

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MARCH 14, 2013**

(Approved: 3/28/2013)

A. CALL TO ORDER

The meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Kevin Tanaka at approximately, 1:30 p.m., Thursday, March 14, 2013, 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. I'll now call the meeting of the Board of Variances to order. It is now 1:30 and we have a quorum of five. There is an item that does not appear on our agenda which has been requested we take care of as our first order of business. With that, I'll call on our Director.

Mr. William Spence: Good afternoon, Board Members. I apologize this isn't on your agenda, but it's the congratulatory resolutions for Kevin and Bernice for their service on the BVA. So what I'd like to do is read the resolutions into the record:

Resolution of the Maui County Board of Variances and Appeals
Whereas, the Maui County Board of Variances and Appeals was established in 1983; and
Whereas, Kevin Tanaka has served the County of Maui since April of 2008 as a Member of the Maui County Board of Variances and Appeals; and
Whereas, Mr. Tanaka has served as Vice-Chairman from April 2009 through March 2011, and Chairman from April 2011 through March 2013; and
Whereas, Mr. Tanaka has served with dedication, performed his duties in the highest professional manner, and provided valuable guidance in serving the needs of the people of Maui County; and
Whereas, Mr. Tanaka's term of office will expire on March 31, 2013; now, therefore,
Be it resolved, by the Maui County Board of Variances and Appeals that it does hereby express its deepest gratitude and appreciation to Mr. Tanaka for his service during the past five years; and does hereby extend its best wishes in his future endeavors; and
Be it further resolved that copies of this resolution be transmitted to the Honorable Alan M. Arakawa, Mayor of the County of Maui; and the Honorable Gladys Baisa, Chair of the Maui County Council.

Chairman Tanaka: Thank you. No speech at this time. You may continue, please.

Mr. Spence: Thank you, Mr. Chairman. The second resolution of the Maui County Board of Variances and Appeals:

Whereas, the Maui County Board of Variances and Appeals was established in

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1983; and

Whereas, Bernice Vadla has served the County of Maui since June 2010 as a member of the Maui County Board of Variances and Appeals; and

Whereas, Ms. Vadla has served with dedication, performed her duties in the highest professional manner, and provided valuable guidance in serving the needs of the people of Maui County; and

Whereas, Ms. Vadla's term of office will expire on March 31, 2013; now, therefore, Be it resolved, by the Maui County Board of Variances and Appeals that it does hereby express its deepest gratitude and appreciation to Ms. Vadla for her service during the past three years; and does hereby extend its best wishes in her future endeavors; and

Be it further resolved that copies of this resolution be transmitted to the Honorable Alan M. Arakawa, Mayor of the County of Maui; and the Honorable Gladys Baisa, Chair of the Maui County Council.

Ms. Bernice Vadla: Thank you very much. It's been my honor to be here, and to do my best to help resolve any of the issues, and be a part of this County. Thank you.

Chairman Tanaka: I guess really quickly, I'd like to thank Trisha, Tremaine, and the Planning Department staff, for their patience with me as serving as Chair, and especially, Mr. James . . .

Mr. James Giroux: Giroux.

Chairman Tanaka: Giroux. I made the statement a few minutes ago that I need James to hold my hand for one last meeting. Thank you very much. And it has been my honor and privilege to serve on this Board. Thank you.

OK. Let's see, the next item on our agenda, Item D, Appeals, just to let all parties involved . . . for everyone here to know, we will be losing quorum at around three o'clock today. So what we'd like to do is get through as much as we can, and address the items, and hopefully, we'll get through what's in front of us. And the testimonies, yeah, would have to be deferred, unless we could get through this in an hour and a half. We'll get as much done as we can. OK. Trish, if you can read that into our record?

B. APPEALS

1. **DEBORAH K. WRIGHT, ESQ., AND DOUGLAS R. WRIGHT, ESQ., of WRIGHT & KIRSCHBRAUN representing TROY and SUSAN MCCASLAND for an appeal of the Planning Director's notice of violations of Maui County Code, §§19.12.020, 19.37(A), & 19.65.080(D) for the operation of a non-permitted short term rental within the County's Apartment District for property located at 120 Kanani Road, Kihei, Maui, Hawaii; TMK: (2) 3-9-016:038 (BVAA 20130001).**

a. **Appellants Troy McCasland and Susan McCasland's Motion to Adjourn Hearing, Request Pre-Hearing Conference, Establish a Scheduling**

Order and Demand for Mediation

- b. Appellants Troy McCasland and Susan McCasland's Motion in Limine; Exhibits "1" - "3"**
- c. County of Maui's Memorandum in Opposition to Appellants' Motion in Limine**
- d. Appellants Troy McCasland and Susan McCasland's Exhibits "A" - "M"**
- e. Appellants Troy McCasland and Susan McCasland's Witness List**
- f. County of Maui's Prehearing Brief**
- g. County of Maui's Exhibits "1" to "15"**

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

Chairman Tanaka: OK. Yeah, if the two parties' representatives may identify themselves?

