

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
NOVEMBER 23, 2011**

**(Approved: 12/27/2011)**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Kevin Tanaka at approximately, 1:34 p.m., Wednesday, November 23, 2011, 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 Kevin Tanaka: Good afternoon. Meeting of the Board of Variances and Appeals will now come to order. Let the record show it is now 1:34 and we have a quorum of five to start. The first item on the agenda, Trisha?

**B. PUBLIC HEARING**

1. **CARL YOUNG of MOBI PCS representing PETER MEAGER, JOAN MEAGER, and DPP FAMILY LIMITED PARTNERSHIP requesting variances to allow the installation of a telecommunication facility, which includes six (6) directional panel, roof-mounted antennas with its associated radio equipment, to be located both on top and behind the Makawao Business Center, whereas Maui County Code, §19.15.030 requires telecommunication equipment to be set back at least twenty-five (25) feet from any property line and that such telecommunication equipment shall be screened from public view by appropriate means, including, but not limited to, landscape planting, for property located at 1043 Makawao Avenue, Makawao, Maui, Hawaii; TMK: (2) 2-4-024:002, (BVAV 20110017).**

Ms. Trisha Kapua`ala read the agenda item into the record, and gave a brief presentation showing the subject parcel and surrounding area.

Ms. Kapua`ala: So I can pull up any of this imagery if you want to see the area a little better. And other than that, Mr. Carl Young is here representing the applicants. Thank you.

Chairman Tanaka: Thank you, Trish.

Mr. Carl Young: Good afternoon. Thank you for allowing me to come here and make this presentation. So I'm here on behalf of MOBI PCS. And a brief commercial—they do have a very affordable plan. And they're trying to bring this community – there are a bunch of phones that are currently being used by DHHL. And they do have a special plan for them, the Department of Hawaiian Home Lands. Po`okela is the plan. And actually they offer very competitive plans, which is like ten dollars for all you can eat, basically, of the pay plan. They also have Android for twenty-five dollars, and they have very competitive plans for local consumers.

This is the basic area that is currently being covered. And so this is the current coverage that they have of the area right now. There's a site at Pa'ia at the mill. And this distance from here to the proposed location is approximately, five miles. There's one also up in the mountains here at Hosmer Grove. And it's approximately, seven miles away. So there is an adequate coverage in this area. Usually coverage is approximately, one to two mile radiuses is what you would prefer. So that's the location for the preferred site. This is what we believe the coverage would be like if you were to – at this site, because it is a very short site. This is the Makawao Town. It's a little closer area where the building would be located, and the area it proposes to serve. A little closer, this is the building here. And getting in tighter, closer. As you get close, you can see there's the park here. This is the main town where you have Baldwin Avenue, and it's just right over here in this country town business district here. It's small. These two parcels are country town business. So as we get closer, here's the parcel we're looking at.

And before advancing on to the – the statute, one thing that we're looking at, we're looking at the ordinance. It does say that – the statute basically, we believe is stating that telecommunication facilities are what were desired for this area. That they were planning on having this area accommodate telecommunication facilities. And upon conformance with the intent of this article, and subject to the terms and conditions as may be warranted and required, then these facilities could be put in. And I understand how statutes are written. They try to cover a broad intent. And there is a 25-foot setback requirement, which is a very large requirement. Typically, it's about ten. I think for this area, it's ten. So we believe that because of the way the telecommunications' act is written, the intent of this was meant to – really for visual concerns, and not really for health and safety concerns, as some people might suggest. So the parcel here on this side is actually, business country town zoned as well. The parcel in the back is interim. And the other parcel here is interim as well.

As you look closer at the parcel, we're asking for a 15-foot setback here for the equipment as opposed to 25, which would put it all the way back here. Thirteen feet is what we're asking for a variance over here. I think it's 19. It's at 19 feet is what we would be instead of– So we're asking for a six-foot – basically, a six-foot variance. As you go to the front of the property– Here's the parcel down here. As you go to the front, it's set back 19 feet, so we're asking for six – a six-foot variance. And these are the antennas on the side. We're asking for 13 and 12. So this is what the side view would look like as you're coming up Makawao Avenue. And so this is the main parcel here. This would be the side view. The equipment would be– On the side of the building, the grade does go down. The equipment would be over here behind some existing foliage. And it shows the setback up about 19 feet. If we were to put the antennas back 25 feet, it would be impractical because we would have to go basically, to this line, which would put the antennas right behind this facade. Same thing would happen on the opposite end–we'd have to put it behind the facade, which would not make it practical. It wouldn't be able to work, and also look worse, probably. So same thing–this is basically, the same. Another view from the back side here. And this is the aerial view again.

This is the zoning of the parcel–country town business. Interim is on the mauka side. The back is interim as well. And this parcel here is country town business. So as you drive up, this is the parcel that we just looked at. So over here is an arrow showing the direction of how this photo was taken and the direction. This is the proposed parcel. And this is what we're proposing for antennas on this end. This parcel here is also country town business. As you get up close to the front, again,

this is the angle in which the photo was taken. If you look straight on, we tried to put the antennas on the facades themselves, and paint them to match, and to make it more – make it look closer to part of the structure. This is another facade that doesn't have anything on it. And this is a facade towards the back of the property. Actually, it's on this end here. And same thing. So it had very little impact here, visibility-wise, from the people in the parking lot. And some people would see this—the other antennas—if you were to drive by and stop.

The equipment is on the back side of the building. And it is masked by existing landscaping. This equipment would be within the setback as well—the 25-foot setback, but it would be well within a ten-foot setback. And I think – nobody knows why – I don't know the exact reasons why a 25-foot setback was required before, but my speculation would be it's possibly because of the way old equipment was. It was probably much larger. So the equipment now is much smaller. In the past, they used to be the size of a small little house, and have big air-conditioners and big fans. And now it's the size of a four-drawer file cabinet. So the power requirements are far less. And they don't have – this doesn't have a backup generator. I think that might've been a reason as well because of the sound the old systems had. So this requires very low voltage and it can run on backup batteries for a – for quite a while, actually. So this is another view of what we're proposing where the equipment would be located behind the existing foliage.

And that's basically it. We do have a letter of support from Civil Defense also stating that this type does play a role in their civil defense exercises. And we do work with Civil Defense quite a bit for e-911, but that's basically, the presentation.

Chairman Tanaka: Thank you. Is there anybody from the public who wishes to testify on this matter? If you can come forward, identify yourself, and we'll give you three minutes to speak.

Mr. Raymond Lyons: Real fast. I'm Raymond Lyons. I'm a union electrician. I work for Duarte Electric, and I probably put all the MOBI sites in on Maui County except for one so far. And I'm definitely for it. We're real slow and they're really – like he was saying, you really don't notice them. And the equipment is small because it only takes of the consumers. They don't do any banking or anything like that. And I just hope you guys take – do the variance. Thank you.

Chairman Tanaka: Thank you. Is there anybody else from the public who wishes to testify? Seeing none, public testimony is now closed. Board Members, any questions for the applicant?

Mr. Stephen Castro: Yeah, I have a question. Was any information given to Planning in regards to the size of the equipment because you just mentioned prior, it was larger equipment, now it's smaller? Was that also included?

Mr. Young: Yes, the equipment size was mentioned within the application.

Mr. Castro: Thank you.

Chairman Tanaka: Yeah, do you have anything—? You know, as I was looking through the materials, it appears as though it is something – I mean, I see six little poles that stick four feet above the top of the roof.

Mr. Young: Two of them are pipes that would stick over the roof. And they would not exceed the height limit, but there are two pipes in the back side, yes.

Chairman Tanaka: Okay.

Mr. Young: The other – there's a total of six antennas. Four of them are put on the facade of the building. Two would be mounted on poles.

Chairman Tanaka: Yeah, from your presentation photo, I liked it. I mean, you don't even see it. You would never notice it was there. Board Members, any other questions for the applicant?

Mr. Ray Shimabuku: I have a comment. This photo that shows the side, the one that sticks above the roof, on the drawing it shows like four feet above the roof line. But according to this picture, it looks much higher. Yeah, that picture right there. What is the actual height above the roof line for these antennas to be sticking out?

Mr. Young: Let's see. I don't have it right in front of me. It would be actually on the drawings.

Mr. Shimabuku: I thought it says four feet.

Chairman Tanaka: Yeah, those sections show four feet above the existing.

Mr. Young: So I believe this would be the roof line here at this point. So there's a facade on there. There's a parapet on the back side that's not on this side. I noticed that, too. It does get a little confusing.

