to the Board, and can you explain why, please?

Ms. Aoki: Sure. We are bound, or the BVA, the Board, is bound in order to reach a variance for approval, you have to find that there is no exceptional, unique, or unusual physical or geographical conditions existing on the property which is not generally prevalent in the neighborhood or surrounding area. The second thing is you must find that strict compliance with the applicable provision of this title would not prevent reasonable use of the subject property. And third, the conditions creating the hardship were the result of the previous actions by the applicant and/or owner of the property. So you must find all three. There's no "or." It's "and."

Ms. D'Enbeau: And it is the judgement of the Director then that those – in this particular application that those criteria cannot be met? Did you want to explain further?

Ms. Aoki: Sure. It is our opinion that the criteria have not been met. What's interesting is looking at the photos and the video is that there's no evidence, first of all, to show that the wall could not have been placed outside of the 25-foot setback. Behind those walls is basically flat. So there's nothing preventing the applicant to have either placed the wall outside of the 20-foot setback when the structure was built and/or preventing them from placing that wall outside of the 20-foot setback now.

In addition, there's no evidence to suggest that there's an inability of the applicant to lower the wall to four feet. Although there's been testimony that MECO or other violators have been told by electricians that they would not lower it, in fact, Debbie Arakaki, who we have testimony submitted in your record, in fact, did lower her wall despite this advice of not being able to lower it. And I'd like to add that if there was any kind of problem with that, the County Inspector, Electrical Inspector, would not have been able to sign off on the electrical permit that is needed in order to lower those

meters.

In addition, there's been some debate about who was actually responsible. And there's nothing in the record to reflect that the County indeed told these owners that they had to put the walls in the setback. That was the choice of the owners to do that.

So based on that— And again, I'd like to add that hardship, financial hardship, cannot be used as a reason to grant a variance. We understand that it is expensive. However, that cannot be used as a basis for granting a variance. And I believe to date, we've had at least 12 other pedestal walls lowered. So there have been at least 12 walls that have been lowered.

And again – the other thing I wanted to mention also was, just from the information that I understand, there were two variances that came before the Board recently. There was also a variance that came before the Board for Mr. Whitehead. And in that situation, they testified that part of the reason why they needed a wall over 4 feet—their wall I believe was between 5 and 6 feet—was because of rain and the potential for flooding, and where they were located. However, they could not make the argument that water would go over a six-foot wall, but not – it would not go over a four-foot wall, or however. In other words, they needed the two or one and half extra feet, but they couldn't show that 4 feet wouldn't still block that water. So the Board did find that they had not proven their variance request and the request was denied.

Ms. D`Enbeau: Thank you very much.

Mr. Firestein: Hello.

Ms. Aoki: Hello.

Mr. Firestein: We've heard testimony that this enforcement activity began as a result of one or more complaints entered into the RFS system. Is that right?

Ms. Aoki: I believe the first set of complaints we got, there were 19, I believe. There was 19 given to us at once, and then it escalated from there.

Mr. Firestein: Does that mean that there were 19 complaints filed by one person, or 19 complaints filed by 19 people?

Ms. Aoki: There was 19 complaints filed by one person.

Mr. Firestein: And could you just repeat the second part of what you just said? The rest were—?

Ms. Aoki: Subsequent to that, there were other RFSs that were submitted to the Department. I would not be able to tell you whether or not it was one complaint per person, or if there were multiple complaints from one person.

Mr. Firestein: And you're not able to tell us because that's not permitted under the rules or you don't know?

Ms. Aoki: I just don't know.

Mr. Firestein: You don't know. Okay. Well, I'll ask you the same question that I asked Kai. If a Planning Enforcement Officer sees a violation, can that Planning Enforcement Officer initiate enforcement?

Ms. Aoki: Their titles aren't "Planning." They're Zoning Inspectors. They do have the authority to review and look at. And yes, if they see a violation, they do have that authority to investigate a possible violation without there being a request for service generated. I think what Kai was trying to explain, however, is that we are very short staffed on Inspectors. So they are responding primarily to requests for services that have come into the Department, because they don't have the time to just go out and randomly kind of make inspections on any--

Mr. Firestein: Now, I'm not a hundred percent certain of when our pedestals were built. I believe it was sometime in 2001. Can you estimate for us how many visits to Launiupoko had been made by Zoning Inspectors since 2001?