Mr. Doug Wright: Thank you. My name is Doug Wright. I'm here for the appellant, Troy McCasland.

Ms. Deborah Wright: And I'm Deborah Wright also present for Troy McCasland who's present with us.

Chairman Tanaka: Thank you.

Ms. Jane Lovell: Good afternoon, Chair and Members. My name is Jane Lovell. I'm the Deputy Corporation Counsel and I'm here representing the Planning Director. I would just like to say for the record that Mr. Spence, and Mr. Goode, and the Mayor were all subpoenaed to be here. I see that Mr. Spence is here. I noticed Mr. Goode in the back. And the Mayor called to say he is returning from Kihei and he will be here as soon as he can.

Chairman Tanaka: Thank you. The first item, we need to address the . . . what is labeled as Item "a," the motions to adjourn hearing . . . prehearing conference, scheduling, and demand for mediation. If you wanna . . . ? Go ahead.

Mr. Wright: Would it be OK if I stand? I feel more comfortable standing instead of sitting and talking into the microphone. Thank you, Members of the Board. This motion was made because although superficially, it does appear to be a simple matter, there is an extensive history requiring an extensive review by anybody really involved. Because of the nature of the rights that are gonna be adjudicated here possibly before this Board, it's really necessary that the appropriate consideration be given for the parties to prepare necessarily so they can present the right issues to you. Unfortunately, this is a complex matter. It's not a matter that was created by the appellant, Mr. McCasland. It's one that he has inherited from by various parties including, the County, to be quite honest, going back nearly a quarter of a century. And I'll do my best to try to give you a brief historical summary of this mess.

It turns out we discovered later by . . . just about everybody involved that this property was . . . it consists of two separate lots actually, that are owned by the McCaslands. And back in 1987, these lots were apparently, consolidated. OK? After they were consolidated in 1987, as far as we could

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tell, nobody either knew anything more about it, or did anything further, and they continued for the next 24 years as separate lots, meaning separate deeds, separate title searches, separate tax payments, separate building rights which have vested long ago in these properties.

In 2004, the McCaslands purchased the . . . one of the properties: the Kanani property at issue here, which ends in the TMK, I believe, 37 and not 38. But it's the 120 Kanani Road is the property that we're discussing here today.

In 2005, the McCaslands filed a conditional use permit application to operate it as a transient vacation rental. They're not gonna be able to complete the CUP because of also discovered from a prior owner, they were unpermitted building violations, as it'll show. This isn't the original construction in 1999. It's construction afterwards. So now, he's . . . the McCaslands have inherited this problem. They're working diligently to go forward with this resolution. And everybody's getting along fine trying to find a resolution to this.

As you can imagine, seeking these after-the-fact permits requires a lot of reviews and it takes quite a bit of time. After several years, it appears as though the reviews have been completed. The departments for the most part had given their stamp of approval, all except for one. And what it comes down to, interestingly enough, is it seems that the final approval was to come from the Parks Department, of all places. The Parks Department discovers this consolidation from 1987. And that's as . . . I'm going to affectionately refer to it as the bomb. It caught everybody by surprise and it essentially blown up . . . had blown up all of the work that's been occurring for this permit application and the after-the-fact permit application for the previous years.

So this new . . . the . . . (inaudible) . . . consolidation which happened decades before all of the sudden leads to the requirement of a new subdivision so that on the record it shows what everybody had believed it to be for the past 20-plus years and how it existed prior to the consolidation. That led to a stalling of the conditional use permit application until the consolidation got resolved. No CUP meant that there was no final permit in place. However, as Mr. McCasland has . . . will testify later is that he was allowed to operate this since an application had been filed and that the enforcement would be stayed pending the processing of this permit, the CUP application. Nevertheless, it led to a notice of violation issued December 21st of last year, just a few months ago. One of the big questions is obviously, is how does this fact . . . how does the fact that the consolidation was not recorded affect liability of subsequent owners such as the McCaslands, and the lack of notice, and the building permits, and the other applications that have been pending since then? It is all tied together. Mr. McCasland, believe me, he wishes he wasn't here having to deal with this and wishes he hadn't had to deal with this for the past eight years, but it doesn't change that that's where we are and it's something that we do have to confront.

