

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
SEPTEMBER 9, 2010**

(Approved: 9/21/2010)

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, 1:39 p.m., Thursday, September 9, 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: Good afternoon. This meeting of the Board of Variances and Appeals will now come to order. It is September 9, 2010, 1:39 p.m., and we have a quorum present of six Members. At this time we will call— Excuse me. Members, if there's no objection, the Chair suggests that we take out of order Item C-2 as it is a status report, which won't take too long, and then we can proceed to our actual appeal hearing. Is there any objection? Hearing no objection from the Board, we will proceed first to hear Item C-2.

C. APPEALS

- 2. MAUI LAND & PINEAPPLE COMPANY, INC. appealing the Director of Parks and Recreations' requirement of \$4,433,610.00 for the development of a park in Napili for the West Maui Village Affordable Housing Development located off of Honoapiilani Highway, Alaeloa, Lahaina, Maui, Hawaii; TMK: (2) 4-3-001:033 (BVAA 20070007)**

- a. Status Report**

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

Ms. Kapua`ala: And here representing the appellant is Ms. Pam English of Maui Land and Pineapple Company. Thank you.

Chairman Endo: Before we begin on this agenda item, I need to disclose that the appellant is my former employer. And therefore, I would not be voting on any matters of substance with regard to this agenda item. I believe that would be proper. But at this time, this is just a status report, and so I'll ask Mr. Giroux if it's okay to proceed or if I should do something else.

Mr. James Giroux: We're just gonna – the only action I guess we're gonna take is to find out what the status of this case is, so we have enough Members here, if there is any action to vote. And if anybody does have a problem with Randy just handling the Chair part, you can appeal, and have him step down. But other than that, I don't think there's going to be any major problems with his staying as Chair to handle this portion of the calendar.

Chairman Endo: Okay. Alright, well, let's proceed then. Good afternoon, Ms. English.

Ms. Pam English: Aloha. Nice to see you all. My name is Pam English with Maui Land and Pineapple Company. And I thought I would just give you a brief overview of what the case is about and where we're at. Okay? Our appeal is a challenge to the Parks Department's decision to apply a parks dedication requirement as defined by the County Council at the time of zoning, as well as apply a second parks dedication requirement at the time of building permit. Maui Land and Pineapple Company believes that the County may not impose more than one parks dedication requirement on a project, and further, that the amount of parks-in-lieu fee for the West Maui Village was fixed at the County Council in 1992.

West Maui Village is a 9.65-acre tract of land in West Maui zoned M-1 light industrial. The zoning was approved by ordinance in January of 1992. One of the conditions of zoning was to provide \$200,000 for the development of a park in Napili. Maui Land and Pineapple Company purchased the land with that zoning in place. Maui Land and Pineapple Company plans to construct multi unit housing on the site, and so we've been processing an application for building permits. Multi unit housing is an allowable use in M-1 light industrial zoning. Maui Land and Pineapple Company has relied on the parks dedication condition of zoning as satisfying the County parks dedication requirement, and doesn't expect to have a second impact fee requirement levied against the project. It's clear the Council resolved the impact fees for parks at the time of zoning.

When Maui Land and Pineapple Company filed for building permits, the Parks Director expressed that the project was to be levied a second parks dedication requirement. This is the basis for our appeal.

Chairman Endo: Ms. English, it's not actually a hearing on the merits at this time. It's just a status update to see where you are with regard to having a hearing with the Hearings Officer, etc. I mean, it's okay to give a brief background.

Ms. English: I'm brief. I'm almost done.

Chairman Endo: Okay.

Ms. English: I just figured I should probably say what it was all about.

Chairman Endo: Okay.

Ms. English: Since it was agendized.

Chairman Endo: Alright.

Ms. English: So when we filed for building permits, the Parks Department expressed that they'd be levying a second parks fee. So that's the basis for our appeal. I just wanted to put that into a little bit of a perspective. The fee that the Parks Department is requesting is 4.4 million dollars, and we only paid 4.5 for the property, so just to give you an idea of why we would want to appeal that type of a thing.

So currently we're working with the Parks Department to try and settle this. We've actually had two meetings in the last three weeks. And we think that we can resolve it directly with the Parks

Department, but we don't wanna withdraw our appeal at this time in case we're not able to come to an agreement. And I really appreciate your patience on the case. It's been a long, involved discussion with the Parks Department and we're getting on it.

Chairman Endo: Okay, before we go any further, I forgot to open it up to public testimony. So we'll continue with any questions on your presentation in a minute, but before we do that, I'd like to open up the public testimony as to this agenda item. I note that we do have a sign-up sheet, and so far one person has signed up. If there's anyone else who wishes to testify to this item, please come forward and sign up. First off we have Elle Cochran. Ms. Cochran, you have three minutes to testify.

Ms. Elle Cochran: Thank you. Yeah, I'm testifying on the Maui Land and Pineapple item. And just for reference, West Maui is in a deficit of 322 acres for parks space. And so for me when I saw this, it kind of alarmed me that there's a company that wants to appeal of building any more park space for our residents in West Maui. Our parks are always just overcrowded as it is. And as I understand, this particular park was supposed to be done. It was one of the conditions of the Kapalua Mauka approval for the low income housing building on the site. And that park was supposed to function for the use of the residents at the, I believe, a 300-unit low income apartment building. And at this point, they're— I've been told that they've said the Napili Park across street about a half mile down the highway is sufficient enough to cover the park that they're needed for this particular project. I personally don't think that is sufficient.

I don't think the residents and the children of the area should have to cross a busy intersection to get to a park when it's been noted that they need to build it in this particular area. So I just wanted to put that out and share my mana`o on it. This intersection is extremely, extremely, busy with the Maui Preparatory High School, Napili Plaza, seven landlocked mauka residents that are using it, . . . Farms, Napilihau Subdivision, people like myself who live further north in the Kapalua/Honolulu/Honokohau area. It is extremely busy. It is the northern portion of the bypass, the connection to the Lahaina Bypass, actually.

So I really hope that this appeal does not go through, and yes, they're held responsible for building a park that was mandated for them to do in regards to the Kapalua Mauka Project. So that's just kind of my mana`o on that. Thank you for letting me testify.

Chairman Endo: Any questions for Ms. Cochran? Thank you.

Ms. Cochran: Thank you.

Chairman Endo: Okay. So we'll ask Ms. English to come back up. Is anyone here from the Parks Department—a representative?

Ms. English: Pat said that he was going to be here. We've just met about three or four days ago, and he said he was gonna be here, but I just tried to call him, and I didn't get—

Chairman Endo: Okay. So I take it that a Hearings Officer was appointed or you're negotiating without the help of a Hearings Officer?

Ms. English: I don't believe that we've had the hearing yet to appoint the Hearings Officer.

Ms. Kapua`ala: Let me confirm that. I believe Judge McConnell was appointed and the contract has been executed.

Chairman Endo: I guess you just haven't been using his services yet, though.

Ms. English: Right, not yet. Sorry. I didn't realize that. It was a while ago, then, they had that hearing.

Chairman Endo: Saving the County money. Okay. At this point, we'll throw the matter out to the Board for any comments or questions. I guess— Bart?

Mr. Bart Santiago: Actually, I had a question on Elle's testimonial. That 330-acre deficit, where is that statistic cited from?

Ms. Cochran: From the General Plan.

Mr. Santiago: General Plan? Okay.

Ms. English: Couple comments?

Chairman Endo: Sure.

Ms. English: As I explained before, this particular piece of property is a straight zoned M-1 piece of property that we purchased after it was zoned. It doesn't have anything to do with any other property or entitlements that Maui Land and Pineapple Company has. I know Elle spoke to a relationship with Kapalua Mauka. There isn't any nexus between the two properties whatsoever. And then the condition of zoning that spoke to parks, specifically spoke to a \$200,000 cash requirement that the owner would pay at the time of the building permit or subdivision. So there wasn't any acreage involved, no park involved, or anything like that. And even to potentially make a little clearer, if you use today's parks dedication requirement for this particular piece of land the way we're developing it, in 158 units of multi family, it would only be 79,000 square feet of park land. So just to put that little bit into perspective. I'll talk to Elle afterwards and see if I can figure out where she thinks some of this is coming from. But I know you just wanted an update and figure out where we're at. And I think we're doing pretty good after I've had a couple meetings with the Parks Department after Trisha brought it up so that I can get back working on this. I think we've gotten an idea of what to do.

Chairman Endo: I think the Board wanted the status update in order to emphasize to the parties that we would want some kind of resolution. We don't want matters hanging in limbo for too long. So in addition to getting input from you, I think that's the message that the Board wants to convey to the parties. So if you don't mind, if you could tell the Parks Department, since they're not here yet, that we would want to see some progress, or else we would want the Hearings Officer to move forward and hear the appeal. Perhaps the matter could be scheduled again for three months from now for another status report to the Board? Okay? So you can work with the Planning Department on a date approximately, three months from now.

Ms. Kapua`ala: January. I'll get in touch with you. We can decide on the first or second meeting in January. Thank you so much.

Ms. English: Okay. Thank you very much. Aloha.

Chairman Endo: Okay, moving on. Oh, wait, I forgot to close public testimony as to that agenda item. Was there anybody else who wanted to speak from the public on that agenda item? Seeing none, we'll close public testimony as to that item. And now that the Parks Department is here, we should ask them— Pat, we just finished your item. Did you want to say anything? Basically, we heard a status report on the matter, and then we asked the parties to come back in three months with another status report.

Mr. Pat Matsui: That sounds good. We're still in discussion trying to get a resolution.

Chairman Endo: Okay. Thank you. For the record, that was Pat Matsui, Parks Department. Thank you. Okay, moving back to the agenda item C-1.

C. APPEALS

- 1. PAUL K. NISHIDA of the NISHIDA FAMILY TRUST appealing the Planning Director's Notice of Violation for maintaining a construction equipment storage and baseyard within the agricultural district for property located at 756 Pulehu Road, Kula, Maui, Hawaii; TMK: (2) 2-3-060:006 (BVAA 20100005)**
 - a. Appellee County of Maui's pre-hearing memorandum; certificate of service**
 - b. Appellee County of Maui's witness list**
 - c. Appellee County of Maui's exhibit list: Exhibits A - W**
 - d. Appellant Paul K. Nishida's witness list**
 - e. Appellant Paul K. Nishida's exhibit list**

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

Chairman Endo: Okay, is there anyone in the public who wishes to testify on this agenda item? If so, please come forward and sign up on the sign-up sheet. Before we take public testimony on this item, I just need to disclose for the record that the Chair possibly, might be a distant relative of the appellant, but I'm not even positive. But it's pretty distant. Just disclosing. I think it's my grandmother's brother's daughter's married into the family or something. It's pretty distant so there's no pecuniary interests or anything else that I would feel would impair my ability to hear the matter. And I'll ask – well, I've preliminarily discussed it with the Deputy Corporation Counsel, and he agreed that he doesn't think there's any need for me to recuse myself. But I just wanted to state that for the record.