Mr. Shimabuku: So the picture looks much higher than what the drawings showed, yeah?

Mr. Young: Yeah, I did try to be conservative. When I do show these things, I don't wanna underestimate anything, but that's just my guess. I mean, I, you know, do the best I can.

Mr. Shimabuku: So this picture you might say that it could be deceiving with that height.

Mr. Young: It could be lower.

Mr. Shimabuku: Could be lower.

Mr. Young: Right.

Chairman Tanaka: But it would still be below the existing – that facade of the – on the roof.

Mr. Young: Yeah. So the height limit, I think, is much higher, but we did try to make it match everything to come down here. I think – is that the 35-foot? I can't read that.

Mr. Shimabuku: Thirty-one feet.

Mr. Young: That's 31 over there? But I think the reason we had to do that was because of the

ground elevation change here. I think we dropped it to make sure that it was within the 35 feet.

Mr. Rick Tanner: You mentioned that the support of Civil Defense and that you work with them. How does this benefit Civil Defense?

Mr. Young: So in this area, coverage is lacking. And so in the event of an emergency, that coverage wouldn't serve those people who have that phone. Right now, it's very poor. I mean, when you go back to these coverage maps. That's way outside of the realm of what should help. So this entire accessway would not be covered. And especially, when there's an emergency, these cell sites tend to get over-flooded. They get overwhelmed. So whatever is happening here along this coastline will suck all the capacity. This highway here, down Haleakala, and down here would suck everything from this, and there wouldn't be anything here. It's actually very, very weak from this side. And so given that, there'd be zero. So there are a lot of phones in Kula that we know of, and also people who come through here from Waihee, people who have a lot of these phones for Hawaiian Homestead just wouldn't have it. But just average consumers, people are looking to lower the price of their bill. I mean, MOBI is a competitive cellular provider. So those people wouldn't really have very good service here.

Chairman Tanaka: Thank you. Stephen?

Mr. Stephen Castro: Hosmer Grove, what is that—another antenna? So what is that—like a relay station or something?

Mr. Young: It's a full cell site. So each cell site is a send/receive transceiver. And so it has a limited capacity and they have a limited range. That's really stretching how far something like that should go.

Mr. Castro: And where does that receive from?

Mr. Young: Where does it receive from?

Mr. Castro: Yeah. You're gonna receive and then transmit out.

Mr. Young: Oh, okay. So basically, from here, it's just basically, covering the roads here. So it sends/receives. And they usually have a tall site on every island that picks up a lot of extra traffic. So cell sites, the way they work is they work in tandem with each other. So you can be on more than one cell site at once. That's what creates the seamless technology. And so whenever there's a – one is overloaded, it transfers to another one. And so this is meant to just give road coverage and some home coverage. But this is not a very good site at all. I mean, in terms of cell design on Oahu, you don't have sites more than three miles away from somebody or even two miles away. One mile is already you're losing in-building coverage. So this is – you know, this is seven from here. And it's about five miles from the road. So it's not a particular good site, but, you know, they build cell sites based on population as well. And so on the outer islands, they have to spread that signal as far as they can.

Mr. Shimabuku: So with your illustration on that picture, parts of Pukalani does not have good coverage even with the new cell site?

Mr. Young: Yes, so there is a need for another site here, potentially. They're asking for it, but they don't know if they're gonna get the money for that. So along with – you know, we talk about e-911 coverage, you asked that question about civil defense, with getting a license to do business, most certainly, there's a profit incentive to go and do this, but they have to provide certain basic services to the public. FCC requires that in order to get a license. So you can pick up any cell phone you want. It doesn't have to have coverage. It doesn't have to be on a plan, and you can dial 911 at any time. It also should be able to locate you too. So these are things that are placed on the carriers to provide especially, in the event of emergencies. So MOBI also works in tandem with their civil defense activities where you set up mobile communications that are only dedicated for communications during emergencies as well. And so there is that responsibility that is placed on them to support the community in the event of emergencies. And when there are disasters, in the event of, let's say, Kauai, what happens – the first thing they do is they ship these people over to make sure cell phone coverage is restored immediately. So on Kauai, all the poles went down. You can't put poles up very fast, but you can put up a cell site antenna very quickly, and it can cover a couple miles.

Mr. Tanner: So regardless of your cellular provider, you can call 911 in this area.

Mr. Young: If they have coverage.

Mr. Tanner: Yeah, right.

Chairman Tanaka: Trisha, one thing I noticed in our packet was any response, or recommendations, or a staff report. Is there anything from either Planning or Public Works?

Ms. Kapua`ala: You did not receive a staff report?

Chairman Tanaka: Yeah, I–

Ms. Kapua`ala: Yes, we did provide – we did sign a staff report and a recommendation report. Did you find it or–?

Chairman Tanaka: Oh, yeah, got it. Thanks, Trisha.

Ms. Kapua`ala: Also, the Department – the Police Department submitted comments recently, and we made copies, and put them on your table. So other than the comments provided by the applicant in his presentation, MPD responded.

Chairman Tanaka: Yeah, it looks like the Police Department – will have no impact. And theoretically, it should be beneficial to the Police Department, if there's an emergency. Board Members, any other questions? I would entertain a motion.

Mr. Tanner: Chairman, I would make a motion that the request for a variance be granted based on the presentation of the applicant, and a hold harmless agreement be in place.

Mr. Castro: I would second that.

Chairman Tanaka: Okay, it has moved and seconded to approve as so stated. Any other discussion? With that, I'll call for a vote. All those in favor of approving the variance? Any opposed? The Chair votes aye.

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

**VOTED: To grant the variance based on the presentation of the applicant, and a hold harmless agreement be in place.**

**(Assenting: R. Tanner, S. Castro, R. Phillips, R. Shimabuku, K. Tanaka.)**

**(Excused: B. Santiago, B. Vadla, J. Haraguchi, P. De Ponte.)**

Chairman Tanaka: **The variance is approved.** Thank you. The next item on the agenda, Trisha?

### **C. UNFINISHED BUSINESS**

- 1. JANET MARIE GRANTHAM requesting a variance from Maui County Code, §§16.08.060A and 19.08.060, to allow the existing east side of a residence to be located at the property line for property located at 225 Prison Street, Lahaina, Maui, Hawaii; TMK: (2) 4-6-011:013 (BVAV 20110010). (Deferred from the 10/13/2011 meeting.)**

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

Ms. Kapua`ala: Because this is a continued item, I think the staff made a presentation and you should have your documents from a previous agenda. And it looks like the applicant is here.

Chairman Tanaka: Okay. The applicant has a presentation?

Ms. Janet Grantham: Yes.

Chairman Tanaka: Okay, thank you.

Ms. Grantham: Aloha, Members. Thank you for giving me a deferral at my last hearing to try to contact the objective party, Lincoln and Pat Maielua, who hold one share of the abutting property, who subsequently submitted this surprising letter just three days before the October hearing date, which brought into question which way I needed to proceed to acquire a variance both by signature and agreement of all shareholders in the trust. In brief, TMK property 2-4-6-11:002 is held by multiple related individuals from several families: the Maieluas, Phillips, and Marfils. The majority shareholder and controller of the land and executor of the estate is Vincent Marfil who signed this easement agreement on 9/21/10, and said that he being the majority stakeholder, his approval of the easement was absolute and should be sufficient as I understood it. This was a big surprise to me as I was told by Mrs. Pat Maielua to speak to Mr. Marfil regarding this proposed easement process as she was on the Mainland attending a sick relative before Mr. Marfil executed the document I just raised.

Being that I'm not a public figure, it may come as news to this committee and my neighbors and friends that I did declare bankruptcy earlier this year as my income had significantly dropped, and my life partner was too ill to work and contribute as he had done so in the past. This is the bankruptcy discharge letter I received this last June after months of nail-biting and the consequence of Chapter 7 of not knowing if my mortgage would affirm my debts so at least I could carry on with my job and keep the home I raised my children in that my late husband had brought prior to our marriage in good faith as being above board and being free of encumbrances or out of code.

Here I am today after over two years between a rock and a hard place after I was told by Lincoln Maielua to contact the executor, Mr. Marfil, of the abutting property for the permission to request an easement as it seemed my only alternative to resolve this County setback issue. This has been no issue with any party for over 23 years, which had been of no concern of anybody until I complained to the County about my backyard neighbor, who appeared to be again, over building and could be violating the code on his already abrasive . . . (inaudible) . . . apartment-like complex behind my house. I checked it out. Even though Mr. Nolasco had applied and been approved to build bedrooms five, six, seven, and eight, and a weightlifting room, it seemed obvious that these rooms were being built for efficiency rentals. And as the County Planning Inspectors may have found of late that this is just a giant studio apartment building in an R-2 zoned area.