As a result of this complex history, we requested certain discovery rights which is the nature of this motion. We request that the matter be referred to a full contested case hearing that would allow for the discovery. Give us an opportunity to go in and find out what happened, how do we resolve this in the best manner. Unfortunately, the County wants you to rubberstamp their position and they've disguised this complicated matter as an easy one. They don't believe that there's any other issues on the table other than the short term rental housing. The appellant hasn't even been provided with a copy of the initial complaint that was apparently filed which kicked this notice of violation investigation into gear. We haven't seen that. We haven't been provided with an

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opportunity to obtain it 'cause there is no discovery allowed under the current rules. We have to guess at who may have said that, what did they say, what was the result of the investigation. We don't have the ability to obtain that. If we go forward later on today, we're gonna do our best to do that in front of all of you and use that as a pseudo discovery proceeding. That does not seem to be very efficient and certainly not a good use of our time and resources.

We have been involved, meaning my office has been involved, for two weeks for a matter that has gone on for a quarter of a century. Although the County may disagree that new counsel is not a reason for an adjournment, we respectfully disagree. This notice of violation was initially brought up you'll hear in January of 2012, around the time that a complaint was apparently received. You're gonna see that the appellant, during that timeframe, wasn't preparing for a hearing before you today. He was preparing for a resolution in trying to work out. That should be everybody's goals, to be quite honest. Prior counsel that was involved is no longer involved in this matter. We're involved. We're here in front of you today. And instead of jumping through hurdles with the County toward an approval, we are attempting to appeal to you to get an adjournment to allow us an opportunity to present the correct facts to you, present relevant evidence to do so that is in a fair manner, not prejudicial to one party versus the other, and not likely to result in more of a hardship than what is already before you.

Having said that, I've alluded to, there's no prejudice to the County. The appellants aren't aware of any complaints that the County has received from neighbors concerning the use of the property. The fines continue to accrue. If the County makes its case and you agree, it doesn't change that the fines are continuing to accrue for the alleged violations. That's still in place. There's a substantial prejudice to the appellant for not being able to present in a confident manner, his side of the case. So while there's no prejudice that's been shown by the County, there's a substantial prejudice and a grave risk of harm to the appellants. And that is not something to be underscored.

Every day for the whopping two weeks that we've been formally involved in this, we discovered either new argument, procedural defects with the notice of violation, the process, the facts that were wrong, the facts that were correct, and flipped again because we're trying to work our way through this as we go. So in an attempt to present the best information to you, we would prefer to get it right instead of it being by ambush.

One of the issues that the County has alleged in its reply brief to you is that the violation is a flagrant violation. However, you're gonna see testimony, and I would ask you to consider, how is it flagrant when the appellant has followed everything that the County has asked him? He's been diligent in seeking his approvals, and has been diligent in working with the County to reach a resolution. You can't have a flagrant violation based upon a problem that may have been caused by the County. Where did this consolidation come from? This is not something that was caused by the appellant but he's left dealing with it today.

They are not ordinarily required to assist an appellant or a property owner in completing an application. They've made that . . . the County has made that argument and we agree. Ordinarily, that's the case. But when the County's the only one with the information, and you choose or otherwise make a decision to withhold the information necessary for the appellant or property owner to move forward, what process are you left with? This consolidation, nobody knew about. The County, somewhere in the bowels of the County, that record was eventually located by the Parks

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Department. That information was solely with the County. It brought it to the appellant's attention. However, because of that, he's prevented from going forward without their assistance. So for that reason, ordinary's off the table. Assistance is gonna . . . there's gonna need to be some assistance.

It is likely that this notice of violation, and we're gonna show . . . give you some testimony later today, and I think the testimony's gonna reveal that this notice of violation may be procedurally defective not only with regard to the history, but this violation's got its own problems. There are substantial problems with it ranging from representation that's been made to the appellant that the . . . the amount of the fines they're trying to be sought. For example, a representation was made the fines of approximately, \$500,000 have been levied. If you read the code, it's a thousand dollars a day for the property violation. The code was adopted May 23rd 2012. It's been less than ten months. So a thousand dollars a day can't equal 500 days, but we don't have a discovery process to flush out these issues so we don't know. Additionally, there's a consolidation. So these properties we thought were two lots are one lot. But the notice of violation is issued on only part of that lot. It's issued on a separate. So which way is it? Is it a consolidation with the two lots combined? Or the lot separate and you can proceed with an application with one? Well, they told us you can't do that. So if the lots are separate, how is a violation issued on only one of the separated lot? It just doesn't make sense. It's inherently unfair and it's hard to proceed at this time.

There are questions about the weight that is to be afforded to the Mayor, the Director's assurances, which have been expressly stated or impliedly acceptance as far as whether or not an applicant could proceed without fear of prosecution. I know this is not a new issue but it's coming up again. The County cites certain law concerning a case that it handled many years ago. This is different than that case. The code specifically states . . . the code that was adopted specifically states that a Director has the authority under certain circumstances to approve or reject applications under the Short Term Rental Housing Code. The case law that was cited is a Federal case, not State law, but it addresses the possibility of assurances from someone who doesn't have the authority to give you those assurances. Here, those assurances are allowed by the code.