Ms. Aoki: No, I can't. I can, however, explain the process for when a building or a structure is built, when a home is built. The Zoning Department does not go out and make inspections on new properties. We review the plans for setbacks. So when the building permits come in, Zoning will look and determine that all setbacks are on what's drawn on the plan. So if something isn't drawn on the plan, we're not gonna know about it, so it's not gonna be reviewed. But I have heard testimony that Zoning came out or Planning came out and never said anything. Well, the fact of the matter is that Planning does not go out on new construction unless there's been a complaint about something that is being triggered as a Zoning complaint.

Mr. Firestein: I see. Do you think it's possible that Zoning Inspectors visited Launiupoko on other business for whatever reason since 2001?

Ms. Aoki: Since 2001?

Mr. Firestein: Since 2001. I'm trying to get a sense of -- even if you don't know how many visits Zoning Inspectors have made to Launiupoko, if we can establish a plausible range, a plausible maximum, a plausible minimum. I mean, do you think it's possible that there were no visits since 2001 by Planning Inspectors to Launiupoko until this complaint was filed?

Ms. Aoki: I was just gonna say they have been out there because -- since 2001 because that's what they've had to do. I'd like to reflect for the record that I became Director of Planning in May. So prior to that I was Deputy Director from August of -- or September, I should say, of 2008. So prior to that, I was in the Long Range Division. I would have no idea what Zoning Inspectors -- where they went. So I can't answer that question.

Mr. Firestein: Well, would you be able to stipulate that it's likely that at least one Zoning Inspector--

Chairman Endo: I'm gonna have to stop the line of questioning. It's kind of going off the tangent. It's barely relevant. If you could say what -- your point you're trying to make, that's fine. The question has actually been asked and answered already. She said she can't answer, so it would be better if we just moved on.

Mr. Firestein: Right. Right. Now the point has to go with the Counsel's arguments about due diligence, whether we should have known, or whether the people who built these pedestals should have known, and why now. So that's what I was trying to establish. And with that, I'll wrap it up. Thank you.

Chairman Endo: Okay. Questions from the Board for Director Aoki? Seeing none. Did you want to—?

Ms. D`Enbeau: Just one redirect question.

Chairman Endo: On the same topic?

Ms. D`Enbeau: Yes.

Chairman Endo: Okay.

Ms. D`Enbeau: In terms of you testified, Director Aoki, that the Zoning Department's not involved in new construction, you just rely on what you see on the papers that are submitted, do you know whether or not any building permit applications were made for any of these over six-foot high walls?

Ms. Aoki: We did check the records as part of the request for service review to see whether or not because these walls, many of them exceeded the six-foot height limit for building permits. Because if it's over 6 feet, it would require a building permit. So, yes, part of our review was to see whether or not they had, in fact, gotten building permits. And I believe that none of them that are over 6 feet have building permits.

Ms. D`Enbeau: In other words, am I correct in saying that the zoning requirement that you have a four-foot limit within the setback in the ag zone is separate from the building – Public Works' requirement that if you're going to build a six-foot wall wherever you're gonna build it, structurally, that requires a building permit because of the height. Is that correct?

Ms. Aoki: That's correct.

Ms. D`Enbeau: Thank you.

Chairman Endo: Mr. Firestein, because she asked more questions, if you want to cross-examine based on that last line of questioning, you can ask more questions.

Mr. Firestein: . . . (inaudible) . . .

Chairman Endo: Okay. Thank you. Next witness?

Ms. D`Enbeau: We don't have any further witnesses. Thank you.

Chairman Endo: Okay, so at this point, we can allow the applicant to go first and make closing remarks. And you can preserve a little extra time, if you like, for rebuttal kind of closing. So basically, we'll go – applicant, you can say your final arguments, and then we'll allow the County

to speak, and then you can have another couple minutes. Try to keep it to ten minutes or less.

Mr. Firestein: Short. Before I begin, one of my co-applicants who has not spoken yet asked if she might have an opportunity to make a short statement. I don't know if that fits within your process.

Chairman Endo: You mean you wanna testify as a witness?

Mr. Firestein: Yes, yes, she does.

Chairman Endo: Okay, well, does the County object?

Ms. D'Enbeau: No, the County doesn't object.