Within days of my complaint, Mr. Nolasco pulled into my driveway and asked, "Why are you making trouble for me? You are in trouble with your wall being too close to the property line." I would like to stress that his complaint to the County, RFS No. 10-0001370, against my property came as a pure retaliation from when I asked the County to check out the additions he was in the process of, and that I filed my RFS to see if he was truly following the law with proper permitting. Mr. Nolasco's new permit should've raised a red flag, but the County – with the County that his structure was not being built to suit as advertised. Is there a photo of the house to hold up?

Mr. Bart Mulvihill: This is just the – appeared two years ago, and it has doubled in size since.

Ms. Grantham: To the point, because I have declared bankruptcy on my credit, I cannot get a new mortgage or a second mortgage to remodel my home to be in compliance. If the Planning Department decides to place fines for not being compliant and to satisfy Mr. Nolasco's desire to retaliate upon me for my initial complaint, those fines cannot be paid as my income will never be high enough to pay for anything more than the necessities. I haven't had a vacation in over two years, even a weekend to Honolulu, or experienced a dining other than my birthday this year.

The land area that I'm asking for in my variance request has been used as nothing more than a junkyard until recently when Mr. Marfil ordered his relatives who occupy the mauka home on the other side of the vacant lot whose father shared the estate is vested to Mr. Marfil's supervision and voting share from what I hear is the only reason they're allowed to live there while caring for their ailing mother. As this picture demonstrates, the only use of the land I have tried to use as a variance has only been used to dump trailers, tires, most recently, a paint – to paint a full-sized van, an unregulated auto repair shop for the Phillips' children's friends to perform a brake job, which took them several weeks of trial and error, and only attempted during the midnight to dawn hours right next to my bedroom on the outside of my house. The repair kept us up every single night with their flashlights, swearing at each other, and the like. This lot has never been of any use other than a junkyard as it suited the Phillips gentleman. The lot is the most abused and blighted property in the



neighborhood complete with the homeless encampment of a distance relative who let it grow to two fortified structures as this picture demonstrates we took the other day.

I do not have the money today, tomorrow, or even down the road in hopes of an inheritance as I came from a poor family. The County would have to foot the bill to tear a wall to satisfy Mr. Nolasco's heartless action of retaliation. And the County would have a slim chance of ever collecting money from me in fines as the money is simply never going to be there should this – or this horrid economy worsens. My life partner is not on the deed and wouldn't marry me knowing this would be his kuleana should we ever say I do in a public setting under the Lord's blessing. I respectfully ask the Board to grant me this variance as this lot is excessive in size at over a quarter acre pitifully abused as evidenced by the photographs, and that no pending building permits have been received by the County or a consensual family vote to develop the lot for any means as it's required under their trust has all been approved by parties according to Mr. Marfil.

In closing, I have paid my property taxes on this home since my husband passed away. Note, this unpermitted work was not done by me, my husband, or are we even clear if it was done by the previous foreclosed owner prior to the builder. Go after the offender if it could ever be figured out who created this seemingly small problem that was never a problem to anybody until I asked for verification of what I suspected was unpermitted work in my backyard neighbor's larger than life home. I do believe Mr. Nolasco is facing County sanctions.

Under Mr. Marfil's direction, the Phillips Family cleared the portion abutting my home according to Mr. Marfil's direction in anticipation of my requested variance. This is the current condition of the adjoining lot next to my home. I respectfully ask for the variance as altering my home would be more than an extreme financial hardship upon me for the next five years. Thank you.

Chairman Tanaka: Is there anyone in the public who wishes to testify on this matter?

Mr. Mulvihill: I signed up.

Chairman Tanaka: Please step forward, identify yourself, and we'll give you three minutes to testify.

Mr. Mulvihill: Thank you. Thank you. My name is Bart Mulvihill. I'm the other half. Janet and I met eight years ago and quickly fell in love. And I moved over from Oahu where I was residing, and joined our families together.

The lot directly mauka that Ms. Grantham is seeking the variance to has been without a doubt the most wretched looking junkyard you've ever seen in your life. It has been occupied by over 16 abandoned vehicles. We have complained to the County through an RFS and was told that the Phillips brothers, the Phillips Family, Wayne Phillips said he was working on the cars. All these cars that he was working on were towed away by Mr. Marfil's direction, from what Mr. Marfil said to us.

Now, this picture should say it all. They went as so far as to put a yacht in that lot as storage. I watched a young man hand five one-hundred dollar bills to Ricky Phillips when he parked that yacht there and said they were going to refinish it, which is against the law. I assure you I am sure of that.

This has been a pure attack on Ms. Grantham by Mr. Jag Nolasco. He is trying to retaliate. He's been very successful. He's cost Ms. Grantham over \$15,000 in legal, architectural fees, and we were advised by Mr. Tom Welch to seek an after-the-fact building permit, which we applied for and paid for. We cannot afford to have him. I have atrial fibrillation. I cannot work in my current profession. I'm getting better, though. And I'm looking forward to helping Janet.

This photograph demonstrates when Mr. Nick Nicholas came over and told us that we had to saw off this portion of the other side of the house, a lattice, to be in compliance that was an alignment with the carport. He came back later with a supervisor and said we had to cut even more off after we had spent two hundred dollars of a friend's – and four hours of a friend's time. This seems to be the most minuscule of matters that the County should be bothered with, and this is pure retaliation, and – on Mr. Nolasco's part. The Maielua Family has never said boo to us in that entire time.

And that's pretty much what I have to say. Ms. Grantham is honestly correct. Her family is poor. They live check-to-check on social security, and through the aide of her brother and her sister, and unfortunately, one of her brothers that was murdered in Montana two and a half years ago. So I respectfully ask the Committee to consider her request for a variance over a piece of land that has never been used for anything other than a junkyard. Thank you.

Chairman Tanaka: Alright. Thank you. Board Members, any questions for the applicant?

Mr. Castro: Yes. You said you applied for an after-the-fact permit. Was it granted? Approved?

Ms. Grantham: I just filed it. I hired a draftsman to draw up the plans. At the time, I thought I–

Ms. Kapua`ala: Excuse me, Ms. Grantham. Could you step to the mike, please, so you can be on record?

Ms. Grantham: At the time I thought that my easement from Mr. Marfil was a good sign that I was going to get the easement and was sufficient. And Mr. Nicholas, the Building Inspector, suggested to get the after-the-fact building permit plans since it looked like I was getting the permission for the easement. My next step would be to file for an after-the-fact building permit.

Mr. Mulvihill: And her first variance here.

Ms. Grantham: Yeah.

Mr. Castro: So as of now, your after-the-fact permit, you're waiting drawings or–?

Mr. Mulvihill: May I answer . . . (inaudible) . . . ?

Ms. Grantham: Yeah.

Mr. Mulvihill: Sir, we have nine sets of plans we brought to the last meeting. They were prepared by a West side draftsman and it's stamped by a Wailuku architect. We were never able to present those as we deferred to this meeting of today to try to approach the Maielua Family in their

objection letter, and find out why they had this sudden change of heart. And also, to contact another relative that was attached to the property, a Litricia Castro, whose maiden name is . . . (inaudible) . . . , if I understand. We still – we submitted a letter that this young lady over on to my left accepted two – I think on the 7<sup>th</sup>, and asked for a deferral so we could try to contact her as the Maielua Family, Lincoln and Pat Maielua were on the Mainland in Fresno, as we understood. And Ms. . . . (inaudible) . . . was in Georgia visiting other family members. So we had no way to put an easement in front of them. We attempted to – and lastly, we attempted to contact the Maielua Family at their home because their phone number was off the hook and doesn't leave a forwarding number. We went there, asked, and we were ordered off the property. We were told to talk to their daughter. Their daughter would not speak – did not call us back. And we received a visit from the Maui Police Department saying that we were harassing them. And after – and after how long have you known the Maielua Family, honey?

Ms. Grantham: Twenty-three years.

Mr. Mulvihill: Twenty-three years. This came as a complete shock. So as Mr. Nicholas told us, we don't like to see neighbors arguing. And they're not even our neighbors. They live four miles away. So we were just hoping that we could get this variance. If they ever decide to build, we'll have to figure out something, but they're not even planning on building anything. So we're hat in the hand begging for forgiveness, and that somebody prior to the Granthams built this structure illegally, or enclosed it, or whatever made it out of code. It was not the Grantham's position – not position, but their doing. And Ms. Grantham is being unfairly victimized because of this error in somebody else's judgement well over 20 years ago. Thank you.