Okay, going back to public testimony, I see that we have one person signed up to testify: Graham Devey.

Ms. Mary Blaine Johnston: Excuse me. No, Mr. Devey is going to be called as a witness in the

case.

Chairman Endo: Oh, okay. So he's not speaking as public testimony?

Ms. Johnston: No, because I want his testimony part of the record.

Chairman Endo: Okay. Okay, that's fine. So we'll close the public testimony aspect and proceed with this matter.

Mr. James Takeyesu: For the record, James Takeyesu appearing with Paul K. Nishida, the appellant.

Ms. Johnston: Okay. And Deputy Corporation Counsel Mary Blaine Johnston appearing on behalf of the Director of the Department of Planning.

Chairman Endo: Have both sides had an opportunity to review the opposing parties' exhibits?

Mr. Takeyesu: Yes, we have. For the record, I've also, in response to a subpoena duces tecum, requesting the various documents, I've provided opposing Counsel with photographs, and also have mounted for the benefit of the Board, the various photographs here.

Chairman Endo: Okay. Do the parties have objections to the other side's exhibits?

Ms. Johnston: No specific objection. Some exhibits may or may not be relevant, but other than that. I have received a copy of these photos this morning from Mr. Takeyesu.

Mr. Takeyesu: This morning I've also – I've received additional photographs from the County. It's a supplemental exhibit list. I believe it's photographs dated 2/20/2010 taken by Mr. Sandate. I do have concerns about those photographs because I did receive – made a request for – under RFS – a summary of all their reports, which I received May 21, 2010, from Mr. Jay Arakawa, and the RFS information drafts on all the various inspections and visits that were made by his personnel to the Nishida property, and there is absolutely nothing listed on 2/20/2010 showing that Mr. Sandate was at the property and was in a position to take the photographs. My concern is in a prior hearing that we had before Judge Mossman, Judge Mossman found that Mr. Sandate's testimony was not credible and –

Ms. Johnston: Your honor, I object to these comments here. We have this hearing. It has no relationship to any other hearing and another matter. So I ask that be stricken from the record.

Chairman Endo: Okay, I think I wanted to address – get a preliminary feeling as to whether or not we could just admit all the exhibits into evidence. Seeing as how there are objections, we'll just hold that to the end of the hearing. We'll resolve which are admitted or not.

Ms. Johnston: Maybe I can clarify this. The mistake may be mine for having put 2/20 on the exhibit list. There was a visit, and we'll go through this when Mr. Sandate testifies on 2/16/2010.

Mr. Takeyesu: I'll confirm that that's what it indicates. With that understanding that it was 2/16, I

have no objection.

Chairman Endo: Okay. So that's Exhibit X?

Ms. Johnston: Correct, Supplemental Exhibit X.

Chairman Endo: Okay. How about this—why don't you tell me which exhibits you have no objection to, and we'll just admit those in right now? Or if they're all good now, then we'll put them all in.

Mr. Takeyesu: Basically, that was the only concern I had. With respect to all the other exhibits, I have no problem. In fact, in my exhibit list, I basically incorporated the County's exhibits, so we wouldn't have to duplicate the exhibits.

Chairman Endo: Okay.

Ms. Johnston: Again, no objections to any of the exhibits that have been listed.

Chairman Endo: Okay. So with that change to Exhibit X to change the date to February 16, 2010, we'll consider all the exhibits of both sides admitted into the record. Okay, would both sides like to begin with an opening statement?

Ms. Johnston: Yes. My comments will be very brief. A notice of violation was issued to Mr. Paul Nishida for allowing construction equipment and storage baseyard on the Kula property owned by him and his wife—him and his wife as trustees for a family trust. Such use of the property is not permitted in the agricultural district by the provisions of the Maui County Code. The evidence that we'll be presenting today will show that from mid-2009 until the notice of violation was finally issued in April of 2010 that the Maui Planning Department Zoning Enforcement Division attempted to get the Nishidas to come into compliance with the Maui County Code so that they would not have to be cited for this violation. These efforts were unsuccessful. The Nishidas concede in their notice of appeal that they have, "Various equipment and vehicles that they use in conjunction with farming activities and other tasks around the property." The notice of violation that was issued was not for having equipment used for farming activities, but was for equipment vehicles and activities utilized in the course of a construction, concrete, or trucking business in an area that neither the Maui County Code or Chapter 205, Hawaii Revised Statutes permits in the agricultural district. The County believes the evidence that will be presented clearly and undisputedly supports the notice of violation that was issued, and that the Board should dismiss this appeal.

Mr. Takeyesu: With respect to opening argument, I'm sorry, but I will not be that brief. I did set out our legal arguments and our concerns about the issuance of the notice of violation that's dated April 21, 2010 alleging a violation of Maui County Code, Zoning Ordinance governing the ag – County ag district.

Our basic position is that the State of Hawaii determines permissible uses within the State ag district under Chapter 205. And that with respect to a property like Mr. Nishida's, HRS Section 205-4.5 sets forth the permissible uses. And that section includes vehicle and equipment utilized on activities permitted in the ag district. That particular provision was – and I've included that as one of my exhibits, the actual act that the legislature took to provide for that specifically, as a permitted

use.

I've also included portions of pretty much the latest edition. I guess the opposing Counsel has also included recent versions of 4.5. And if your review them, you'll see that the County ag zoning laws do not track what is permissible under State law even though State law makes it clear that for the ag district, the uses shall be determined by the Land Use Commission and the legislature under 4.5. There are also provisions in the County Zoning Ordinance like agricultural conservation that they down as a permitted use, and you will not see that in State law as a permitted use. I think that was stuck in there to help justify what we call "gentlemen estates," or like . . . (inaudible) . . . Farms where you have big, beautiful homes with no agricultural activities, and it's all grassed in with beautiful lawns, and that would be considered agriculture conservation use.

In my notice of appeal, I also cited a Supreme Court decision rendered in 2005 that dealt with communication towers. And that case is important because it's spelled out that when you have a permitted use in State law, the County cannot require owners to go ahead and obtain special use permits for things that are already permitted. And in the notice of violations that were issued to Mr. Nishida, it seemed like the Zoning people weren't even sure what laws he had allegedly violated. The first letter said, oh, you should've gotten a conditional use permit and a State special permit. Now, a State special permit, you do not have to get a State special permit for a use that is already permitted and authorized as a matter of right. Later on they go ahead, and by the time they get to the notice of violation, they just go ahead and cite the general use provisions under the Zoning Code, and again, that is the very section that is in conflict and inconsistent with controlling State law.

One of the concerns I also had about the NOV was that it set a very short deadline for compliance before the County was gonna take the position that they could impose additional fines above the one thousand initial fine that was stated in the NOV. Again, on page 6 of the notice of appeal, I've cited both Sections 205-12 and 205-13. Those are entitled, Enforcement, and 205-13 is Penalty for Violation.

The first provision makes it clear that the County is mandated to enforce within each County, the use classification adopted by the Land Use Commission, not by the County Council. Again, that's because in this area, the ag district, the state predominates in terms of uses. The next Section 13 says that if any person cited for violation fails to remove such violation within six months of such citation, then you can go ahead and impose these additional fines for what to be considered continuing violation. Again, the County rules and the County ordinances do not recognize or give credence to that six-month grace period that have been granted by the legislature. So again, if there's any questions that, I think, have to be addressed during this proceeding, we have provided you with some of the law, statutory law, that we believe governs in this case.

I don't know. At this time, we request the Deputy Corp. Counsel to advise the Board as to what law controls. Or is that something that you would decide after—at the end of this hearing? Because there are definitely conflicts between controlling State law and the law governing the County Code.

Again, in the exhibits I've presented you with, not only the statute that authorized the storage of farm equipment and vehicles as a permitted use. And what's interesting is this law and this case reflects what the legislature or the situation legislature was attempting to address. In Section 1 of

Act 281, it says:

The legislature finds that urban expansion in and adjacent to agricultural districts have created numerous problems for those engaging in active farming and ranching activities. The legislature notes that one of the common complaints that urban residents living near agricultural areas is an unsightliness of agricultural buildings and agricultural equipment.

And they went on to point out that they're passing this law so that the counties cannot require people engaging in agricultural activities to go to the Council to get special use permits.

In addition to that, I've gone ahead and this is from the committee report. It points out:

Some testimony suggested it may be prudent to let the land use control powers granted to the counties function to resolve the issue, but upon further discussion, your Committee concluded that it would be better to standardize and control the interpretations by modifying the enabling land use control law.

In other words, they want to make clear that the counties cannot use their County level laws to interfere with permitted uses. And it's not only this where I can . . . (inaudible) . . . but if the legislature says a particular use is permitted, the County cannot go ahead and set up additional requirements. Again, this is an important case because at some point, the County's gonna have to get a zoning provision that's consistent with State law. I'm not saying that the County has no authority in this area. The State law is silent as to setbacks, and heights, and things like that. And that's the area that the County can get involved in. They can also go ahead and enact by ordinance if they want to do certain things with the accessory uses. There's another one. It's interesting. Utilizing that authority, the County Council went ahead and authorized bed and breakfasts in the ag district even though legislature explicitly prohibits overnight accommodations for tourists in the ag district. It's another area where the County's gonna have to get its law correct especially, if they're gonna try to enforce that again—people who are trying to farm. Thank you.

Ms. Johnston: Could I just respond? I think a request for any kind of legal ruling is highly improper. There are no facts at all before this Board. He's assuming that we're talking that Mr. Nishida was cited for agricultural activity equipment. The evidence is gonna show that it's not correct. So I think it is highly premature for him to even be asking for that. Let's get the facts on. Then if you wanna have the Corp. Counsel speak to that, that's fine.