Chairman Endo: Okay, normally they could object because we closed your case already, but since they don't object, we'll allow you.

Mr. Firestein: Okay. I'd like to call Cassie Sternthall.

Chairman Endo: Do you swear or affirm that the testimony you're about to give is the whole truth?

Ms. Cassandra Sternthall: I do.

Chairman Endo: Thank you. Please have a seat and state your full name for the record.

Ms. Sternthall: My name is Cassandra Sternthall. The short thing I would like to say is Gordon and Doris, and Bob and myself, are very hardworking people. And we always pay our bills on time. And I think the important thing here is we were not deliberately trying to go against the County, or in some way, get away with something. We came into a situation where this building was already there, and we had no idea it was not up to code. So I think the important thing here is because we didn't have the information and we weren't – there was some lack of communication maybe going on in terms of information coming to us, and we certainly didn't know the proper people to find this information out, we were really trying to do things properly and in order. And we're just honest people. And we just hope you understand that we really feel strongly that we would like our case to be understood from that perspective that we really didn't know. And that's all.

Chairman Endo: Thank you. Cross examination?

Ms. D'Enbeau: No.

Chairman Endo: Okay. Questions from the Board? No? Okay.

Mr. Firestein: Okay, so briefly in summing up, I would like the Board to understand that we are not objecting to the ag ordinance or the four-foot requirement. We are not asking you – we recognize this is not your purview to alter the existing legislation. We're asking you to consider our case on its merits as you have the previous cases. And the fact that others in the neighborhood have complied, I think has no bearing on our situation. As we've said in many of those cases, they did so under considerable duress in violation of MECO's existing standards with MECO's

accommodation as we have acknowledged, and against the professional advice that they've received from licensed electricians. As far as others, the other examples of electrical equipment that has been placed out of the setback on houses, etc., etc., it's simply not relevant here. That wasn't a choice that was offered to us. As we've said many times, we bought the properties, you know, with the pedestals where they are, as they are.

We believe we do meet all three criteria. This is a unique situation for a variety of reasons that we've gone into at some length. It does not alter the character of the neighborhood. Strict compliance would have then and would now prevent reasonable use of the property should we lose power, which seems to us, a reasonable expectation given the unique conditions. And it is a hardship. And it was no fault of any of us. So thank you very much for considering all the evidence in our case. We appreciate it.

Ms. D'Enbeau: And to briefly reiterate what the Director stated, the unique situation that the applicants have been testifying about is apparently, rainfall that might come down in their direction, the decorative wall and the pedestal walls are over the height that's allowed. However, a four-foot wall height is allowed in this setback. And I think it was a very well taken point that there isn't evidence that water coming down would go over a four-foot wall – appears to be that there's some water that might come in, and for that reason, they wanted this decorative wall situation. But again, there's no reason that they can't comply with the four-foot height restriction. So in other words, they can have the wall that they have. They just need to be brought down to the appropriate height.

And the fact that other people have been able to do it is relevant. It's relevant to whether or not it can be done. And if it can be done, which obviously it can, then you do have reasonable use of your property by complying with the height restriction in the setback, in the ag district.

And the fact that they weren't the ones who built the wall, again, you know, I'm sure you're all aware that doesn't excuse a zoning violation of a home that was built by someone else that you have then purchased, and then find out there's some problem with the setback or something else, you still have to comply with the zoning. Thank you very much.

Chairman Endo: Okay. So both sides have finished their cases and presented their final arguments. The Board can now deliberate or start off with a motion and then—

Mr. Rick Tanner: I'll make a motion.

Chairman Endo: Okay.

Mr. Tanner: I would make a motion to grant the variance and allow two electrical pedestals and decorative walls to exceed the four-foot height limit by up to four feet based on the applicants meeting the following three criteria. I believe there is a unique physical condition existing on the subject property which is not generally prevalent in the neighborhood or surrounding area, and the use sought to be authorized by the variance will not alter the essential character of the neighborhood. In addition that there is that strict compliance with the applicable provisions of the title would prevent reasonable use of the subject property due to electrical concerns. And the condition creating a hardship were not the result of the provisions actions by the applicant.

Chairman Endo: Previous action of the applicant.

Mr. Tanner: Correct. Sorry.

Chairman Endo: Is there a second?