And interestingly enough, found a case from, it turns out, Illinois from 1986 around the same time as this alleged consolidation. And it kind of makes it mark here today because it recognized what I've had a hard time thinking about and putting into words, but it recognized that to allow a . . . the position by the municipality to suspend the ability of a property owner and otherwise prevent him from obtaining a vested right is in itself an invalid and arbitrary action of that municipality. Gosh, that makes sense. That's right. So we recognize that there's no vested right in ultimately obtaining the permit, but shouldn't we be allowed to rely on the process and an actual hindrance and prevention from being able to go forward to that process is considered arbitrary and capricious? And I think that's correct. That was the case, First American Trust versus Armstead when it was in 1986, the Supreme Court of Illinois.

This is my last page of notes and it's only half a page. I believe that the County is also equally confused as we are in our two-week investigation, and possibly perhaps as some of you might be of the current moment. In their reply brief, they said that we have to prove that we haven't violated the transient vacation rentals. That's not the charge that has been alleged in the notice of violation. The code was the Short Term Rental Housing Code. They're not interchangeable. This TVR, Mr. McCasland has an application pending for a conditional use permit to operate a TVR since 2005.

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The notice of violation alleges a Short Term Rental Housing Code which was adopted May 2012. That's a different code, but the terms are being used interchangeably apparently, or maybe the notice of violation is wrong. It's not clear to me at this point what I'm supposed to be defending necessarily. And as a result, you're getting everything.

We respectfully request you consider and allow us an appropriate amount of time to do our discovery, do our due diligence, present a well thought out and perhaps more flowing argument to you for what needs to be addressed. These are substantial, complex rights that have to be adjudicated. It goes beyond an administrative function. And it does deal with something that was caused 24, 25 years ago by a consolidation that involves the County's own actions. We're asking for a fair opportunity for you to review this matter. Thank you.

Chairman Tanaka: Thank you. Ms. Lovell?

Ms. Lovell: Thank you very much. Before I . . . before I start, the Mayor has arrived. He has been subpoenaed by Ms. Wright and Mr. Wright to be here. He is here; however, he is to be called as a witness in their case. And because we have preliminary matters, opening statements, ruling on these motions, all of our witnesses, and we understand you are going to lose quorum at three o'clock, I would respectfully ask that his Honor be allowed to return to work, and that he be on call. He has assured me that he takes this proceeding and this subpoena very seriously, and that he will come back down just as soon as you are ready for him.

Chairman Tanaka: OK. If there's no objections? Yeah, no problem, Ms. Lovell.

Ms. Lovell: OK. So, Mayor, you're free to leave, but you will return when needed, is that correct? Thank you very much.

Mayor Alan Arakawa: Give me about five minutes 'cause I have to take the elevator down.

Chairman Tanaka: Thank you, Mayor.

Ms. Lovell: OK. Thank you. Well, I'm not sure whether I'm responding to the motion or to an opening statement.

Chairman Tanaka: Yes, actually, yeah, since an opening statement was given by the appellant, I guess I'd like to give you the opportunity to do that as well, and then we'll address the individual items.

Ms. Lovell: OK. Thank you. Ladies and gentlemen, this appeal arises out of a notice of violation that was issued to Troy and Susan McCasland on December 21st 2012. That is some-what? Three months ago. The violation that the McCaslands are charged with is operating an illegal short term rental within the County's A-1 apartment district at their property at 120 Kanani Road in Kihei.

In 2009 . . . I'm about to get into matters that are the subject of another motion, I realize. Let me skip over those for the moment.

Chairman Tanaka: Yes, thank you.

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Ms. Lovell: Thank you. All right. I will return to that subject when the Board has decided the other motion. The County Zoning Inspector, Tammy Osurman, will testify that a complaint was received on January 10th 2012. And this is not, as I understand it, a written complaint. This is someone who called in a complaint, which she was required to investigate. And according to the complaining party, I believe that Ms. Osurman will testify that Units C and D of the property located at 120 Kanani Street, Road, in Kihei were being used as vacation rentals. So Inspector Osurman visited the property on January 23rd 2012, spoke to witnesses, took photographs, and with the permission of the cleaning staff, inspected Unit D of the property. Inspector Osurman will testify that on January 24th 2012, Mr. McCasland called her, and she advised him that without a permit, it was illegal to operate short term rentals on the property. On January 27th 2012, the Planning Director told Mr. McCasland that the Planning Department had no policy to cease enforcement merely because a property owner was attempting to legalize an existing illegal activity.