Mr. Takeyesu: In response, I indicated whether I didn't know if it was proper to have it done now or later on, so I wasn't saying you have to do it now.

Chairman Endo: I think what we'll do is proceed with the testimony, and then you can make all of your arguments as to which law applies, and all your legal arguments at the end.

Ms. Johnston: Okay. Thank you. Okay, at this time, I'd like to call the first witness. Mr. Takeyesu and I spoke before the hearing as to whether or not we want to exclude other witnesses during the time that testimony is going on. I don't have a problem with witnesses being here. He seemed to indicate that he didn't want any people that were gonna be called to testify to sit in on this part of

the proceeding. Is that correct? You can change your mind, if you want to.

Mr. Giroux: Just for the Board, this is kind of called the . . . (inaudible) . . . of the witness exclusionary rule which in a lot of formal cases, the parties will ask that witnesses not hear the prior testimony of witnesses so there's not an opportunity for people to change stories or accommodate their stories to match other stories. It's a way of accentuating credibility issues. It also allows for consistency in the taking of testimony so that the testimony doesn't get better and better as the case goes on, that type of thing. So this is an administrative hearing. There's nothing in our rules that say that it has to be done. It's something that can be by agreement of the parties, or it could be something that the Board can ask for.

Mr. Takeyesu: That was a good explanation. And in the meantime, we have decided to waive the exclusionary rule.

Ms. Johnston: I think the nature of the testimony is such that it's gonna be very different from every witness. So at this time, the County would like to call Ron Sandate.

Mr. Ronald Sandate: Good afternoon.

Mr. Takeyesu: I was wondering, is it okay for us to sit down while we question?

Chairman Endo: Sure. Sir, will you please raise your right hand? Do you swear or affirm that the testimony you're about to give shall be the whole truth?

Mr. Sandate: Yes, I do.

Chairman Endo: Thank you. Please begin by stating your full name for the record.

Mr. Sandate: My name is Ronald Sandate.

Chairman Endo: Could you spell that?

Mr. Sandate: S-a-n-d-a-t-e.

Chairman Endo: Thank you.

Ms. Johnston: One of the first appearances I made after taking the job with the County in front of the County Council, so used to standing up to argue in court. Riki Hokama was the Chair, and he was just amazed that I stood up every time I addressed the question. So this is my habit is to stand while I'm questioning. Okay, Ron, state your job title with the County of Maui, please.

Mr. Sandate: I'm a Zoning Inspector.

Ms. Johnston: And how long have you been a Zoning Inspector?

Mr. Sandate: About 17 years, I believe.

Ms. Johnston: When did you first have contact about the Nishida property?

Mr. Sandate: It was about the middle part of 2007. I was recently assigned to the Kula area and received a call initially about some painting going on, painting of cement trucks. And I went up to the property, and I spoke with one of the workers, and let them know that they could not be painting commercial equipment there. It was clear that it was not farm equipment. It was cement trucks that were being painted.

Ms. Johnston: Ron, do you recall? Was there a formal complaint form filed for that 2007 call?

Mr. Sandate: Yes. There was a previous request for service that was handled by another Inspector. And I believe the basis of it was the commercial activity, but he was unable to determine that there was any commercial activity at that time.

Ms. Johnston: And who did you talk with about the complaint about this spraying – painting?

Mr. Sandate: I didn't get his name. He was just a guy there working on some of the equipment.

Ms. Johnston: So you didn't talk to Mr. Nishida or Mrs. Nishida?

Mr. Sandate: No, I spoke to Mr. Nishida later on, on another visit.

Ms. Johnston: Alright. And so after the first visit having to do with the painting, what was your recollection of your next contact on this property?

Mr. Sandate: The next contact was sometime later. I got another call about continuous ongoing activity that now they were storing a lot of cement trucks on the property and a lot of construction equipment, as well as people were using it as a staging area. They were coming there and taking equipment from the property, and driving out to other jobs, and things like that. It was at that time I spoke with Mr. Nishida.

Ms. Johnston: And do you recall when that--? You said your earlier contact was in 2007. You recall when this contact was?

Mr. Sandate: I believe that was still sometime in 2007, later, much later. And I asked Mr. Nishida what was going on. And I told him that, "You need to – you can't be operating a baseyard here. You can't be using this property in this manner."

Ms. Johnston: And what was his response, if you can recall?

Mr. Sandate: He asked could we give him some time to clean it up. And I asked, "How much time do you need?" And he said, "Well, what can you give me?" And I said, "Well, you show me some effort and I'll check back in a month."

Ms. Johnston: And did you check back in a month?

Mr. Sandate: Yes, I did and nothing had been done.

Ms. Johnston: After that, when was your next contact, if you can recall?

Mr. Sandate: Well, I was off work for quite some time. And it was probably around the middle of 2008. And I still got calls from people saying, "What's going on?" So I did – I believe I went up there and left a message. And I got a call from Mr. Paul Yokoyama.

Ms. Johnston: Can you identify who is Paul Yokoyama?

Mr. Sandate: He's sitting right here in the audience.

Ms. Johnston: But who is he? What's his relationship to Mr. Nishida?

Mr. Sandate: My understanding is it's his father-in-law. Mr. Nishida is the father-in-law and Yokoyama is a general contractor.

Ms. Johnston: And what do you recall from—? Now we're talking about 2008, correct?

Mr. Sandate: Yes.

Ms. Johnston: And what do you recall your conversation with Mr. Yokoyama?

Mr. Sandate: He called me at home one night and asked me what I wanted him to do and what I expected him to do. And I told him. And he tried to convince me that all these junk cement trucks were part of his ag business. That he was going to use them for mixing soil. And I told him, "You can fool me, but that answer's not gonna satisfy the people that are complaining." He didn't like hearing that. He became very belligerent. My impression was he had probably been drinking. He kind of made some veiled threats and I told him, "You know, you're gonna have to clean up the property. You cannot— I know that you're operating it as a baseyard. You're running your crew out of there for other jobs, and that is not a permitted use."

Ms. Johnston: Did you enter in the reports that are kept by the Department these conversations you've just described about Mr. Yokoyama and the other conversations?

Mr. Sandate: No, I didn't because I was trying to work with Mr. Nishida. I was trying to show him respect, and believing that he would be true to his word, and make a difference. It was quite some time and I was off work for some periods during this time having some surgeries and recuperating. And I didn't actually start until I could see— It was towards the end of 2008, and Mr. Nishida had told me that the Kipahulu job would be finished towards the end of the year and then they would clean it up. And when I saw that time come and go, I told him, "I have no choice. I'm gonna have to start this, document the case, and write you a notice of warning, and go through the regular channels."

Ms. Johnston: When you said the "Kipahulu job," can you explain what that was?

Mr. Sandate: There were – I believe Yokoyama Construction was probably a subcontractor doing some renovations at some of the ranger facilities out there in Kipahulu providing cement, and workers, things like that. And they were meeting up at the Kula job, at the Kula property, and being

delegated from there to Kipahulu and other jobs as well.

Ms. Johnston: And then you testified that you became – when the Kipahulu job was pau that you became concerned that the property wasn't gonna get cleaned up. When was that, approximately?

Mr. Sandate: I believe it was the latter part of 2009 before I finally did write a notice of warning.

Ms. Johnston: Could you look at—? You have the County's exhibits in front of you, is that correct?

Mr. Sandate: Yes.

Ms. Johnston: Could you look at Exhibit A? First of all, what is Exhibit A?

Mr. Sandate: Exhibit A are photographs that I took in June of 2009.

Ms. Johnston: So does that – is that when you started back dealing with the situation?

Mr. Sandate: Well, I'd started a long time ago, but it was when I finally realized that they weren't going to do anything towards compliance.

Ms. Johnston: Are these photographs that you took?

Mr. Sandate: Yes.

Ms. Johnston: Could you explain to the Board what – there's about four photographs, what they represent?

Mr. Sandate: These photographs were taken early in the morning when I had received a call from one of the complainants that, "Hey, they're up here every morning. You need to get up here at the crack of dawn and see what's going on." So I did go up at the crack of dawn. And some of the pictures, they show that it's – the sun has not come up yet, and the workers are arriving. And the first picture with the posted note on it shows that the workers have arrived, and they've piled up all their coolers and their lunches taken from their personal vehicles to transfer into the work trucks and go off to the jobs.

Ms. Johnston: Did you talk to any of these workers?

Mr. Sandate: Yes, I did.

Ms. Johnston: And what was the result of those conversations?

Mr. Sandate: I spoke with a couple of workers. And I asked them, "Hey, what are you guys doing here? Where are you working? What's your name?" And I don't have the names in front of me, but they all gave me their names. They told me some of them live down in Kahului, some lived in Kihei, and they were going to work. Some of them were going to the Kipahulu job, and some of them, I believe – I believe one of them said he was working on another job in Kula. I asked them about the Kipahulu job and they told me what it was. And I asked, "Do you guys have a regular

baseyard that you operate out of?" And they said, "No, this is it." And we talked a little bit about wouldn't it be more convenient if you had a place downtown? And yeah, they said yes. And then I took some more pictures, and I believe that morning I followed one of the trucks as they left with a couple of workers in it. And I went as far as Kanaio, and I realized that, yep, they were going to Kipahulu.

Ms. Johnston: Can you describe in the other pictures in this Exhibit A? Just briefly tell the Board what they're pictures of.

Mr. Sandate: One of these pictures is all of the construction equipment: forklifts, construction materials, old cement trucks, cranes, all very industrial commercial heavy equipment, backhoes, excavators, everything that you need to do heavy construction jobs.

Ms. Johnston: Could you turn to Exhibit K?

Mr. Sandate: Yes.

Ms. Johnston: K is a representative of the farm plan prepared by Mr. Nishida, I believe probably in conjunction with getting a building permit for his home. Can you on that diagram there, can you indicate what area of the lot appears to be that all the equipment that are depicted in those two photographs in Exhibit A, approximately, where they were located?

Mr. Sandate: All of the equipment, it looked more like a junkyard, was where it's depicted as "row crops."

Ms. Johnston: So there were no crops there?

Mr. Sandate: Not that I've observed.

Ms. Johnston: At that time, at that point in time, did you observe agricultural areas, any plantings, or whatever?

Mr. Sandate: No, I saw no ag activity whatsoever. As well as the row crops, there were cement trucks down here on the left of what is called the "future dwelling."

Ms. Johnston: Okay. Just so we're clear, you're talking about this little triangle?