Mr. Shimabuku: I second.

Chairman Endo: Okay. It's been moved and seconded to grant the variance application. Discussion?

Mr. Tanner: I would add that I've served on this type of Board in two different states for many years. And I think this is a perfect example of why these Boards exist. I think the actions and the position of the County is deplorable in this case.

Mr. Shimabuku: I'd like to say looking over all this information, I would like to agree with Mr. Tanner. I believe that all the three conditions were met. Therefore, I'm in favor of the motion.

Chairman Endo: Further discussion? Just to clarify, I know that when you stated that the first criteria was met, you didn't actually state the reason, and I'm assuming it's due to – on the basis of the testimony we received that you were probably intending to say that the exceptional, unique circumstances dealt primarily with the fact that there's water flowing into the property based on where the property's located, and also that they were attempting to comply – the original owners appeared to have been attempting to comply with requirements provided by Maui Electric Company and the developer.

Mr. Tanner: I would agree, yes.

Chairman Endo: Okay. Is there any objection to so amending the motion that being the rationale for the meeting of the first criteria? Seeing no objections, we'll consider the motion amended. Any further discussion? Yes, Trisha?

Ms. Kapua`ala: Thank you. Would the Board consider adding the hold harmless agreement and possibly an insurance requirement to indemnify the County in case of a lawsuit or – arising from the granting of the variance?

Mr. Tanner: I would agree to that, to the hold harmless agreement.

Chairman Endo: Okay. So if there's no objection, the motion will be amended to require the standard hold harmless provision which is basically, an indemnity provision whereby the applicant indemnifies the County for any liability that might arise out of our Board granting this variance, but you're not imposing any insurance requirement?

Mr. Tanner: Correct.

Chairman Endo: Okay. So if there's no objection, then that's the motion as amended. Any further discussion? All those in favor of the motion, please say aye. The Chair votes aye.

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

VOTED: To grant the variance with the stated conditions.

**(Assenting: R. Tanner, R. Shimabuku, R. Phillips, B. Vadla, R. Endo.)
(Excused: W. Kamai, S. Castro, K. Tanaka, B. Santiago.)**

Chairman Endo: **The motion passes. The variance is granted with the stated conditions.** Okay. Moving on, we have our August 12, 2010 meeting minutes.

C. APPROVAL OF THE AUGUST 12, 2010 MEETING MINUTES

Mr. Shimabuku: I make a motion to accept those minutes.

Ms. Vadla: Second.

Chairman Endo: Okay, it's been moved and seconded to approve the August 12, 2010 minutes. Discussion? Hearing none, all those of favor, please say aye. The Chair votes aye.

It was moved by Mr. Shimabuku, seconded by Ms. Vadla, then

VOTED: To approve the minutes of August 12, 2010 as presented.

**(Assenting: R. Shimabuku, B. Vadla, R. Tanner, R. Phillips, R. Endo.)
(Excused: W. Kamai, S. Castro, K. Tanaka, B. Santiago.)**

Chairman Endo: **The motion passes.** Moving on to Item D-1, status update on BVA contested cases.

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

Ms. Kapua`ala: For item no. 1, the West Maui Village Appeal, we have asked the parties to appear before you to give you a status. We felt that this is too long that it's been in your case load. So they subsequently met the Parks Department and Maui Land and Pine, and they still haven't been able to try to settle anything. So we wanted them to come before you and tell you what they wanted to do or ask you to do, whether they should withdraw it or proceed with the contested case. Other than that, item no. 3 has actually been scheduled before Judge McConnell for October 15th. And the rest are just in process. We're waiting for hearing officer contracts for items no. 5 and 6.

Chairman Endo: Alright. Thank you.

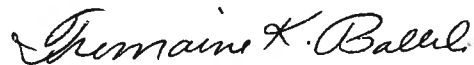
E. NEXT MEETING DATE: September 9, 2010, Thursday

Chairman Endo: Our next meeting is September 9, 2010. If there's no further business of the Board, this meeting is adjourned.

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at 3:55 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
Rachel Ball Phillips
Ray Shimabuku
Bernice Vadla
Rick Tanner

Members Excused:

Kevin Tanaka, Vice-Chairman
William Kamai
Steven Castro, Sr.
Bart Santiago, Jr.

Others:

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