Mr. Tanner: I wanna make sure I'm clear because I didn't even hear that the question was answered. At this point, you have not filed for any after-the-fact building permit?

Mr. Mulvihill: No, sir.

Mr. Tanner: Okay.

Mr. Mulvihill: We had the plans drawn up, got the . . . (inaudible) . . .

Mr. Tanner: I understand.

Chairman Tanaka: I have a question. I'm looking an exhibit, Exhibit No. 3, that shows the property, and the building footprint, and proposed Easement A. It was drawn up Arthur Valencia, the land surveyor. At what point has this– I just wanna be clear. You made reference to Maieluas. Is this the property that the easement would be going through?

Mr. Mulvihill: May I approach? This area here goes into the Maielua–

Chairman Tanaka: This is the Maielua property?

Mr. Mulvihill: Maielua property. And actually, there are parts that stray three feet, from one foot to three feet. And also, if there is a–

Chairman Tanaka: We're looking at Exhibit 3.

Mr. Mulvihill: Can we ask a question while we're here?

Chairman Tanaka: Yeah.

Mr. Mulvihill: On this mapping, what is this line here? It says "5'3." Was this an original award?

Chairman Tanaka: That was gonna be a question of mine as well. I'm looking—

Mr. Mulvihill: Right, because it says 5'3 to the furthest point. And by the time you hit our wall where the house is, it's well beyond six feet from the setback. The wall is more than six feet from this original award line. I went down to the office downstairs and asked the question. And the young lady did not know the answer. So, I mean, it's a no man's land as far as we know, sir.

Chairman Tanaka: Francis, Trisha, there's an Exhibit No. 1 of TMK:4-6-11. Do you see that? That was gonna be a question of mine.

Mr. Francis Cerizo: What's the question?

Chairman Tanaka: Well, what is that piece?

Mr. Cerizo: Right. Can you explain what piece?

Ms. Kapua`ala: Francis couldn't see what he was speaking about, so I think you're gonna have to describe it so that—

Chairman Tanaka: You have that exhibit—Exhibit 1?

Mr. Cerizo: Yes.

Chairman Tanaka: The copy of the — that is directly above—

Ms. Kapua`ala: For the record, it's a tax map key. I'm gonna put it up on the screen so that you can— You should be on record, sir, and speak into the mike. Thank you.

Chairman Tanaka: Okay, while Trisha is doing that, I do have another question. Before us, when we sat down today, there is a letter directed to this Board that in part, describes what you were talking about. And highlighted is a request for a deferral of this hearing date. Now, I'm confused why I have a letter — we have a letter in front of us that requests a deferral and we are still proceeding.

Mr. Mulvihill: Well, the reason was, sir, is that we learned from a relative — two separate relatives of the Maieluas, and also, Litricia or Patricia Castro, I'm not sure of her first name, that one was in Georgia, and the Maielua Family parents, Lincoln and Pat, were living in Fresno, California, and they were not on island to either discuss or to execute the proper documents for an easement so we could seek a variance in this case. And nothing came of it. We didn't hear anything from the

County. And the Maieluas came home. And that's where we hit the rock and hit the wall.

Chairman Tanaka: Okay, outside of what we're still trying to figure out that parcel is—

Mr. Mulvihill: We just trying to make sure that we didn't waste everybody's time.

Chairman Tanaka: Yes. Now, referring back to your Exhibit 3, the plan that shows the easement going through the Maielua property, now, this is a proposed easement from your land surveyor.

Mr. Mulvihill: Correct, sir.

Chairman Tanaka: But as of this time, you do not have the permission of the Maieluas for this easement.

Mr. Mulvihill: No, sir, we don't.

Chairman Tanaka: Okay, so as far as what we are able to even discuss right now, this is not an option because you don't have that permission.

Mr. Mulvihill: Actually, sir, Vince Marfil, the executor of the Maielua Family Trust, we do have his permission in an un-notarized – and we did not know that it had to be notarized that was executed well over a year ago. And he told me that he had three voting shares: Mr. Phillips, who shows on the deed, another family member, and his own. And that his word went. And I took him at his word. And so there is permission from a portion of the family, and a portion of the family who doesn't want us to have it.

Mr. Tanner: I got a question along those lines, because you stated in your application, and you stated here today that the owners of the property have no immediate plans to build. But the last time you were here, we had received a letter stating the opposite that they do have plans to build.

Mr. Mulvihill: That's correct, sir. That was the issue that surprised us the most because right after that hearing, I called Vincent Marfil, and he said, "They've never called me. They've never discussed it with me. I have no idea. And they'd have to call me and get me to sign off on such a project."

Mr. Tanner: Now, do you have anything after that point notarized from him?

Mr. Mulvihill: No, sir, I haven't because we were unable to contact the Maieluas. And before spending two hundred dollars that we don't have to fly over to meet with Mr. Marfil in Nanakuli and his brother I think is one of the shareholders, we were pretty much at a standstill. And that's why I submitted that letter on the 7<sup>th</sup> of December asking for another deferral so we could try to get everybody signed properly, correctly, as much as we could to fortify our request for this variance.

Chairman Tanaka: Yeah, because without that, this Board would have no way of granting any kind of variance without any kind of proposed solution. At least with that easement, you have a proposed solution, and we could possibly move forward. Board Members, any thoughts as far as along this line?

Mr. Shimabuku: Well, Mr. Chair, your question of the letter is still not answered. Is this a deferral?

Chairman Tanaka: Well, apparently, this letter was submitted on the 6<sup>th</sup> – on the 7<sup>th</sup>, received on the 7<sup>th</sup>, and the Planning Department–

Ms. Kapua`ala: Didn't defer.

Mr. Tanner: Did not defer. Okay.

Mr. Mulvihill: It was– I'm sorry. I forgot your name.

Ms. Kapua`ala: Trisha.

Mr. Mulvihill: Trisha. Trisha gave me a copy of this letter, and it said "Received by e-mail 2:05 p.m., 10/10/2011, by Litricia U. Castro, daughter of owners." So we are not even assured that Lincoln or Patricia Maielua had submitted this letter. And we are unaware, and I don't know if the Planning Department has even received plans, and Mr. Marfil in Honolulu has told us – he said, "They haven't asked me and they need my permission. And I'm the executor of the estate so I don't know what they're talking about."

Mr. Tanner: But you have nothing notarized from him either.

Ms. Grantham: We did have his signature on . . . (inaudible) . . . the lawyer . . . (inaudible) . . .

Mr. Mulvihill: We have–

Ms. Grantham: . . . (inaudible) . . . notarized.

Mr. Tanner: But you – from the time you were here last till now, you have not bothered getting that notarized.

Ms. Grantham: I thought it was pointless without getting the other parties to sign.

Mr. Tanner: I guess my question is between the last hearing and now where it was deferred till now, you haven't done anything.

Ms. Grantham: . . . (inaudible) . . .

Mr. Tanner: You've not done an after-the-fact building permit. You've not gotten anything – any of this notarized.

Ms. Grantham: . . . (inaudible) . . . we should wait until we have the easement.

Mr. Castro: I believe it was a deferral. But I brought up the letter, you know, was it notarized because we don't know for a fact if that was the individual, Mr. – what's his name?

Mr. Tanner: Marfil.

Ms. Grantham: . . . (inaudible) . . .

Mr. Tanner: And that's the question is, if he would do that, and you could have that, why didn't you?

Mr. Mulvihill: I did photograph . . . (inaudible) . . . signing the . . . (inaudible) . . . thing. I mean, I wanted to make sure. It even has his name and badge.

Mr. Tanner: You gotta realize that that is just–

Mr. Mulvihill: I mean, you know– You know–

Mr. Tanner: It's a photograph of a person. That doesn't mean anything. It really means nothing.

Mr. Mulvihill: Well, you can ask the Marfil – you can ask the Maieluas, is this Vincent Marfil. . . . (inaudible) . . .

Mr. Tanner: You understand that you're the one seeking the variance.

Ms. Grantham: . . . (inaudible) . . .