Mr. Sandate: Yes.

Ms. Johnston: That area. So there were cement trucks there, correct?

Mr. Sandate: Yes, as well as a lot of other trucks along the boundary of that same area on Pulehu Road.

Ms. Johnston: Did you take photographs of those also?

Mr. Sandate: Yes, I did.

Ms. Johnston: And this represents not all the photographs that have been taken that have been presented to the Board, because there are quite a large number of photographs. Okay, after – so this occurred in – this was in June of 2009?

Mr. Sandate: Yes.

Ms. Johnston: Okay. If you turn to Exhibit B– And when was the next time that you recall going onto the property to deal with this, going to the property to deal with this?

Mr. Sandate: That was probably early December of 2009.

Ms. Johnston: Okay. And what happened on that visit?

Mr. Sandate: I'm sure I probably just took some photographs, documented that nothing was going on, I mean, no improvements.

Ms. Johnston: Are there any notes that could help refresh your recollection on what went on?

Mr. Sandate: Do you know if – is the request for service notes in this exhibit?

Ms. Johnston: No, they're not in. Would the request for service notes help you?

Mr. Sandate: Yes, they would.

Ms. Johnston: I have a copy. Actually, I let it to Mr. Takeyesu.

Mr. Takeyesu: Yeah, I'm looking at it.

Ms. Johnston: Okay. Let me– Some of you on the Board may know, but the form they use when there have been complaints in process, it's called a "Request for Service," and notes are kept of the various inspections and contacts that the Inspectors think they're important to list. So that's what he's looking at is an RFS, one of the RFSs for this property.

Mr. Sandate: This is actually the time that I did speak with the workers that I saw the workers in the morning, and got their names and the job site locations.

Ms. Johnston: So instead of June, it was in December?

Mr. Sandate: Yes.

Ms. Johnston: Anything else that happened in December when you visited the property?

Mr. Sandate: Yeah, I met Mr. Yokoyama on the property that day. And I asked him if all of these guys were here to work on this house. And he said, yes, they were. Then I told him that the workers have given me conflicting information. Then he admitted that they were going to different jobs. And I asked him if he were the property owner. And he said he was not. And then he asked me to leave the property.

Ms. Johnston: And did you leave the property?

Mr. Sandate: Yes, I did.

Ms. Johnston: As far as the photos in Exhibit B, these were photos that you took at that site visit?

Mr. Sandate: Yes.

Ms. Johnston: Is there any comment you wanna make?

Mr. Sandate: Basically, no, that it just shows that nothing has really changed. Some equipment has been moved around. Additional equipment has been brought onto the property. It shows that there's no indication of any intent to comply with the requests.

Ms. Johnston: Did you issue the first notice of warning subsequent to this visit?

Mr. Sandate: Yes, I did.

Ms. Johnston: And that's Exhibit F, correct?

Mr. Sandate: Yes.

Ms. Johnston: And I note in that you – that the citation's for operating a construction baseyard without first obtaining a conditional permit and a State special use permit.

Mr. Sandate: Yes.

Ms. Johnston: And later in the next warning, that was changed, correct?

Mr. Sandate: Yes.

Ms. Johnston: And we'll get to that in a minute. You can explain why. When was the next time that you went to the property?

Mr. Sandate: I believe it was January 22nd of 2010.

Ms. Johnston: And what happened at that visit?

Mr. Sandate: I verified that the property was still being used as a baseyard. I spoke with Mr. Nishida. Explained to him that if the cement trucks were not removed by Friday, the 29th, a notice of violation would be issued with an initial fine of a thousand dollars and daily fines of the same amount.

Ms. Johnston: And Exhibit C, are those photos you took at the January 22nd visit?

Mr. Sandate: Yes, they are.

Ms. Johnston: And the second photo—

Mr. Takeyesu: What exhibit was that again?

Ms. Johnston: Exhibit C. Again, are these cars and vehicles, this equipment, and so forth in the same area that you previously photographed?

Mr. Sandate: Yeah, this is the area that is on the farm plan defined as “row crops.”

Ms. Johnston: And what is the building in the second photo in this that's depicted in the—?

Mr. Sandate: The building with the – the white building with the blue roof?

Ms. Johnston: Correct.

Mr. Sandate: Is there an ag building, ag shed, ag barn? I don't remember the wording on the permit.

Ms. Johnston: Okay. Did you have an opportunity to look inside of the barn at any point in time?

Mr. Sandate: I have looked inside of the barn, yes.

Ms. Johnston: And what's in the barn? What did you see in the barn?

Mr. Takeyesu: I'm gonna object. If he could specify exactly when he went into the barn and when he obtained permission to go onto the property. Again, under the County Code, you're supposed to be identifying yourself.

Mr. Sandate: I always identify myself.

Ms. Johnston: Do you recall when it was you went into the barn? What visit?

Mr. Sandate: It was probably one of my first visits when I met the guy that was working on the equipment during the painting period.

Ms. Johnston: Okay. So it might've been in 2007?

Mr. Sandate: Yes.

Ms. Johnston: And what was in the barn?

Mr. Sandate: Just a bunch of heavy equipment. I didn't really look that well, but it was just – it went hand-in-hand with all of this equipment: you know, tools to repair the things, and just like any industrial building, any industrial area.

Ms. Johnston: And then in the same Exhibit C, if you look at the third photo, is that the Nishida's house over to the right, the building to the right?

Mr. Sandate: Yes, it is.

Ms. Johnston: And then you can go to the fourth picture. It looks like some stairways or I don't know what you would call them—racks. Some pictures— It's the number – one, two, three, the fifth photo in.

Mr. Sandate: Those – I believe those are like high lifts to – like a portable scaffold to raise the men up to maybe work on fascia or high parts of a building.

Ms. Johnston: And then the next photo, is it – this is a truck that was located on the property?

Mr. Sandate: Yes.

Ms. Johnston: And the following one, the cement truck, that was located on the property?

Mr. Sandate: Yes.

Ms. Johnston: And the last one is, I guess, it's another cement truck?

Mr. Sandate: That's correct.

Ms. Johnston: What did you do after that January visit to the property? Now we're in 2010, correct?

Mr. Sandate: Yes. After the January 22nd meeting – I'm sorry, visit, I was told I believe by one of my supervisors that the Nishidas wanted to meet with the Mayor's representative, and that I was to go to the property and meet with the Nishidas and the representative from the Mayor's Office.

Ms. Johnston: Who was the representative from the Mayor's Office?

Mr. Sandate: Roy Silva.

Ms. Johnston: And that was after the January visit, correct?

Mr. Sandate: Yes, this was on January 28th.

Ms. Johnston: And what happened at that meeting?

Mr. Sandate: I arrived at the property and I waited outside. And then Mr. Silva arrived, and we both entered the property, and went to meet with Mr. Nishida. Mr. Nishida wouldn't come out. I believe his daughter was there and she said I was to get off the property. And Roy said, "Well, he's here for the meeting. This meeting can't take place without him." And she said, "Well, my father's not gonna come out until he leaves the property." So I went outside the property, then Mr. Nishida came out. And they call came, and before we even got to talking, the police came and told me to leave the property. Two police officers came. I explained to them what I was there for, and they said, "Get off the property. He doesn't want you on the property." So I had to leave the property. They– I believe Mr. Yokoyama showed up at the same time. And they all had a talk. And then the police were trying to tell me to leave, and I said, "I'm not gonna leave until this meeting is over. I'm

here on official business, and I don't think that you really have the right to tell me to leave."
Ms. Johnston: Did you wait till the meeting was over?

Mr. Sandate: I waited till the meeting was finished.

Ms. Johnston: Okay. If you could look at Exhibit G?

Mr. Sandate: Yes.

Ms. Johnston: And identify what this document is.

Mr. Sandate: This is a second request to correct the nonconformity. We call it a "notice of warning."
This is the second notice of warning.

Ms. Johnston: And then after this, did you make another visit to the property?

Mr. Sandate: Yes.

Ms. Johnston: When was that?

Mr. Sandate: February 16th.

Ms. Johnston: And the supplement exhibits that – the appellant County of Maui's supplement exhibits, Exhibit X, which is the separate handout, which we've now corrected the date of the photos, were these photographs you took at the February visit to the property?

Mr. Sandate: Exhibit X?

Ms. Johnston: Yes.

Mr. Sandate: Yeah, these are all pictures that I've taken.

Ms. Johnston: And could you again just describe the different photos? Like the first one I see has a green–

Mr. Sandate: Yeah, the first one, it shows a new building has been moved onto the property. It looks like typically what you call a "job shack." And it shows a backhoe, forklift, it looks like an old truck body, a couple of cranes. And the second photo shows more equipment, another view of the job shack, and it looks like some planters that have been set up to block off one of the roadways. The third photo shows from the driveway looking into the property, the barn, if you will, as well as other equipment. And the fourth photo is another view from the road just showing the crane sticking up in the air, and the dump truck, and just more pieces of equipment.

Ms. Johnston: Is that 756? Is that the Nishida's street address?

Mr. Sandate: Yes, it is, yes.

Ms. Johnston: When you were there – well, at any time you were there, did you see any work being done on the wall that runs along the front of the Nishidas' property.

Mr. Sandate: I have seen – I believe a new wall has been constructed. I believe there are walls separating another parcel that have been constructed.

Ms. Johnston: But did you actually see work going on, on the walls?

Mr. Sandate: I believe I have seen some people working on the walls.

Ms. Johnston: And then let's get to the – what has brought us here which is the notice of violation, which is Exhibit E. And was this the notice of violation you issued for this property?

Mr. Sandate: Yes, it is.

Ms. Johnston: And you cite to 19 – Maui County Code 19.30A.050, and the citation for maintaining a construction equipment storage and baseyard where the use is not permitted with the agricultural district, correct?

Mr. Sandate: Yes.

Ms. Johnston: Has – since the issuance of the NOV, have you been back to the property?

Mr. Sandate: I've driven by a couple of times.

Ms. Johnston: And have you noticed any difference or any improvement in the matter of the equipment or vehicles that are there?

Mr. Sandate: No, no, I haven't.

Ms. Johnston: I don't have any further questions.

Chairman Endo: Cross examination?

Mr. Takeyesu: Directing your attention to your photographs, you said you took a series of photographs on January 22nd. And that'll be County Exhibit C. Could you turn to that Exhibit C? If you look at those exhibits, you'll see that – you don't see a wall, right?