We will present to you Exhibit 9, which shows that the Planning Department clearly informed the McCaslands in writing that a notice of violation with appropriate penalties would issue if they continued to operate an illegal vacation rental on their property. And they were asked to consider that communication as a notice of warning. But instead of shutting down, the McCaslands continued to operate illegally, as shown in our Exhibit 10, which we will present to you, they've advertised and continue to advertise to this day extensively on the Internet.

On December 21st 2012, the department issued a notice of violation. On January 22nd 2013, the McCaslands filed a notice of appeal. In their notice of appeal, they admit that they have been operating short term rentals on their property for at least one year. They say "Maui County has known that owners were operating a short term rental for approximately, one year." They also admit further in their notice of appeal that they have operated a short term rental for many years. Michele White, who is a legal assistant in my office, will testify that on February 27th 2013, she conducted an Internet search to follow up on a previous search that had been done by our office investigator, Frank Krau. And she discovered as recently as February 27th of this year, 2013, that the property at 120 Kanani Road in Kihei was still being advertised on the Internet. And she will testify that the online calendar showed that the property was fully booked for February, partially booked for March and April, and that reservations could be made all the way up until the end of 2013. That is what the evidence will show that we will present to you. We will also present testimony from the Planning Director, Mr. Spence, that short term rentals are not allowed in this area without a permit. And he will testify as to the permitting history in this case. The Maui County Code says that short term rentals and transient vacation rentals are prohibited unless there are valid either conditional use permits or short term rental permits, unless the property is located in a zone where such rentals are allowed as a matter of right such as the hotel district. And Mr. Spence will testify that there is no permit for the short term rentals on this property.

Now, I would like to address the McCaslands' claim that by merely applying for a permit, they have the right to operate until a permit is issued. There have been no assurances to them by anyone with any authority to give such assurances that they can operate without a permit completely independent of whatever issues there are on their property whether they're subdivisions, whether they're permit violations for setbacks, whether they are after-the-fact permits for structures that were built without a permit. You cannot operate a short term rental without a permit and you cannot file an application for a conditional use permit in 2005, ask in 2007 that the Planning Department hold that application in abeyance, and then let the Planning Department send numerous reminders

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asking what do you want to do with this permit: do you want to proceed or else, you know, we'll just shut the file down? And then in 2011, as you'll see by an exhibit that we will produce, Mr. McCasland said we are withdrawing our application for 120 Kanani Road. We wish to proceed with our application for the neighboring property on Awihi Place in Kihei. I understand from Mr. Spence that he will testify that on Monday, he received a letter from Mr. McCasland's attorneys asking that the conditional use permit application be reinstated for 120 Kanani Road. But in any event, throughout those long years, there has not been a permit in place, and without a permit in place, you cannot operate short term rentals.

Now, the McCaslands and basically, anyone else in the County who's operating a short term rental knows or should know that there is no defense to a notice of violation for a short term rental that's operating without a permit on the basis of this supposed policy of all you have to do is apply for one and then you can keep operating. And we ask this Board to please take judicial or official notice under Rule 12-801-97(G) of your rules of Practice and Procedures of two cases that were resolved in the Federal courts. The first was a decision on December 19th 2007 which we will introduce as our Exhibit 14 in which a U.S. District Court decided the case of Maui Vacation Rental Association versus County of Maui. That lawsuit sought to prevent the County from enforcing current laws prohibiting unpermitted transient vacation rentals. The court dismissed the lawsuit brought by the Maui Vacation Rental Association on the grounds that no such supposed policy was legally enforceable. In other words, the Planning Department is free to enforce against anyone who is operating a transient vacation rental or a short term vacation rental without the appropriate permit. That case was appealed to the 9th Circuit Court of Appeals which is the Federal court just below the U.S. Supreme Court. And the 9th Circuit also decided that there was no such policy that was enforceable by someone who is operating without a permit. And there are other reasons why the McCaslands knew that they needed a permit, which I will go into later after one of their other motions is resolved. The McCaslands knew that they shouldn't be operating without permits and yet they have done so for many years. Whatever the state of their subdivision application, they still need a permit and they don't have one.

So who has to prove what in this proceeding? Well, the Maui County Code says that advertising a property as a short term rental home shall constitute prima facie evidence of the operation of the short term rental home on the property, and the burden of proof shall be on the owner, operator, or lessee of record to establish that the subject property is not being used as a legal short term rental home or is not in operation. As a result of the Internet advertisement, we believe that we can easily satisfy that prong. And the County's Planning Director, Mr. Spence, will testify that the property lies within a zone that doesn't allow rentals of less than six months without one of two permits: either a conditional use permit or one of new the short term rental permits that has come into play since the spring of 2012. And as I mentioned, Michele White will testify that the property is being advertised on the Internet.