Mr. Mulvihill: We understand we need– We understand we need to have to get it notarized, but what we thought would be a piece of cake would be to have Lincoln and Pat Maielua, if they understood why we needed the easement under this, you know, very, very tense situation that they would say, oh, that's right, we told you to call Vincent over two years ago. And then have them meet us, meet at a notary, sign, get on a plane, go over, or send the documents via Fedex, whatever, and have Mr. Marfil sign the easement for – on his behalf and the behalf of others that he – or landowners, as you put it, have to sign, and be notarized. So, you know, cart before the horse, horse before the cart, you know–

Mr. Tanner: Okay, so back to the letter that we received from the owners that said they planned to build, you got nothing from them saying anything different than what was in that letter?

Mr. Mulvihill: Right.

Mr. Tanner: Okay.

Chairman Tanaka: Just as part of – just giving you my thoughts here in that whether or not the owner – especially since it appears as though what you have been told and versus what has been written and signed, I mean, they can write a letter, notarized, perfectly legal that says we have no intention of building in the next 20 years, and 20 days from now, they turn around and apply for a building permit. Just because they signed that they have no plans to build, that does not mean that they will not build. So there is that potential.

Mr. Mulvihill: We have – we were going to suggest that we could put a notarized letter in front of the family and say, you know, if push comes to shove, and you have to put a structure within 12 feet of our mauka wall, then we would have to make some kind of remodel to the home to make it in

code. And that when that time came, we would have to perform, but we never even got that far.

Chairman Tanaka: Okay. Yes, in the best case scenario, if we do get that far, that would be a part, a conditional part of any variance specifically, to something like this that if you were granted something, an agreement would be part of the record that says that if they build tomorrow, you gotta knock down that section. You understand that?

Mr. Mulvihill: Right.

Chairman Tanaka: Okay. Now, before we keep moving forward, I have directed at our Board Members here, from what we've seen in their application, I'm just – well, let me give you my thoughts. With the existing condition, now, it was apparently 26 or 24 years ago, 24 years ago in 1986, well, greater than 24 years ago, so the condition was not created by the applicant. And it would be a hardship to knock it down. I understand that. Whether it's, you know, an exception or unique physical geographical condition can be argued both ways. But if what – referring again back to your Exhibit 3, if this easement were recorded, I may see, for myself, I may see that it would be possible to grant the variance. And I'd like to hear from the rest of the Board as far as your thoughts.

Mr. Castro: I just have a comment and a question. My comment is, we did give you a – deferred this to allow you the time to – you know, I thought it was important enough for you folks to go and get that notarized. And my question is, has Mr. Marfil had any communications with the Maielua Family in regards to this matter?

Mr. Mulvihill: Yes. We found that out through Mr. Marfil who called me and told me that he had spoken to a family representative. I don't know who. And that's how the lot got cleaned up next to it in preparation for the easement. And also that he was unsure and unaware where the Maielua – Lincoln and Patrick Maielua—I have trouble pronouncing their last name, I apologize—where they were, and also the submitter of the letter was unfindable as well. And Mr. Marfil said he would be glad to sign the easement, notarize it, but, you know, we had to – as this Board indicated, we had to have the approval of all applicants to have our strongest case for a variance. So it's like a scavenger hunt to try to get all the names and all the addresses put down.

Chairman Tanaka: Yes, but a very necessary step.

Mr. Mulvihill: Yes, sir, I understand that.

Chairman Tanaka: That's the reason why— Oh, okay.

Mr. Tanner: I would agree with the Chair that it does create something of a financial hardship, but I think the thing that weighs heavier is the property next door. And it creates a huge problem for that. If that landowner chooses to build, or even chooses to sell, the conditions on your property impede greatly on the seller or the building of his. Without that guaranteed easement, there's no way for me personally to even consider a variance.

Mr. Mulvihill: I understand that, sir.



Mr. Shimabuku: Mr. Chair, I'd like to make a comment too. I agree that there is a hardship, a financial hardship in this situation, but, you know, all the talk about what this guy said and what that guy said, there's nothing in writing, notarized, but we do have a letter from Lincoln and Patricia Maielua indicating that they object the said request made by Janet Marie Grantham. And having this Exhibit 3, the proposed easement on their property, it does not match. They're against what they're trying to do. And then there is a proposal. And if there's an easement on their lot, it'll cause problems for them in the future.

Mr. Mulvihill: There is no encroachment, though, sir.

Mr. Tanner: There's a huge encroachment. There's six feet of encroachment. You're right on the property line.

Mr. Mulvihill: We didn't do it. And it's on—

Mr. Tanner: I understand you didn't do it, but you just said there's no encroachment. There certainly is.

Mr. Mulvihill: There's an encroachment on the County's setback.

Mr. Tanner: Right, which impedes the value of your neighbor's property, clearly.

Mr. Mulvihill: I understand that, Mr. Tanner.

Mr. Tanner: Okay, and you stated here that the neighbor has no intention of building, yet we've got a letter from the owner saying they do. You've stated that in writing. We've got in writing the opposite of that just as was stated.

Mr. Mulvihill: Well, that letter came three days before the hearing, and so we had no idea that they had any objection to us doing it. The amount of our home that would have to be torn back in order to satisfy this encroachment into the County's setback is well over a 160 feet. That would destroy the study, the family storage area, and a bedroom. And already, we have three additional bedrooms, two of which are rented out to be able to make the mortgage payment. So we'd have to squeeze into our youngest daughter's bedroom, which has a closet about this big. So the hardship is bigger than—

Mr. Tanner: We've acknowledged that there's a hardship.

Mr. Mulvihill: It's — it's — you know, I don't know what to say. We wanted to know do you wanna get— Can we send you to Vegas? What do you want? But we weren't even allowed to talk to them because they called the police and said that we were harassing them.

Mr. Tanner: Then to me, that's clear that they are not interested.

Mr. Mulvihill: Even in negotiating a financial settlement?

Mr. Tanner: They're not required to.

Chairman Tanaka: Yeah, it's on you to, you know, to pursue this matter. Like I said, and like I was starting to say, and trying to get some feedback from our Board as well is that if this easement that we have – that has been put in front of us, or something that was recorded and legal, I think we could possibly move forward on this. Now, that's not to say that if you had this easement recorded and everything was legal that you would get this variance, now. I'm just giving you one – just the Chair's opinion.

Mr. Mulvihill: Yes, sir.

Chairman Tanaka: So with that said, if we can get a feeling from the Board so that you can go back, and pursue all of these matters, and with these same five Board Members, there is that possibility of a variance. At this point, from what we have, from contradiction to what was stated on the record versus what was printed in a letter to this – to the County, we – the action – the only action I could foresee would be a denial. And I'd like to help you out.

Mr. Mulvihill: Thank you.

Chairman Tanaka: But as – at this point, I don't think that's possible. Board Members?

Mr. Tanner: I would agree. At this point, you know, it would be my position to deny the variance.

Mr. Shimabuku: I would say the same thing.

Chairman Tanaka: Okay. Okay. Yeah, sorry. Let's see. We have one more person who wishes to testify on this matter. Litricia Castro, if she could please come forward? State your name for the record. You got three minutes, please. Thank you.

Ms. Litricia Castro: Hi. I'm Litricia Castro. I'm U`i. And I spoke to Janet. I'm actually the daughter of Lincoln and Patricia Maielua who are part owners of the said property.

Mr. Castro: For the record, no relation. I'm a Castro too.

Ms. Castro: Oh, yeah, no relation. Just to reiterate the letter, I have my parents here to speak for themselves that they're not in support of the variance, the granting of it.

Chairman Tanaka: Now, okay a question for you or your parents. The easement that was proposed is through their property, and they would – they are opposed to the easement as well as the variance? Or if you could explain that to us?

Mr. Shimabuku: I don't think she knows about this Exhibit 3.

Chairman Tanaka: Okay. A 12-foot–

Ms. Castro: Yeah, they are not in support of that, granting of that.

Chairman Tanaka: Oh, sorry. I cut you off during your testimony. Was there anything else? I apologize.

Ms. Castro: No, I mean, that's pretty clear, I think.

Chairman Tanaka: Okay, so— Oh, okay. Is there anything else?

Ms. Castro: Not unless you folks have questions.

Mr. Castro: Yeah, I have a question. What is Vincent Marfil to you?

Ms. Castro: He's my father's cousin.

Mr. Castro: Father's cousin. Has there been any communications with him?

Ms. Castro: With me, yes. He will support whatever my parents decide.

Mr. Castro: So there's a great chance your letter is not gonna be any good. So he's supporting whatever you folks decide?

Ms. Castro: Yes.

Mr. Castro: Okay, thank you.

Mr. Shimabuku: So my question is, you never saw this proposed easement?