Mr. Sandate: Correct.

Mr. Takeyesu: And then you compare the photographs in County Exhibit X. Those photographs were taken February 16, 2010. And at that time, those photographs show a portion of the wall, at least the portion near the driveway?

Mr. Sandate: I think it was always there.

Mr. Takeyesu: Since then, has there been quite a bit of all installed along the – both the mauka and

makai areas adjacent to the main driveway? In other words, there's a driveway. The walls have been constructed going both ways?

Mr. Sandate: I think there's a lot of new walls that have been built.

Mr. Takeyesu: And you've also observed the wall going between the Nishida property and the adjacent property?

Mr. Sandate: Yes.

Mr. Takeyesu: And that would be a lower wall? Do you recall what it looks like?

Mr. Sandate: A low-

Mr. Takeyesu: A shorter wall.

Mr. Sandate: Yeah.

Mr. Takeyesu: I'd like to show you - this is photographs taken produced in response to a subpoena duces tecum. A-13, would that be the driveway?

Mr. Sandate: Yes.

Mr. Takeyesu: And you see a portion of the driveway?

Mr. Sandate: Pulehu Road.

Mr. Takeyesu: Mauka.

Mr. Sandate: Yes.

Mr. Takeyesu: So there's a wall going all the way up?

Mr. Sandate: I believe that's a new wall.

Mr. Takeyesu: And A-7 would be looking down Pulehu Road?

Mr. Sandate: Is there a wall there?

Mr. Takeyesu: Yeah.

Ms. Johnston: Which photograph are you referring to?

Mr. Takeyesu: A-7.

Mr. Sandate: I think that's a new wall.

Mr. Takeyesu: You see the house, and so you're looking that way, and then you're looking up?

Mr. Sandate: Hm-mm.

Mr. Takeyesu: And directing your attention to A-28, that'll be the low wall between Nishida's mauka property and the adjacent property?

Mr. Sandate: Yes.

Mr. Takeyesu: Now, you indicated when you went to – when you were on the property on December 03, 2009, that was the time you were asked to leave the property after you had talked to Mr. Yokoyama? Is that correct?

Mr. Sandate: Yes.

Mr. Takeyesu: Now, the photographs you took on January 22nd, who gave you permission to go onto the property to take those photographs?

Mr. Sandate: I don't believe I went on the property at that time.

Mr. Takeyesu: The first two photographs in the exhibit, they appear to have been taken while off the property? Is that correct?

Mr. Sandate: Yes.

Mr. Takeyesu: But the next two photographs, you were actually on their property when you took those photographs?

Mr. Sandate: It looks like I probably turned into the driveway to turn around.

Mr. Takeyesu: And you were on their property without permission after being asked not to be there?

Mr. Sandate: That's what it looks like.

Mr. Takeyesu: The next photograph, were you again on the property when you took that photograph? It shows the portion of the aluminum shed or barn.

Mr. Sandate: I was in the driveway, pulled in, backed out.

Mr. Takeyesu: So many of these photographs, you were on the property after you have been asked not to be there?

Mr. Sandate: I think I just went into the property, pulled into the driveway, and turned around.

Mr. Takeyesu: And you went – you did that so that you could take photographs while on the property? Isn't it correct?

Mr. Sandate: Yeah, I was told to the monitor the situation.

Mr. Takeyesu: And that included trespassing on private property?

Mr. Sandate: I don't think I was trespassing.

Mr. Takeyesu: But prior to that, you've been asked not to be on the property.

Mr. Sandate: I was asked on that day to leave.

Mr. Takeyesu: Okay. Prior to being a Zoning Inspector, were you also a Building Inspector at one time?

Mr. Sandate: Yes, I was.

Mr. Takeyesu: And how long were you a Building Inspector?

Mr. Sandate: I think about five years. The last couple of years, we were doing building and zoning enforcement.

Mr. Takeyesu: And under the Building Code, as an Inspector, you were required to identify yourself before going on to property? Is that correct?

Mr. Sandate: Yes.

Mr. Takeyesu: And if you – if there's nobody's there, you're supposed to make attempts to locate the owners so you can get permission to go onto private property?

Mr. Sandate: Yes.

Mr. Takeyesu: And is that your normal practice of doing that?

Mr. Sandate: Yes.

Mr. Takeyesu: And that's what the code requires?

Mr. Sandate: I can't recall that it's in the code, but that's just what we do.

Mr. Takeyesu: So you were instructed that's what they wanted you to do? I can assure you that is in the Building Code.

Mr. Sandate: Okay, well, I can't really even recall that were instructed. That's just a matter of habit that you do.

Mr. Takeyesu: But in this instance, you decided to just go onto private property without permission?

Mr. Sandate: Well, I came on, I honked the horn looking for somebody, nobody was there, I turned

around and left, took the pictures and left. I didn't exit my vehicle. I didn't walk around the property.

Mr. Takeyesu: Now, when you approached Mr. Yokoyama's employees on December 3, 2009, did you identify yourself as a County investigator?

Mr. Sandate: Yes.

Mr. Takeyesu: And how did you do that?

Mr. Sandate: I said I asked them who they were and what they were doing. And I said, "Well, you're – because I'm an Inspector with the County."

Mr. Takeyesu: And did you arrive in a County vehicle?

Mr. Sandate: I don't believe I was in a County vehicle that morning.

Mr. Takeyesu: Well, how did you get to the Nishida property?

Mr. Sandate: On my own vehicle.

Mr. Takeyesu: And what kind of vehicle was that?

Mr. Sandate: I believe that time it was a motorcycle.

Mr. Takeyesu: Okay. You arrived on a motorcycle, and you drive onto the property?

Mr. Sandate: No, I parked off the side.

Mr. Takeyesu: And why did you park on the side rather than enter the property?

Mr. Sandate: I wasn't in an official vehicle. I just didn't feel it prudent to ride my motorcycle onto the property.

Mr. Takeyesu: But you had no problem driving onto the property on January 22nd?

Mr. Sandate: On January 22nd, I was in a work vehicle. I was up there to monitor the situation. I pulled in, honked the horn, nobody came out, I left.

Mr. Takeyesu: Now, as a Zoning Enforcement Officer, are you familiar with the State law regarding the ag district?

Mr. Sandate: Somewhat.

Mr. Takeyesu: And are you aware that under the State law, vehicle and equipment storage areas within – on ag lots is a permitted use?

Mr. Sandate: I believe if you were to interpret that, it would mean farm equipment, and farm

vehicles, and personal vehicles.

Mr. Takeyesu: Okay. Now, in the ag district, is it permissible to construct single family dwellings and farm dwellings?

Mr. Sandate: Yes.

Ms. Johnston: I'm gonna object. I think you're asking for legal conclusions. He's not qualified . . . (inaudible) . . . If you're asking what his understanding is, that's one thing, but to ask him what the law says, I think that's a stretch.

Mr. Takeyesu: Okay. As a Zoning Enforcement Officer, is it your understanding that it is permissible to construct buildings, including single family residents and farm dwellings in – on ag lots?

Mr. Sandate: Farm dwellings.

Mr. Takeyesu: Farm dwellings?

Mr. Sandate: Hm-mm.

Mr. Takeyesu: Well, what's the difference between a single family residence and a farm dwelling—your understanding?

Mr. Sandate: The code does not allow for – to the best of my knowledge, the code allows for farm dwellings. It does not list single family dwellings.

Mr. Takeyesu: Okay. It doesn't say single family residence in conjunction with a farm as a farm dwelling?

Mr. Sandate: I couldn't answer that exactly.

Mr. Takeyesu: But you're not only as an Enforcement Officer, you also live on an ag lot.

Mr. Sandate: Yes, I do.

Mr. Takeyesu: And your ag lot is subject to 205-4.5 because it's A classified lands?

Mr. Sandate: I couldn't answer that.

Mr. Takeyesu: It would be in your deed. Do you recall?

Mr. Sandate: I'd have to get my deed.

Mr. Takeyesu: So do you live in a farm dwelling?

Mr. Sandate: Yes, I do.

Mr. Takeyesu: And what kind of farming do you do on your property?

Mr. Sandate: I grow pumpkins. I grow watermelons. I grow papayas. I grow chilies. I have quite a variety.

Mr. Takeyesu: And is half of your property under active cultivation?

Mr. Sandate: At least.

Mr. Takeyesu: And so if you live in an ag district, there are certain restrictions on the use of your property? Is that correct?

Mr. Sandate: Correct.

Mr. Takeyesu: And basically, they're related to agriculture?

Mr. Sandate: Yeah, I mean, I couldn't run a construction baseyard on my property.

Mr. Takeyesu: Right. Or could you say, do a vacation rental? Is that correct?

Mr. Sandate: No. That's correct. I'm sorry.

Mr. Takeyesu: You cannot have a vacation rental on your property?

Mr. Sandate: Not without going through the rules and permits.

Mr. Takeyesu: Now, have you ever been investigated by the Planning Department regarding a suspected vacation rental on your property?

Ms. Johnston: I'm gonna object because that's . . . (inaudible) . . .

Chairman Endo: I'm gonna sustain that objection. Although the rules of evidence – formal rules of evidence govern in an administrative proceeding, the two primary rules that we like to guide ourselves by is prohibitive and irrelevant evidence. So if you wanna give an offer of proof, I'll consider it, and then make a ruling. All rulings by a Chair are made initially, but anyone on the Board can appeal the initial ruling by the Chair.

Ms. Johnston: I would like to also object to the witness . . . (inaudible) . . . In violation of HRS 92-14 which designates a . . . (inaudible) . . . So I would object his even making an offer . . . (inaudible) . . .

Chairman Endo: I'm sorry. I couldn't hear that part.

Ms. Johnston: I'm sorry. HRS 92F-14, significant privacy interest, disclosure of government records shall not – it may be subject to not being disclosed if this was any kind of a formal investigation subject to the provisions of 92F. So before he even gets to make an offer of proof, I'd be happy to talk with him at a break for it to be considered.

Chairman Endo: Okay. Mr. Takeyesu, you wanna respond to that legal argument as to whether or not you can even make an offer of proof, or you wanna just move on?

Mr. Takeyesu: Okay, the offer of proof was that, in fact, Mr. Sandate was the subject of an investigation, I guess, filed against him by Jay Buzianis alleging that he was engaged in illegal short term vacation rental on his property in Spreckelsville.