Now, once those facts are established that a permit is needed, that there is no permit in place, and that the property is being advertised on the Internet, then it's up to the McCaslands to prove either that they have not been operating a short term rental at 120 Kanani Road, or that they do actually have a permit. I believe that once you have heard and seen all the evidence in this case, you will conclude that the appellants are operating illegal short term rentals at 120 Kanani Road in Kihei as alleged in the notice of violation.

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Now, with respect to the motion and the request that we put all this off, it's clear from the evidence that we will present that the McCaslands have been operating illegally perhaps off and on, perhaps continuously for years. Also, Subchapter 10 of your rules is the chapter that applies to appeals from notices of violations. The Subchapter 4 of your rules, which applies to contested cases says very specifically in Rule 12-801-34 that this subchapter, namely Subchapter 4 about contested cases, governs contested case procedures before the Board except appeals governed by Subchapter 10. So when we look at Subchapter 10, Subchapter 10 provides for a very streamlined process. That's so that these things do not drag on for years. No discovery. No lengthy or complicated proceedings. You get a notice of violation, and you come in, and you explain either that you did what was alleged, or that you didn't, and you put on your evidence. The staff is instructed to schedule these very quickly so that there is no delay that would prejudice either party. And so for those reasons, because of the lengthy history of unpermitted rentals, because there is no discovery, because Mr. McCasland, perhaps not his attorneys, his most recent attorneys, but certainly, Mr. and Mrs. McCasland themselves have known over a year that they needed to shut down, and in fact, because they were specifically told by the Planning Department that enforcement would ensue if they did not shut down. They have had over a year to be prepared for this proceeding. And therefore, I ask that we do proceed.

I have one other reason for asking to go forward today and that is because the Zoning Inspector, Ms. Orsuman, who is a key witness is not available if you were to continue this for two weeks. She is not going to be working on March 28th. So therefore, I would ask that we go forward today. Thank you.

Chairman Tanaka: Thank you. OK. Board Members, I guess the first portion of this would be for us as a Board to decide on the appellant's motion to adjourn hearing, request a prehearing conference, establish a schedule . . . a scheduling order and demand for mediation, which is pretty much what Mr. Wright presented to us in his statement. Is that correct? That is correct, yes. Board Members, thoughts? Questions? For myself, and I guess just to get an overview, and I guess, Ms. Lovell and Mr. Wright, if you could correct any or all statements that I am about to make, I think it's pretty clear that what we have in front of us is by the letter of the law from the County of Maui, a short term rental has been in operation for a while and illegally. Now, I understand . . . well, my understanding is that . . .

Unidentified Speaker: Allegedly.

Chairman Tanaka: Oh, allegedly, for years. And my understanding is that the appellants are not disagreeing with the fact that this operation has been going on, but that there are many extenuating circumstances that . . .

Mr. Wright: That's right. It's not just the extenuating circumstances, but the characterization that it's been done illegally is something that we contest. And briefly, there is a reference that you made to it going on for years, which is not the case. It hasn't been shown. It hasn't been alleged. The code has only existed since May 23rd of 2012. And that's what we have to address here for the notice of violation.

Chairman Tanaka: OK. And so one of those circumstances would be what the code was in previous years to . . . versus what it is as of today.

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Ms. Wright: And can I add one thing? I'm sorry. Part of the problem, too, is what we're alleging is that the notice of violation itself is defective.

Ms. Jacqueline Haraguchi: Defective in . . . ?

Ms. Wright: Defective because it cites to a TMK which the County has said is not a separate TMK. It says Kanani and Awihi were consolidated. They're one property. So they're only citing part of the property. OK? Which they told us we can't do applications on only part of the property, but they're noticing a violation for one part of what they told us is a consolidated lot. And that goes into all of the problems that Mr. McCasland has had in even applying for a short term . . .

Ms. Haraguchi: But I think even though . . . the bottom line is, if it is on one lot that they're sending the violation on, there still is a violation of him operating.

Ms. Wright: It's not . . . all I'm saying is there is a problem with it. It's defective. They don't get to notice a part of the property and call it . . . it's not a separate lot.

Chairman Tanaka: Yeah, being specific to the case, at this point, anyway, we need to address . . . Now, the three motions, I guess, is part . . . is all in one. So we can . . .

Mr. Wright: It's three. It's three separate motions presented as one, that's correct. Different . . . (inaudible) . . . though that would be required.

Ms. Lovell: Yes, Chair, just to clarify, this notice of violation that was issued in December of 2012 is only seeking fines and penalties since the date of the notice of violation.

Chairman Tanaka: From December 11th?

Ms. Lovell: From December 21st.

Chairman Tanaka: Oh, OK, yeah.

Ms. Lovell: Which was the date of the notice.