Ms. Castro: No.

Mr. Shimabuku: Until now?

Ms. Castro: Yes.

Mr. Shimabuku: Thank you.

Chairman Tanaka: Any other questions, Board Members? Okay, thank you.

Ms. Castro: You're welcome. Thank you.

Mr. Mulvihill: Question, please? The question you asked, Mr. Castro, is Mr. Marfil in agreement with the past testifier's desires, I'd like to see that in writing. And I'm gonna seek out Mr. Marfil because he was one hundred percent on board and had been up until our last meeting. One hundred percent on board. As he put it, he said it was the neighborly thing to do. So this is a complete change and abandonment of his position prior. Thank you.

Mr. Shimabuku: I have a comment to that. I think the last meeting that we had, you were seeking advice from the Board. And the advice was given that maybe you should get a legal counsel. And you had the time to go and get all your stuff, all your paperwork in order so that you can have a more stronger case. I think that time was granted to you, and you didn't make a move for that.

Mr. Mulvihill: . . . (inaudible) . . . some financial problem.

Mr. Shimabuku: Regardless of finances, you're coming to the Board for a variance to get an approval, but without the proper necessary paperwork, regardless of the financial situation, you gotta do what is right to get your paperwork in order.

Mr. Mulvihill: Our paperwork was in order. It was submitted by Tom Welch sometime ago.

Mr. Shimabuku: Well, we don't have any of your – all of this.

Mr. Mulvihill: Current?

Mr. Shimabuku: All of this notarized–

Mr. Tanner: Yeah, there's no notarized statements. There's no application for a building permit. There isn't anything.

Mr. Mulvihill: We've been trying to get a hold of these people and ask them, "Do you mind?" And if you want to build a house, we're gonna have to do something. We're gonna have to go borrow money from a – from Peter Martin or one of our friends and say, we're in a real bind, can you help us? And, you know, it's – the legal fees for Tom Welch are staggering. And if you know – if you've ever hired him, you'd know. So that is why. Sir, I've made less than five thousand dollars this year on purely consulting. Ms. Grantham has carried us on everything. We have one car. This isn't about – you know, you gave us time. I'd have to go rob a bank to have the money to have an attorney stand here before us. So – and I'm not gonna break the law.

Chairman Tanaka: The situation you're in, while this Board feels for you, the fact remains that the onus is on you to produce.

Mr. Mulvihill: I understand that, sir.

Chairman Tanaka: Now, I am, once again, this is the Chair's opinion, for one, this is the first time it's been before me since I was not in attendance the first time. I would like to in an attempt to help you get through this process, but it sounds like – give you – what the Board did at the last meeting, to give you the time to follow through.

Mr. Mulvihill: Thank you.

Chairman Tanaka: And that you've made the statement that you've been trying to get in touch with them. Well, here's your first step. They're right behind you. Please let me finish.

Mr. Mulvihill: Yes, sir.

Chairman Tanaka: Now, in – and to go through, and you're saying that there are – what you have stated versus what someone else has stated is two very different things. Well, I'd like to give you the chance to go back and get that. And if what you are saying is true, get it in writing specifically, to this variance request. Once again, I'll state that if there is an easement there, and that is recorded and legal, I would be – I would lean towards the granting of that variance. Now, that's just one person of a Board of possibly, nine. That would be my advice to you. And if this Board would

go along with that, that's where – that would be my recommended next step. Otherwise, at this point, for myself, and it sounds like the entire Board, if we were to take action today, that action would be denial of your variance request. With that said, Board Members?

Mr. Shimabuku: Mr. Chair, this is the second time that I've been hearing this. I was here for the first meeting. I think the chance was given at the first one. That's why we approved the deferral till today. Whether he tried to contact the Maieluas, I don't know why they're here today, but they're here. Somebody told 'em. And they're still saying that they don't approve of this variance.

Mr. Mulvihill: The Maui Police Department has come to our home twice and told us not to contact the Maieluas under any circumstance under the possibility of a misdemeanor charge of harassment. And so they, we cannot talk to by order of the police. And as a professional licensed real estate salesperson, I know things have to be in writing. I've never had a complaint with RAM or the DCCA. So I understand the importance of the written document being notarized, but, you know, I mean, the Maieluas just came to island. And we didn't even – we couldn't even identify who Ms. Castro was in that letter that was submitted. So now we know who the players are, but how can we contact them, communicate with them, negotiate with them if we're forbidden by a complaint they've made to the police?

Mr. Shimabuku: So your actions toward the Maieluas has caused a problem where you cannot contact them. That you were saying earlier that you tried to contact them, but never could get a hold of them? And then all of a sudden, they appear today?

Mr. Mulvihill: No, sir. The Maielua Family lives in Fresno, California, part of the year, some of the year, we don't know. I had to go to the delicatessen, a family owner – a family – a hanai family member operates. "When is Lincoln and Pat gonna be on island?" They said, "Oh, they're coming in tomorrow." The next day, I can't quote the date, but Janet went up to their home at 1280 or 1260 Ainakea Street, and said, "Hi, Lincoln. How you doing?" And she came down and said, "I hit a stonewall up there. They acted like they don't even know me." And then I went up, and I said, "Hey, what's the deal? You guys told us to contact Vincent and it wouldn't be a problem." And they told us, "Contact U'i," the lady, the young lady that just testified. They said, "Contact her. Her number's 422–" something. We contacted her. We both left her voicemails. Without a phone call, we have a sheriff – I mean, a sergeant and a patrolman from the Maui Police Department banging on the door at 9:30 at night the next day saying, "Do not contact them again." And so, I mean, it's not like they just showed up today. We've made every valid attempt to try to contact them. And so–

Mr. Tanner: So my question is, wouldn't that make it clear to you that they are not interested in granting an easement? That's what I would draw from this.

Mr. Mulvihill: Mr. Tanner, I'd like to understand what happened between the 23 years between when Janet's late husband and her first met Mr. Maielua, and what happened in the last three weeks.

Mr. Tanner: I think that's irrelevant. I think their concern is about their property. And I don't know they're interested in this easement. They've stated it in writing. They've stated it in person.

Mr. Mulvihill: Okay.

Mr. Tanner: Okay, so do you acknowledge that there's not a potential for this easement?

Mr. Mulvihill: There could be.

Mr. Tanner: How?

Mr. Mulvihill: I don't know. Maybe they would like a financial settlement. Maybe they would like a trip to Vegas. I don't know. We're trying to find out what they want.

Mr. Shimabuku: Right now, there's none. They said they're-

Mr. Tanner: I think they would've stated that.

Mr. Mulvihill: I think they should state that and not speculate, sir.

Mr. Shimabuku: It's right here.

Mr. Tanner: It's in writing.

Mr. Shimabuku: It's in writing right here.

Mr. Mulvihill: Yeah.

Mr. Shimabuku: So what else you need?

Mr. Mulvihill: They plan on building a home?

Mr. Shimabuku: They're not in favor of your request. So how can you get a easement on their property when they're not in your favor? They're not in favor, but they going give you one easement? I don't think so.

Mr. Mulvihill: Well, if you note on that letter, it came three days before our first-

Mr. Shimabuku: It doesn't matter when it came.

Mr. Tanner: It doesn't matter at all.

Mr. Shimabuku: It could've come the minute you stepped to the podium or testified-

Chairman Tanaka: Understand that a submitted signed document is like testimony. Now, you are saying that the owner said something. We have in writing in front of us what the owner said. And the two are different. A signed document sitting in front of us would be what we would take as true.

Mr. Mulvihill: We have a signed document from Vincent Marfil.

Mr. Tanner: It was not sent to the County and it was not notarized. It was brought here by you.

Mr. Mulvihill: That's not notarized either.

Mr. Tanner: That was sent to the County.

Mr. Mulvihill: But not notarized.

Mr. Tanner: It was received by the County.

Mr. Mulvihill: What difference does it make?

Mr. Tanner: It makes a big difference.

Chairman Tanaka: Well, let me try this one more time.

Mr. Mulvihill: Okay. We're fighting for our life here.

Chairman Tanaka: Again, I understand. And again, this is why I have proposed— Now, apparently, the feeling is that it's been before us twice. We've still gotten nowhere. And this Board does not wish to hear this again and move forward on the facts that we do have. Now, once again, Board Members?

Ms. Rachel Ball Phillips: I'd just like to say that while I do absolutely feel for the applicant's financial hardship, and I appreciate that that's there, the fact that the neighbors are in objection is – would, you know, would give me no choice but to deny at this point.