Ms. Johnston: Again, he is just trying to impune the integrity. I think it has nothing to do with this proceeding. This is the second time he's tried to get this done. I object, vehemently, object to this.

Chairman Endo: Okay.

Mr. Takeyesu: Could I just ask--?

Chairman Endo: Hang on one second. Okay, having heard the offer of proof--

Mr. Takeyesu: There was no offer of proof.

Chairman Endo: No, you just made an offer of proof.

Mr. Takeyesu: No, I did not. I've shown this gentleman certain documents. They're not government records.

Ms. Johnston: I haven't seen them . . . (inaudible) . . .

Mr. Takeyesu: Okay. Wait. One of them is an affidavit that was an exhibit in another enforcement action. There was an affidavit that was signed by Hiro Nakajima, Mr. Sandate's friend, against one of his neighbors alleging that . . . (inaudible) . . . that there was illegal vacation rentals occurring on property. During that hearing, Mr. Nakajima indicated that he did work with Mr. Sandate, and that Mr. Sandate actually was able to get the affidavit notarized, again, because there were common concerns about vacation rentals, which is a zoning violation in the ag district. I've also shown the Chairman, e-mails from Hiro to someone who's interested in renting Mr. Sandate's home as a vacation rental for this week in -- around May of 2009.

Chairman Endo: Okay. The Chair's gonna rule that topic is irrelevant to this matter. And I'm gonna instruct you to move on. You haven't shown that this is any kind of reason why he's doing anything in this particular case. And therefore, whether or not the testifier has committed a violation of the County ordinances is irrelevant to this particular matter.

Mr. Takeyesu: Can I ask him if he would testify as to whether or not he has ever engaged in illegal vacation rentals, or attempted to rent his property, and see how he testifies?

Ms. Johnston: I am going to again object. This hearing is about Mr. Nishida's violation. It has nothing to do with Mr. Sandate. This is character assassination.

Chairman Endo: Okay. Unless you're gonna say that somehow the acts of the witness were a motive, or did something to relate to this particular case, we're gonna -- the Chair would rule that

it's irrelevant in this matter.

Mr. Takeyesu: Just for the record, what I was trying to do was gonna question him about it. I know the investigation that was conducted. Planning came up with the finding that there was no evidence of illegal vacation rental on Mr. Sandate's property. And then I was going to ask him whether he, in fact, had ever engaged in illegal vacation rentals or attempted to rent his property. And if he said, "Of course not, I never would have done that," then that document would've shown that he's lying, but because you kind of interrupted, that train of questioning, I didn't really get a chance to attack his credibility. You understand? If he had denied ever engaging in that type of zoning violation.

Chairman Endo: Okay. So we're gonna stay with our ruling that it's irrelevant, and ask that the Counsel move on for the questioning. Or did you have any further questions for cross examination?

Mr. Takeyesu: Okay, during the course of your investigation, did you contact any people complaining about the use of this property? . . . (inaudible) . . .

Mr. Sandate: Several people contacted me about it.

Mr. Takeyesu: Did you go to their houses?

Mr. Sandate: I have been to some houses.

Mr. Takeyesu: And where do they live? Approximately, where do they live?

Mr. Sandate: Close enough to be affected by what's going on there.

Mr. Takeyesu: Would some of them be living across the gulch from the Nishida property?

Mr. Sandate: Some of them could be.

Mr. Takeyesu: And did you have a chance to look at the Nishidas' property from other residences?

Mr. Sandate: Yes, I have.

Mr. Takeyesu: And in doing so, were you able to see that part of the property had been cultivated with certain – I guess, the avocado trees?

Mr. Sandate: I haven't seen that.

Mr. Takeyesu: You can't see that from across the gulch?

Mr. Sandate: I haven't seen that.

Mr. Takeyesu: Did you look?

Mr. Sandate: I've looked at the property from different angles.

Mr. Takeyesu: And you never saw – did you ever see any banana trees?

Mr. Sandate: I can't say that I have.

Mr. Takeyesu: Or the koa trees?

Mr. Sandate: I wouldn't know what a koa tree looks like.

Mr. Takeyesu: How about the lychee trees?

Mr. Sandate: Couldn't tell you.

Mr. Takeyesu: You did view the Nishida property from across the gulch at any time?

Mr. Sandate: I've viewed it from many places.

Mr. Takeyesu: And you could not see any type of farming activity?

Mr. Sandate: I haven't been made aware of any farming activity.

Mr. Takeyesu: I'm gonna show you again. This is a board with various photographs. Directing your attention to Photograph B-12, and 17, and B-18, do those show homes across the gulch? B-12, B-17, and B-18.

Mr. Sandate: I can't see that there's a gulch there, but I guess that's what you're showing.

Mr. Takeyesu: And from there, can – if you were up there, could see these avocado trees?

Mr. Sandate: What, are those avocado trees like three feet tall?

Mr. Takeyesu: Some of them are. So you've never seen the back of the Nishida property?

Mr. Sandate: No, I haven't. No, I haven't.

Mr. Takeyesu: In your photographs, you took pictures of a cement truck.

Mr. Sandate: Several trucks.

Mr. Takeyesu: You see this truck located on the portion of--?

Mr. Sandate: Yes. Yes, I see it.

Mr. Takeyesu: In doing that, did you go around the vehicle to see – if you could see what was in the truck?

Mr. Sandate: No, I didn't.

Mr. Takeyesu: Photograph B-3, do you see what's in the truck? Does it look like hardened concrete?

Mr. Sandate: I'll go with that.

Mr. Takeyesu: Okay. I hope so. But you never went around to the side to see what was wrong with these trucks?

Mr. Sandate: No.

Mr. Takeyesu: Now, okay, does the Building or the Zoning Code have any specific provision that says an owner of an ag lot cannot have – or may only have vehicles on his property that are registered to the owner of the property?

Mr. Sandate: I don't think you would find that specific provision.

Mr. Takeyesu: Does the Zoning Code permit rock walls to be constructed on the property?

Mr. Sandate: Rock walls are a permitted use.

Mr. Takeyesu: And what about accessory farm buildings, if you have a permit?

Mr. Sandate: Those would be permitted.

Mr. Takeyesu: And farm dwellings are also a permitted use?

Mr. Sandate: Yes.

Mr. Takeyesu: And when people are doing this type of construction, are they permitted to have construction equipment on their property?

Mr. Sandate: Yes, I would think so.

Mr. Takeyesu: Are they required to have ownership of those pieces of equipment for it to be lawfully on the property on an ag lot?

Mr. Sandate: Not to my knowledge.

Mr. Takeyesu: Okay, what is the – is the normal practice, you hire a contractor and the contractor brings in his equipment?

Mr. Sandate: Yes, I would think so.

Mr. Takeyesu: And do you need a special permit to do that?

Mr. Sandate: No, you don't.

Mr. Takeyesu: Is there anything in the County zoning law that either specifically authorizes that type of activity without a special permit?

Mr. Sandate: Is there anything that authorizes that without a permit?

Mr. Takeyesu; Yeah.

Mr. Sandate: Not to my knowledge.

Mr. Takeyesu: But it's still – under your understanding, that wouldn't be illegal for a contractor to have equipment on somebody else's property while they're doing construction work?

Mr. Sandate: I think it would not be within reason.

Mr. Takeyesu: Within reason. Now, in terms of the Kipahulu job that you testified to, is there any County zoning law that says that it is prohibitive for maybe Paul Yokoyama to have his workers arrive on private property, leave their cars, and then carpool, and drive all the way to Kipahulu?

Mr. Sandate: I believe that's how we would define a baseyard where people are gathering and dispersing from there. I'm pretty sure it's not permitted and – it's not listed as a permitted use. And the code says that any uses which are not expressly permitted shall be prohibited.

Mr. Takeyesu: Okay. Now, is there any kind of restrictions relating to what type of vehicles can be on property or cannot be on property?

Mr. Sandate: Well, let's say for example, the storage of all these cement trucks, I would say that any use which is not expressly permitted shall be prohibited.

Mr. Takeyesu: Now, directing your attention to Exhibit B. This is a photograph showing cement trucks.

Mr. Sandate: Yes.

Mr. Takeyesu: This is makai of Mile Post No. 1. Do you see that?

Mr. Sandate: Yes, yes, I do.

Mr. Takeyesu: Okay, now, in some of the communications I guess maybe from Aaron Shinmoto, it was indicated that you had instructed them to remove the trucks that were being used to transport concrete. Is that correct? Have you seen Aaron's letter?

Mr. Sandate: I don't have it in my recollection.

Mr. Takeyesu: That would be County Exhibit N. It says, "As previously instructed by our inspector, Ron Sandate, the trucks used to haul concrete should have been removed from the subject property." That's Exhibit N, letter dated March 18, 2010.

Mr. Sandate: Okay.

Mr. Takeyesu: You see that?

Mr. Sandate: Yes, I do.

Mr. Takeyesu: Now, I previously showed you a photograph of a portion of that truck that is filled with hardened concrete so it can no longer be used to haul concrete. Is that correct? In a business?

Mr. Sandate: Okay.

Mr. Takeyesu: So that would not be a truck that could be used to haul concrete?

Mr. Sandate: So I guess it's a piece of junk?

Mr. Takeyesu: It could be.

Mr. Sandate: So are you saying he's keeping a junkyard?

Mr. Takeyesu: I'm not saying that. Now, in terms of this other photograph, these trucks here, do you know whether they're licensed to operate on the public highway so that they could be used to transport—?

Mr. Sandate: No, I don't know that.

Mr. Takeyesu: So you just took the picture to show where they were located?

Mr. Sandate: Yes.

Mr. Takeyesu: Okay. I have no further questions.

Chairman Endo: Okay. At this point, we'd like to allow the Board to ask questions of the witness.

Ms. Johnston: Mr. Sandate has a medical appointment. It's somewhat urgent, so we can bring him back.

Chairman Endo: Okay, well, were there any questions? No, there were no questions anyway. Thank you. Who's the next witness? Who are you calling next?

Ms. Johnston: I'll be calling Graham Devey.

Chairman Endo: Okay, why don't we take a very short bathroom break just for two minutes, and come right back?

(A recess was then taken at 3:22 p.m. and the meeting reconvened at 3:28 p.m.)