Chairman Tanaka: OK. OK. Board Members, it's inevitable as we . . . as statements are being made, statements regarding the case itself, so as far as the motions that are listed as Item "a," we, procedurally, would have to say . . . in order to move forward, anyway, we would have to deny the motion and actually move forward. Is that clear to . . . and is that agreeable to you all? OK. Yeah, so procedurally, we have to address it meaning either accept it or deny it. So with that, I'd need a motion.

Ms. Haraguchi: Motion to deny their request to adjourn.

Chairman Tanaka: OK. We have a motion to deny the motion to adjourn hearing.

Ms. Haraguchi: Yes.

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Chairman Tanaka: Do we have a second?

Mr. G. Clark Abbott: Question? Point of order? We're only dealing with the first thing—the prehearing conference?

Mr. Giroux: No, there's three parts: adjourn the hearing . . .

Mr. Abbott: There are three parts. Are we dealing with them individually, or as a consortium, or a group?

Chairman Tanaka: Jackie, yeah, is your motion . . . would it be . . . your motion to deny the motion to adjourn hearing?

Ms. Haraguchi: Yes.

Chairman Tanaka: As well as to deny the request for a prehearing conference, as well as to deny scheduling an order and demand for mediation?

Ms. Haraguchi: Yeah. Yes. I wanna deal with the issue at hand now. I understand the dates, and the times, and all the past that they both have spoken about. And it seems like an unfortunate and a confusing situation for the owner, but at this point the way I see things is we have to move forward and deal with the issue at hand. So that's the basis, why I'm denying that.

Chairman Tanaka: OK. OK. So we have a motion to deny the three motions. Do we have a second? OK. The motion has failed. OK. So the appellant's opening statement addresses their . . . some of their . . . the facts that they feel pertaining to putting this off for a substantial amount of time that you feel . . . they feel is necessary to move forward. Board Members, is that your feeling as well?

Ms. Bernice Vadla: Yes.

Ms. Haraguchi: No. I'm always gonna say no, because there are two separate issues here. And listening to both of them, I believe they've been given what the violation that we're dealing with here, and everything that runs backwards of that is within their attorney's or legal counsel, and they're trying to look into it, and bring it forward. But even with all these situations where the lot numbers and the TMKs, the County issued a violation on a specific . . . on a specific cause which was using it as a vacation rental when it was not permitted.

Chairman Tanaka: OK. Well, Jackie, the . . . well, as far as the first item anyway, it's . . . if any and/or all of their motions were granted, it's just . . . it would be . . . mean putting it off for the time they feel they need to better prepare for it to state their case. You know, I apologize, but what I'd like to do, if there are no objections from the Board, to go into executive session so that we . . . we can confer with . . . so we can . . . us . . . I apologize, so that we can discuss our responsibilities as a Board. So I apologize. This should be quick, but we will now go into executive session.

(The Board then went into an executive session from 2:23 p.m. to 2:42 p.m.)

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Chairman Tanaka: OK. We are now back in session. After discussion with what . . . what we should be doing. And what we . . . I think it is now clearer . . . a clearer understanding by all of us. We left off in the middle of a motion. Jackie, if you would restate your motion?

Ms. Wright: Excuse me. I don't think there was a middle of a motion. You had already said the motion failed. I'm sorry. I thought you already declared it failed.

Chairman Tanaka: Yes. OK. If you . . .

Ms. Haraguchi: Yeah, I'll make the remotion to deny a . . . the continuance.

Chairman Tanaka: Jackie, to deny the motion to adjourn the hearing . . .

Ms. Haraguchi: Yes, yes.

Chairman Tanaka: Request prehearing conference . . .

Ms. Haraguchi: Establish a scheduling order and demand for mediation.

Chairman Tanaka: OK. We have a motion to deny. We have a second. All those in favor, please say aye. Chair votes aye.

It was moved by Ms. Haraguchi, seconded by Mr. Abbott, then

VOTED: To deny the motion to adjourn hearing, request prehearing conference, establish a scheduling order and demand for mediation.

(Assenting: J. Haraguchi, G. Abbott, P. De Ponte, B. Vadla, K. Tanaka.)

(Excused: R. Shimabuku, T. Espeleta, B. Santiago, R. Tanner.)

Chairman Tanaka: OK. **So their motions are denied.** We shall move forward. The next item, the appellant's motion in limine.

Unidentified Speaker: . . . (inaudible) . . .

Chairman Tanaka: OK. Again, we are . . . it appears as though . . . because of . . . well, one, because of our time restriction and the desire of this Board to move forward, we've . . . in essence, you will have a continuance because we will not be able to move any further on today's agenda. We will need to schedule when it would be able to be continued. So with that in mind, if you can keep your statement to three minutes, yes, regarding the motion in limine.