Mr. Castro: And also that there is documentation that they may plan to build in the future. And they were given ample time to have that letter document – notarized, which it wasn't. And the family members that are here, it's conflicting with what was said in the letter. I would have no recourse but to deny this.

Chairman Tanaka: Any other discussion?

Ms. Kapua`ala: Excuse me, Mr. Chair. Just for the record, as noted in the staff report, because of the close of the public hearing occurred at the last meeting, you have 60 days to make a decision or this variance is automatically granted. So if you choose to defer, then December 8<sup>th</sup> would be the last – the next hearing date would be the last time you could deliberate or this variance would be automatically approved.

Chairman Tanaka: Okay. Thank you, Trish. Okay. I think everyone knows how everyone feels. Excuse me. Trisha, what is the December 8<sup>th</sup> – when is our next meeting?

Ms. Kapua`ala: December 8<sup>th</sup>, which is a Thursday.

Chairman Tanaka: So technically – it's 15 days from now. Now, so technically, if this were deferred, it would have to be heard on that December 8<sup>th</sup> and a decision would have to be made on that December 8<sup>th</sup>, correct?

Ms. Kapua`ala: Correct.

Chairman Tanaka: Thank you.

Mr. Shimabuku: Mr. Chair, I won't be in attendance on that December the 8<sup>th</sup> meeting. At this point, I cannot be in favor of granting the variance based on what we have. And giving him another shot, I mean, he already had one shot of trying to get all this stuff done, and apparently, nothing was done. And now it seems to be worse where the police was involved that he cannot contact the people. So as much as possible, I'd like to give Ms. Grantham the opportunity, you know, based on the financial issue, but to hear it another time, and I not gonna be here, you know. I don't know how it's gonna turn out. But at this time, I cannot be in favor of granting the variance at this time.

Ms. Kapua`ala: Mr. Chair, and for the record also, this a dual request where it's a Title 16 and Title 19 requirement that they're seeking variances from. Both setback, but Title 16, as well as Title 19 have separate requirements. So we have two staff reports: one from the Department of Public Works signed by the Director, as well as Planning. And the Public Works' staff is here in the audience if you'd like to seek their expertise.

Chairman Tanaka: Yes, I would, before we move forward.

Mr. Mulvihill: And can we find out what that dotted line is that--?

Chairman Tanaka: Hopefully, we'll have some clarification. Is that Mr. Chun in the audience?

Mr. Cerizo: The dotted line that's adjacent to your property line is of no consequence. It's a reference line. The adjacent Parcel 2 is – adjacent Parcel 2 includes this area. This is the boundary line of Parcel 2. These are a reference line that involves this Grant Land Commission Award.

Chairman Tanaka: Access easement, is that?

Mr. Cerizo: No.

Chairman Tanaka: No.

Mr. Cerizo: It's a grant line for reference purposes. It's just – like this is another grant line. So they show – in some maps, they show the grant lines just for reference because that's a historical – just historical information. It doesn't – this 5.3 indicates that this is the dimension of this portion of the boundary line, as likewise, this 126 is another dimension. This line here, it's a reference line.

Mr. Shimabuku: So I have a question. So that's also a reference line on that Maielua property in the back, which runs from the bottom to the top up to, I think, 16?

Mr. Cerizo: Yeah, that appears to be the same thing also. It's likewise. Here's another Land Commission Award.

Mr. Shimabuku: So that doesn't really mean nothing pertaining to the property?



Mr. Cerizo: No.

Mr. Shimabuku: What is that 26 right there on unknown owner right on the 13?

Mr. Cerizo: This one here?

Mr. Shimabuku: Yeah.

Mr. Cerizo: This parcel here, yeah.

Mr. Shimabuku: That's nobody's property?

Mr. Cerizo: As of now, there's no record – no owner of record on that parcel at the time the map was made. I'm not sure if this been resolved since.

Mr. Shimabuku: But that's not a reference line on that – what is that? 50.0?

Mr. Cerizo: This one here?

Mr. Shimabuku: Yeah. That's the actual property line?

Mr. Cerizo: Yeah, this is the property line.

Chairman Tanaka: Okay, thank you, Francis. My question for Mr. Chun, we have in front, a Public Works' staff report. Now, this isn't the first time a situation like this has come about. In – from Public Works' point of view, if there were an easement, and an after-the-fact building permit was granted, what are – the issues are in Public Works' view as far as building within a setback?

Mr. Jarvis Chun: Thank you, Chair. The – if there was no setback, or Title 19, no Housing Code setback, or Title 16, the Building Code would take precedence. The Building Code would regulate the distance to property line based on – from the property line to the exterior wall. The closer you get – the closer the building gets to the property line, the requirement of a fire wall will take place. In this case, if a dwelling, which we classify an R-3 is less than three feet to a property line, the wall, that exterior wall, would have to be rated one-hour.

Chairman Tanaka: Okay, meaning so that if this structure is on fire, they wanna protect the next door neighbor. That's the purpose of having setbacks?

Mr. Chun: That's correct, Chair.

Chairman Tanaka: Thank you.

Mr. Shimabuku: Mr. Chair, question or comment. So regardless if you approve or deny the variance, there's still financial requirements probably would come into place by having that fire wall erected?

Chairman Tanaka: Yes, see, that's – is that true? If in this case, so that wall up on the property has

to be rated for one-hour fire, would that be – so if the variance were granted, this would be required, that wall would have to be fire-rated?

Mr. Chun: That request wasn't part of the – that code section was not a part of the variance request. However, I guess in the past like what you said, if the applicant received approval on an adjacent property that's been affected, and provided some kind of like a no-build easement meaning, similar to like the setback easement, I'd guess we would have to take a look at the actual wording in the doc. The only problem is, it'll affect whatever building that would be proposed to be built or if it's an existing building on that adjacent property.

Mr. Shimabuku: So, Mr. Chun, so in this case, if the owners did move forward and apply for an after-the-fact permit, the stipulation would be put in then to make that fire wall?

Mr. Chun: That is correct. It's two-part, yeah. If they didn't receive– My section enforces the Housing Code with the six feet setback too. So let's say he did receive a six-foot setback, he would also need a fire wall setback, or if he can provide some other documentation like what you're trying to get from the applicant or – and the adjacent owners to serve as a – we call it like a no-build area so to create that setback.

Chairman Tanaka: Safety.

Mr. Shimabuku: Okay, thank you.

Mr. Mulvihill: May I you ask a question? If we build a fireproof wall or a wall that would be satisfied that would retard a fire from our property on the Maieluas' property, Marfil property, Phillips property, could we volunteer to build it at our cost?

Chairman Tanaka: Well, yeah, I mean, that is something that you could possibly propose, and possibly maybe you could've proposed before this point, but again, this has to go through the process of getting their permission in writing, getting an agreement signed that says that you are going to do this, and they are fine with that, and then this Board could act. But–

Mr. Shimabuku: None of the action was taking place as far as putting in a after-the-fact permit, so therefore, it's kinda like too late. Am I correct?

Chairman Tanaka: Well, because we have 15 days to act as a Board.

Mr. Shimabuku: That's why I think we mentioned the last time that you had all this time to go and get all this stuff taken cared of, and get legal advice from the last meeting that we had. You didn't take any action, then that's where we are here today.

Mr. Mulvihill: Sir, I strongly disagree. We took as much action as we could.

Mr. Shimabuku: You didn't get anywhere.

Mr. Mulvihill: Pardon me?

Mr. Shimabuku: You didn't get anywhere.

Mr. Mulvihill: Yeah, but that doesn't mean the effort wasn't put forward. You make it sound like we sat on our fannies.

Mr. Shimabuku: Well, there's no proof that we received any information other than what we had from the last time. So it clearly states that nothing was done. That's all I can say.

Mr. Mulvihill: We were directed by this Board to get signed easements from the Maieluas and any other related property owner. We have put so much forward – effort forward. It's not funny. But anyway, I'm just curious if we could build a wall.

Chairman Tanaka: The same as if – you were as directed to get an easement, you would have to go through the process of getting the individual owners to sign off on that. Board Members, any other discussion? Any–?

Mr. Lyons: Could I ask you a question? I gotta sign in again?

Chairman Tanaka: It's up to me, so go ahead. Please come forward. State your name for the record.

Mr. Lyons: Raymond Lyons. I just was wondering if he could put a fire wall on his building instead of a – is that what you're saying? That the fire wall is tied to the wall where he could make it a two-hour rating, three-hour rating, you know? And then I just wanted to bring that up. Maybe he could hear that and– He need help. . . . (inaudible) . . . help him.