Chairman Endo: How many more witnesses do you have? I think we're gonna – we're not gonna

finish today. And it looks like several Members probably have to leave by 4:00. So I think we'll have to stop right around 4:00 and then continue.

Ms. Johnston: I have two that I think both will be very short. I have Graham Devey who is a neighbor to the Nishida property, and then Roy Silva from the Mayor's Office. And if we can't get Roy on today, I can bring him back later. And then I've got two other short witnesses after that, but if we're gonna have to go on another date, then let's just bring them in.

Chairman Endo: Okay. And then I guess needless to say we won't get to the appellant's witnesses today.

Mr. Takeyesu: In terms of when the next hearing, continued hearing, would be set, is it ever set in the mornings so that you can kinda run--? Like if it's only half day, then we still have half a day, but if we start in the afternoon, sometimes we're just gonna run out of time.

Chairman Endo: Yeah, we generally start at 1:30. Mr. Shinmoto?

Mr. Aaron Shinmoto: I believe your rules allow you to vote to change the meeting date and time. You could do it in the morning, but I don't know if this room is available.

(After due discussion, the Board, by consensus, decided to hold a special meeting to continue the hearing to Tuesday, September 21, 2010, in the Planning Conference Room, starting at 8:30 a.m.)

Ms. Johnston: I think I'll just be able to get the one witness on, Mr. Devey. He's a teacher so he's had to take off from school, and I'm gonna ask Mr. Silva come back on the 21st.

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

Mr. Graham Devey: Yes, I do.

Chairman Endo: Thank you.

Ms. Johnston: Graham, could you state your name and address for the record?

Mr. Devey: I'm Graham Devey. I live at 11 Kolonahe Place in Kula.

Ms. Johnston: And what is your occupation?

Mr. Devey: I'm a retired engineering executive, and I've been on Maui for 16 years. I teach high school science at Baldwin High School.

Ms. Johnston: And you live -- you're neighbors to the Nishidas, correct?

Mr. Devey: That's correct. We're right across the gulch.

Ms. Johnston: Okay, you're right on the other side of the gulch. How long have you lived there?

Mr. Devey: We've lived full-time in our house since 1995.

Ms. Johnston: And what – from your house, what are you able to see of the Nishidas' property?

Mr. Devey: We have kind of the backside view of their property, the gulch-facing view of their property, and it's a big part of our view from our house.

Ms. Johnston: And what do you see on Mr. Nishida's property?

Mr. Devey: It's kind of hard to describe. It's a huge collection of vehicles and equipment most of which kind of sits there constantly, and some of which moves around from time to time.

Ms. Johnston: And how long have you seen these vehicles and so forth?

Mr. Devey: Several years.

Ms. Johnston: Did you bring some pictures with you today that you've taken of the property?

Mr. Devey: Yeah, two sets: one from a little over a month ago, and one from last night.

Ms. Johnston: Do you have them with you?

Mr. Takeyesu: . . . (inaudible) . . .

Ms. Johnston: Yeah . . . (inaudible) . . . Okay. I'm gonna have you describe the pictures. You only have the one set, right?

Mr. Devey: That's correct.

Ms. Johnston: Okay, so if you could just describe the photos, and then I'm just gonna have them – pass them around so the Board Members can look at them.

Mr. Devey: Well, the photos – these are August 4th and then again September 8th, which was yesterday afternoon about 4:00. We just took them from our side balcony of our house, but a lot of the vehicles are kind of staying in the same spots all the time. And when I looked out last night, there were I believe five cement mixer trucks. It's a little hard to tell how many because some of them kinda are parked in front of each other. It's a little hard to see pass them. A large caterpillar or Komatsu; a bulldozer, a huge one; an orange cab; a heavy truck; a yellow farming sized tractor; a dump truck; a heavy truck with a white cab; an oversized front-loader; at least five pickup trucks; a large truck trailer that goes – gets pulled behind a truck; a large backhoe; large yellow beam crane, there's at least one container, some kind of work trailer, and a number of other vehicles that I don't really know what they are, but at any time, there'll be between 20 and 30 vehicles on the property.

Ms. Johnston: And has this been continuous over the last several years?

Mr. Devey: Over the last several years.

Ms. Johnston: Could you look at--? Have you--? Where were you when you took these pictures, physically? Where were you?

Mr. Devey: Side of our house facing the Nishida property looking across the gulch.

Ms. Johnston: Okay, so none of these were taken from the Pulehu Road side of the property?

Mr. Devey: No.

Ms. Johnston: So these are all photographs that are the backside?

Mr. Devey: That's correct. Yeah, this is the typical view from our house.

Ms. Johnston: Did you -- do you have any awareness of any rock wall work that's been done on the property, or is that all in the front?

Mr. Devey: Well, if you go -- we sometimes use Pulehu Road. So if you see Pulehu Road, there's a new rock wall that's going up along the front of the property facing Pulehu. And that's kind of going up in fits and starts. In other words, for a while they'll work on it, and then for a while, it'll sit, and then it'll get worked on again.

Ms. Johnston: Do you know approximately, when they started working on that rock wall?

Mr. Devey: It would be hard to say, maybe a month or two.

Ms. Johnston: Okay, so it's just been recently that they started?

Mr. Devey: That wall is pretty new.

Ms. Johnston: Did you have occasion to be on Pulehu or to see prior to the last two months whether or not a rock wall was going up?

Mr. Devey: I'm not sure if that one is taking that long or not. It's going up pretty slow, yeah.

Ms. Johnston: Could you look on the exhibit board here, Photos A-3, 4, and 5? Have you seen work like this going on?

Mr. Devey: Typically, whenever there's any work going on, on the property, it's usually on a Sunday. It seems like during the week, they don't have time to work on their property. So I've noticed a couple Sundays that big backhoe thing out there moving some rock around to help out with the rock wall.

Ms. Johnston: And that's more recently?

Mr. Devey: That's recently, yeah, real recently, less -- maybe two weeks.

Ms. Johnston: During the weekday, do you notice any kind of activity going on, on this property?

Or are you there during the week?

Mr. Devey: I'm not there during the daytime. I usually get home around 4:00 in the afternoon. And you'll see some folks walking around from time to time.

Ms. Johnston: Do you remember any particular activities they're engaging in, or is it just that they're walking around?

Mr. Devey: Hard to tell, hard to tell. Sometimes they'll be kind of meeting out by the back of the garage. Sometimes it looks like they might be in the garage, but I don't sit there with binoculars staring at them, so—

Ms. Johnston: Can you see any kind of agricultural activity going on from your house on the property?

Mr. Devey: Well, that's kind of the funny thing. There seemed to be. You don't see it much from our side, but if you're going on the Pulehu side, you can see a couple little kind of roped off areas where it looks like they're growing a vegetable garden. I would say all together, maybe the size of this room. It's hard to say. To say that that's agricultural work going on at their place is kind of stretching things a very long way. We do have farms in our area. This is not a farm.

Ms. Johnston: I'm gonna show you – I guess this is Exhibit Board B, right?

Mr. Takeyesu: Yeah.

Ms. Johnston: Have you seen—? This depicts some kinds of agricultural growth. I think this is like some trees and so forth. Can you see any of this from your property?

Mr. Devey: It's hard to see something like that. There are so many vehicles parked and kind of piles of construction materials and so on. Mostly blocks the view with those other kinds of things. Hard to see much that would qualify as a farm.

Ms. Johnston: So you can't tell from where you're sitting like how tall any of these trees are and so forth?

Mr. Devey: No, not really.

Ms. Johnston: Have you – has any of the activity on the property caused any problems for you on your property?

Mr. Devey: There's a huge visual property when anyone comes to our house and walks around the front of the house to take a look out at the ocean or whatever. And they get to that side of the building, they physically, recoil when they see what's going on over there. "Oh, my God, that's ugly. What's going on over there?" And in fact, we have some Realtors looking at our house. We may put it on the market. And they basically said, "You know, you have a six-figure view, but what's going on over there? That's gonna be a problem if you do wanna sell your house." That's not our primary motivation here, but it just goes to the impact of what it looks like over there. It doesn't look

like a farm.

Ms. Johnston: Have you ever talked to the Nishidas about the problem?

Mr. Devey: No.

Chairman Endo: Are you trying to add those photographs into the record?

Ms. Johnston: Yeah, I would like to since I didn't have them before.

Chairman Endo: Is there any objection from—?

Mr. Takeyesu: No objection.

Chairman Endo: Okay, so if you could mark them later?

Ms. Johnston: Yeah, I will. He has them marked.

Chairman Endo: Okay. So we'll admit those in, though.

Ms. Johnston: Thank you. I just wanna ask you a couple of questions about the photograph that's marked September 8th, no. 10. Can you identify approximately, where that is on this property in relationship to the house or the barn?

Mr. Devey: It's near both the house and the barn, probably kind of between them along an access road there.

Ms. Johnston: Let me hand you Exhibit K, which is a farm plan we've talked about before. Maybe can you pinpoint about where? This would be Pulehu Road.

Mr. Devey: Looking from our direction here, probably along here.

Ms. Johnston: Okay, by along here, you're saying – you're pointing to the road that says "barn."

Mr. Devey: Right.

Ms. Johnston: So that would be between the barn and what they've said is "row crops?"

Mr. Devey: Okay.

Ms. Johnston: Is that what where that—

Mr. Devey: That's the location, yeah.

Ms. Johnston: Of that picture?

Mr. Devey: Yeah.

Ms. Johnston: I don't have any further questions.

Chairman Endo: Cross examination?

Mr. Takeyesu: I'm going to show you these photographs here. When we took these pictures, we took it with a view like towards the ocean, and then across the gulch going up looking more mauka. Is one of these your home? Can you see your house?

Mr. Devey: This is our house here.

Mr. Takeyesu: That's on B-17. I'm just gonna mark it with an orange color. And from your home, could you see these avocados, avocado plants?

Mr. Devey: Can I check my pictures?

Mr. Takeyesu: Yeah.

Mr. Devey: I can't tell where you took those pictures from.

Mr. Takeyesu: Okay. In your photograph, August 4, no. 5, do you see some plants that seem to be somewhat in a row?

Mr. Devey: Not really. Mostly kind of random trees and bushes.

Mr. Takeyesu: Okay. So that would be the upper portion of the – where you see the very low, maybe a two-foot wall? That's on the upper part of the property? It's a very low wall on A-28. That's the boundary with another parcel. In the photographs, you can't – do you see the banana trees? When you think about being on here, your deck, and looking across the gulch, do you recall seeing these banana trees?