Chairman Tanaka: Again, and any – anything like that would still have to go through the process. You need permission to build whether it be on the property line, in the easement – I mean, in the setback, in your next door neighbor's property. That has to be– Now, at this point, now we do not have that. So as much as I–

Mr. Castro: Mr. Chair, if we don't act today, does it automatically get approved, or disapproved, or–?

Mr. Giroux: One more meeting.

Mr. Castro: One more meeting.

Mr. Tanner: But we don't know who's gonna be here, or if for example, if there wasn't a quorum, and we couldn't hold it, then it's automatic.

Mr. Castro: Automatic approval?

Mr. Tanner: Exactly.

Chairman Tanaka: Board Members, please, we would – I would entertain any motions you may have.

Mr. Shimabuku: I would entertain a motion from all what we heard from the last meeting and this meeting that we deny the variance application.

Mr. Tanner: I second.

Chairman Tanaka: It has been moved and seconded that the application for a variance be denied. Any discussion? All those in—

Mr. Shimabuku: Yeah, well, I have a discussion. You know, as much as possible, you know, there is financial burdens, but the rules is the rules, and we gotta follow. And not enough information was brought forward to us, and that's the reason why I make the motion.

Chairman Tanaka: Thank you. With that, all those in favor of the denial, please say aye. Chair votes aye. Any opposed?

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

**VOTED: To deny the variance application.**

**(Assenting: R. Shimabuku, R. Tanner, S. Castro, R. Phillips, K. Tanaka.)**

**(Excused: B. Santiago, B. Vadla, J. Haraguchi, P. De Ponte.)**

Chairman Tanaka: **Motion – variance application is denied.** Okay, next item, approval of the November 10<sup>th</sup> 2011 meeting minutes.

#### **D. APPROVAL OF THE MEETING MINUTES OF THE NOVEMBER 10, 2011 MEETING**

Mr. Tanner: I would make a motion to approve the minutes.

Mr. Castro: Second.

Chairman Tanaka: It's been moved and seconded. All those in favor, please say aye. The Chair votes aye. Any opposed?

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

**VOTED: To approve the November 10, 2011 meeting minutes as presented.**

**(Assenting: R. Tanner, S. Castro, R. Shimabuku, R. Phillips, K. Tanaka.)**

**(Excused: B. Santiago, B. Vadla, J. Haraguchi, P. De Ponte.)**

Chairman Tanaka: **Meeting minutes have been approved.** The next item: Director's report. Trisha, do we have any report?

#### **E. DIRECTOR'S REPORT**

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

Ms. Kapua`ala: Nothing to report other than the prehearing conference with Judge McConnell that was scheduled in January is now being requested to be moved again. That's for the West Maui Village Appeal, which has been in-house since 2007. So Judge McConnell is trying to process it, but the applicant and the County are still trying to settle.

Chairman Tanaka: Thank you. Next meeting date is December 8<sup>th</sup>. Do we know what's on the agenda at this point?

**F. NEXT MEETING DATE: December 8, 2011, Thursday**

Ms. Kapua`ala: On December 8<sup>th</sup> we have – or we were supposed to have a Mike Anderson come before you asking for a setback variance. Jarvis and – Public Works and Planning has been in discussion, and we realized that the same issue is there where he had submitted an application, and wasn't straightforward with his information. It was insufficient to move forward. Same issues where the eaves and the fire rating is an issue. So we're gonna defer that one. And other than that, I don't think we have anything else scheduled. So you might be getting a break on December 8<sup>th</sup>, yeah.

Chairman Tanaka: Alrighty. Board Members, thank you very much. For me personally, I was trying to give him an extension, but I understand. I understand.

Mr. Shimabuku: I think we gave 'em the chance. He never – to me, he never acted upon it. Like Mr. Castro stated, if we're gonna have enough quorum the next time, it might get away from us, and that's the reason why I made the motion, because I'm not gonna be here next time on the 8<sup>th</sup>, just to let you know.

Mr. Castro: I'm not – I'm not certain as well.

Chairman Tanaka: It's no problem to be discussing this as part of the record. Okay. I want this part of the record, that's why.

Mr. Tanner: . . . (inaudible) . . . if we didn't have a quorum . . . (inaudible) . . .

Chairman Tanaka: No, well–

Mr. Shimabuku: That's what me realize that, eh, we cannot let 'em step away.

Chairman Tanaka: Yeah, well, the reason why– I would've let pushed – I would have pushed for a deferral had we not had the December 8<sup>th</sup> deadline. But the possibility arose that if on December 8<sup>th</sup> we didn't have quorum or something–

Mr. Castro: I would've preferred . . . (inaudible) . . . but having the family come in and testify, now, it's conflicting testimony.

Mr. Tanner: Very.

Mr. Castro: And one is not even notarized and we gave him ample to–

Mr. Tanner: But he had a picture of the guy smiling.

Chairman Tanaka: Yeah, okay.

Unidentified Member: Oh, my God.

Chairman Tanaka: Okay, again, Board Members, thank you very much. Staff–

Mr. Giroux: Just to highlight, I think we – there's two things I just wanna bring up is that in the state that our rules are in right now, you know, there is options where we believe that they need – we need more information even though we have closed the hearing, is to have the applicant state on the record that they waive any type of timeline or deadline that has been set.

The other thing is that on our rules, there has been some case law coming out from the Hawaii courts that we don't necessarily have to have these deadlines in our rules. We do have them. If that's something that the Board wants to look at as far as taking that off of our rules because they're not legally required. The Big Island went through the litigation, went through the Supreme Court. The Supreme Court said that a variance is not one of those developmental permits that is spelled out in Chapter 91, which requires agencies to have deadlines upon their developmental. So that's something for discussion in the future. I just wanted to throw it out, you know, for discussion.

Mr. Shimabuku: So they still have a chance to appeal at a higher level, then.

Mr. Giroux: Right.

Mr. Mulvihill: May I ask a quick question? I'm sorry to interrupt. Are we dead in the water, Corporation Counsel?

Chairman Tanaka: Can – can we–?

Mr. Mulvihill: Is there anything else we can do?

Mr. Giroux: Yeah, I can't give you legal advice. The only thing is that you will be given an – an order will be served upon you, and that within 30 days of receipt of that, you do have the option of taking this to the circuit court.

Mr. Mulvihill: Okay. And I can ask Ray – Mr. Shimabuku, why didn't you graduate from Lahainaluna?

Mr. Shimabuku: What does it matter?

Mr. Mulvihill: It means plenty. We were both there.

Chairman Tanaka: Okay, please, we're still part of--

Mr. Mulvihill: No, I wanna know. No, no, I'm very curious. If-- I was--

Chairman Tanaka: We are still in session, so this is not--

Mr. Mulvihill: No, if Mr. Shimabuku was trying to retaliate on me and . . . (inaudible) . . . my family, then I'd wanna know.

Chairman Tanaka: Again, again--

Mr. Castro: I think you out of order.

Mr. Shimabuku: What is that? What was that?

Chairman Tanaka: No, that -- Ray, that--

Mr. Shimabuku: Are you accusing me of something?

Mr. Mulvihill: I wanna know if you had . . . (inaudible) . . .

Mr. Shimabuku: I don't even know you.

Chairman Tanaka: Please.

Mr. Shimabuku: I don't even know you. What are you accusing?

Mr. Mulvihill: How do you not know me?

Chairman Tanaka: How do you stop this? Excuse me. Yeah, thank you.

Mr. Tanner: It's really in your best interest to leave right now.

Chairman Tanaka: Yes, please.

Mr. Tanner: It really is.

Mr. Mulvihill: I'm sorry. . . . (inaudible) . . .

Chairman Tanaka: Okay. Again, sorry about that, Ray.

Mr. Tanner: How do you not know him?

Chairman Tanaka: But-- Does that--? Authority. Be quiet. Okay, thank you, staff. Thank you, everyone. Meeting adjourned.

## **G. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at approximately, 3:15 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Kevin Tanaka, Chairman  
Rick Tanner, Vice-Chairman  
Rachel Ball Phillips  
Stephen Castro  
Ray Shimabuku

**Members Excused:**

Bart Santiago  
Bernice Vadla  
Patrick De Ponte  
Jacqueline Haraguchi

**Others:**

Francis Cerizo, Staff Planner, Planning Department  
Trisha Kapua`ala, Staff Planner, Planning Department  
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel  
Jarvis Chun, Department of Public Works, Development Services Administration