Mr. Devey: Honestly, no. It's not the banana trees you notice.

Mr. Takeyesu: You see the A-24? This is the upper portion of the property. The plants here are smaller and this is by the rock wall. This area here. So I guess that corresponds to this area.

Mr. Devey: Well, what's your question?

Mr. Takeyesu: Well, you said that you don't see any agricultural activity.

Mr. Devey: Right.

Mr. Takeyesu: In this A-5, do you see these small—I don't know what they call them—treelings?

Mr. Devey: Saplings?

Mr. Takeyesu: Saplings. Thank you.

Mr. Devey: There are some small trees growing along the boundary.

Mr. Takeyesu: And does it run all the way along the property?

Mr. Devey: I think there's probably 15 or 20 trees. I'm not sure.

Mr. Takeyesu: In this area?

Mr. Devey: Right, right along the boundary line.

Mr. Takeyesu: Now, directing your attention to this photograph B-18, so is this a portion of your house also?

Mr. Devey: Here.

Mr. Takeyesu: Here? I'll also mark that . . . (inaudible) . . .

Chairman Endo: Excuse me. We need to record everything, so please, whenever anyone speaks, please use a mic. Sorry.

Mr. Takeyesu: Okay. We just marked two of the pictures B-17 and B-18 with a pink marker showing your house. Okay now, how long have you owned your property?

Mr. Devey: We've owned our house for 16 years. Actually, we've owned it for four years prior to that, so 20 all together.

Mr. Takeyesu: And what do you do for a living?

Mr. Devey: I'm a science teacher, retired engineering executive.

Mr. Takeyesu: And where do you teach?

Mr. Devey: Baldwin High School here on Maui.

Mr. Takeyesu: And what do you teach?

Mr. Devey: I teach physical science, ninth grade science.

Mr. Takeyesu: And who else is living in your house?

Mr. Devey: My wife.

Mr. Takeyesu: And what does she do?

Mr. Devey: She's a housewife, homemaker.

Mr. Takeyesu: And anybody else?

Mr. Devey: No, our son is off in California. He graduated college.

Mr. Takeyesu: And is he living and working on the Mainland?

Mr. Devey: Correct.

Mr. Takeyesu: And what type of farming activity do you do on your property?

Mr. Devey: Sir?

Mr. Takeyesu: What kind of farming activity do you do on your property?

Mr. Devey: Am I allowed to ask a question?

Mr. Takeyesu: If you don't understand the question.

Mr. Devey: Well, my question is, my farming is not what we're here to talk about.

Mr. Takeyesu: That's correct, but we wanted to know what kind of farming you would do.

Mr. Devey: I'm not a farmer.

Mr. Takeyesu: Have you had occasion to have Mr. Sandate on your property?

Mr. Devey: As far as I know, he's never been on our property, as far as I know.

Mr. Takeyesu: He hasn't used your deck as a way to look . . . (inaudible) . . . Nishida?

Mr. Devey: Oh, no.

Mr. Takeyesu: So basically in terms of the problem, it's been a more visual problem rather than sound, or dust, or anything else?

Mr. Devey: Oh, my goodness. You sure you wanna talk about that?

Mr. Takeyesu: Sure.

Mr. Devey: Okay. We have an 800 square foot, tiled deck around our house. And since the construction or whatever work is going on over there began, it gets covered with dust within two, three, four days. A push broom won't take it off. We also have a swimming pool deck in the backyard because there's a lap swimming pool out there. You can't walk around the pool barefoot. You have to wear slippers in the backyard. We had our house completely repainted here about three and a half years ago and a new cedar roof, and it's coated with dust all the time. It wasn't like that three, four years ago. We could go three weeks a month without cleaning the pool deck. Now, in three days, you have to wear shoes or slippers out there. It's a mess. And it's a dramatic change from before all this. I'm not sure what's going on over there, but whatever is going on, that's the huge change. The noise is isolated to the times they're actually doing work over there,

which is usually, as I say, on a Sunday or a holiday. Then it's pretty noisy all day long.

Mr. Takeyesu: And that would be from the machines?

Mr. Devey: Yeah, yeah.

Mr. Takeyesu: Okay. So the dust problem has been very recent. It was not like something that was existing between 2005 through 2009. It's more in the last, what, year?

Mr. Devey: Well, it's been continuous since at least 2006 or '07.

Mr. Takeyesu: But has it gotten worse recently, as you've described?

Mr. Devey: Hard to say worse. You know, we don't actually measure, but it seems to be as bad as ever right now. I don't know if it's because there's so much loose surface over there that hasn't been taken care of. I don't know. We do notice also, if I may add, a couple times last summer when there are windstorms, we noticed piles of debris lifting off from the ground and coming back down again. We were kinda concerned some of it was going to take off in our direction.

Mr. Takeyesu: Now, you said you have occasion to drive down Pulehu Road?

Mr. Devey: It's infrequent because we usually use the road in front of our house.

Mr. Takeyesu: Have you had occasion to go down the road and notice that there's – for the last – for quite some time now, they've been mauka of the Nishida property, there are some other contractors building a home?

Mr. Francis Cerizo: Mr. Takeyesu, can you use the microphone, please?

Mr. Takeyesu: Direct your attention to the photographs numbered, I guess, A-21 through A-30. These photographs indicate construction going on in an area mauka of the Nishida property.

Mr. Devey: That's correct. There is a house going in there. It's not as visible from our property, but we can see it through the trees.

Mr. Takeyesu: And you see that – it looks like the whole area had been graded and they're doing some construction of a home.

Mr. Devey: I think so.

Mr. Takeyesu: This is basically the first time you've seen this?

Mr. Devey: What do you mean?

Mr. Takeyesu: That they're constructing a home?

Mr. Devey: Oh, no, you can tell there's a home being constructed there.

Mr. Takeyesu: I have no further questions.

Chairman Endo: Are there any questions from the Board for this witness?

Mr. Ray Shimabuku: Mr. Chairman, I have a question. You consider irrigation with water a farming procedure?

Mr. Devey: Describe what you mean by irrigation? Do you mean hand-spraying or--?

Mr. Shimabuku: With whatever it may be.

Mr. Devey: Yeah, there's drip lines, there's spray heads, and things like that.

Mr. Shimabuku: So you would consider irrigation a part of farming?

Mr. Devey: Should be part of farming.

Mr. Shimabuku: But then you mentioned that you didn't see any farming activity?

Mr. Devey: We did see -- last night, we saw a fellow standing in what looks like a little vegetable garden with a hose in his hand.

Mr. Shimabuku: I just wondering about your picture that you had mentioned that you didn't see any farming activity, but yet, you have a picture indicating--

Mr. Devey: We did see one guy there last night with a hose in his hand.

Mr. Shimabuku: Oh, that picture was last night?

Mr. Devey: Yeah.

Mr. Shimabuku: Okay. No questions.

Chairman Endo: Any further questions from the Members?

Mr. Takeyesu: I have one question.

Chairman Endo: Okay.

Mr. Takeyesu: In the photographs, you can see all of these green plants, and these represent that these are avocado trees and banana trees. Have you seen people hand-watering these plants?

Mr. Devey: You know, I think part of the reason I haven't noticed that plot is if you look where our house is, that land slopes away from us, so that plot is kind of hidden from view from us by the way the land slopes away from us. If somebody were to work out there, I probably wouldn't be able to see them working.

Mr. Takeyesu: Okay. But you can tell that because of the dryness of the area, if somebody were not somehow watering them on a very regular basis, these plants would probably not look like that, is that correct? Since you're familiar with the area.

Mr. Devey: It's a very dry area, and plants like that do need to be irrigated, yes.

Chairman Endo: Okay, our time is up. So this is taking longer than our typical NOV hearing. And I'm gonna let you folks know that we'll probably do is be a little stricter on the questions and answers to keep us on track to finish up on a timely manner. In addition, I think it would behoove you folks to meet and attempt to settle the matter, if you have not already tried to do so, before the next meeting in order to save everyone time and expense. Otherwise, we're gonna stand— Oh, you wanna say anything?

Ms. Johnston: I have one issue. Subpoena duces tecum were served on Mr. and Mrs. Nishida and Mr. and Mrs. Yokoyama. And I've given them their witness fee checks. They're gonna need to come back. We have to come back because we didn't get through under the same subpoena.

Mr. Takeyesu: Okay, for the record, we did receive the subpoena duces tecum for requesting production of various documents. And as indicated by Ms. Johnston, under the BVA rules, or the newer rules, those types of requests, production of documents, are not – are no longer permitted, but we did go ahead and respond with the photographs, but we will not be responding with respect to the other type of documents requested by Ms. Johnston in accordance with the newer rules of the BVA.

Ms. Johnston: Excuse me, the rules say no discovery. These people were subpoenaed to testify and to bring documents with them. It was not a discovery request. It was a subpoena to testify and bring documents.

Chairman Endo: Okay, based on our quick reading of the rules, we don't see any provision for subpoena duces tecum, but we do see a prohibition on a request for production of documents. So at this time, we're gonna rule for the appellant with regard to not producing those documents. Of course, you can always re-file a motion with substantiation as to your legal position.

Ms. Johnston: What about as far as the subpoena to appear to testify?

Chairman Endo: It definitely has subpoenas to testify.

Ms. Johnston: Okay, so what you're saying is they'll still be under subpoena to testify, but not required to bring the documents? Is that what you're saying?

Chairman Endo: As best as we can tell under quick review of the rules.

Ms. Johnston: Okay, but I just want them to understand that they're gonna need to come back on the 21st to testify, to be available to testify.

Chairman Endo: Okay. Is that understood?

Mr. Takeyesu: That's understood.

Chairman Endo: Okay.

Mr. Takeyesu: We thank you for that, that early date.

Chairman Endo: Sure. Okay. We're behind schedule so we're gonna table all the rest of the matters and take it up at the next meeting. If there's no further business, this meeting is adjourned.

(The meeting then ended at 4:10 p.m.)

Respectfully submitted by,



TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairman
William Kamai
Steven Castro, Sr.
Rachel Ball Phillips
Ray Shimabuku
Bart Santiago, Jr.

Members Excused:

Kevin Tanaka, Vice-Chairman
Bernice Vadla
Rick Tanner

Others:

Aaron Shinmoto, Planning Program Administrator, 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