Ms. Wright: I'll try and be brief about that. We have moved in limine with regard to certain exhibits that the County has proposed. We have them also in our exhibits just because we didn't know if you were going to grant the motion in limine or not. But obviously, the motion in limine would apply to these documents regardless of who has them in their list of exhibits. We're not asking for you to cut the County out, and let us do what we want with them, it would apply to all of them. And I'm

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just gonna use ours for the time being to refer to which are Exhibits L and M. These are two resolution agreements that are dated in 2009. And the resolution agreement . . . I thought it was L and M. Maybe it's all in L. Yes, I'm sorry. It's all in L. And then the County has two, and I'm not sure of the exhibit numbers right now.

Chairman Tanaka: Exhibit 3.

Ms. Wright: Exhibit 3. OK. Thank you. The resolution agreements, if you look through them, the agreements deal particularly with a property on Ilikahi Street in Lahaina that the McCaslands own. And there was a notice of violation issued with regard to those. And an agreement eventually was reached. In the agreement, they also refer to some properties in Kihei that the McCaslands own which include . . . and I'm not gonna say "property," because it isn't one property, it's part of a property, but it includes the TMK for Kanani Road that is before you in this particular notice of violation. And in it they discuss the resolution agreement that during the pendency of getting the conditional use permit for the Lahaina property that there will be no short term vacation rentals on any of the properties. All right? Now, the conditional use permit that is referred to in these agreements is only for the Ilikahi property. And the fines that were levied in this agreement were only as to the Ilikahi property. So that was the focus. But what is most important is that in the agreement, and this is . . . I'm looking at the one that's dated January 30th 2009 in our Exhibit L, it says, "This agreement shall terminate if owners become legally permitted to operate the property," singular "property," "as a transient vacation rental or short term rental provided that owners have paid the fines required by this agreement," which again, is only as to the Ilikahi property. So the agreement itself says that it's over with once they get a conditional use permit for the Ilikahi property. The agreement defines . . . at one place it defines "properties," plural, to include all three. But when it says when it terminates, it only refers to the one property. The reason this is important or significant is because the County has tried to say, well, these 2009 agreements, they're violating them, they've breached them, because they're operating a short term rental agreement now, and they were bound by these particular resolution agreements. The fact of the matter is that with regard to the Ilikahi property, Mr. . . . well, the McCaslands got a conditional use permit at the beginning of August 2011. There was no short term vacation rentals on any of the properties during that time period at all. There's no claim that there was. The agreement is over. OK. The agreement ended when they complied. They paid the fines. And the County has those . . . those copies of the checks to pay the fines as part of their exhibits. The resolution agreements are over and so the County in its brief, at least prehearing briefs, they were gonna show that they violated these agreements, and they breached these agreements by doing what they alleged . . . are alleged to have done in the notice of violation. That's . . . that, as we understand it, that's completely improper. The agreement itself says it terminates at a certain point. So there's no breach of an agreement with the County. And it would be inappropriate to allow these exhibits to come into evidence.

Now, what the County says in response to that is, well, OK, even if . . . even if it's not proper to introduce these exhibits for that reason, it's just to show that they had knowledge about transient vacation rentals being illegal. Well, the County's already told you today that they intend to present evidence that Mr. McCasland was told last year that he shouldn't do vacation . . . term vacation rentals on the part of the property or the TMK that they have done the notice of violation for in this case. So there's no point to that. All it is, is some sort of attempt to prejudice the Board, to bring in irrelevant evidence to say, oh, my gosh, you know, you should go after him because of this old

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agreement which he complied with, got the conditional use permit, paid the fines, and was praised for it by the . . . by Gladys Baisa and by all of the people in the neighborhood because they didn't like how it was being . . . the property was being handled before. And there's nothing . . . there's no real purpose. They wanna say, well, there's some sort of history, or you can see that this was something that he should know about, or should've known about. They already said that they're gonna have their evidence from 2012 that Mr. McCasland was warned or was told whatever he was told. So this evidence should be excluded only for one thing because it's completely a terminated agreement, and secondly, it's irrelevant to this issue with regard to this property at this time. Thank you.

Chairman Tanaka: Thank you. Ms. Lovell, your response to this motion?

Ms. Lovell: Thank you. Obviously, the County profoundly disagrees with the interpretation of what this contract or agreement says or what it proves. But we are not here to enforce this contract. What we are here to do is to determine whether or not illegal vacation rentals are taking place on one of the properties. Trisha, could you roll up, please, to the first page of that exhibit? It's the very next page, yeah, there we go. OK. And is this gizmo all set? OK. This agreement specifically mentions 120 Kanani Road, Kihei. And then if we go up to the next page, it says . . . can you go up just a little bit, please? Thank you. It says "Owner shall" . . . it says "Owners shall cease any vacation rental or operation of the property as well as any other property," etc., "until such time as the owners become legally permitted to operate transient vacation rentals or short term rentals on such property." And so that is why this agreement is important. A court may eventually have to decide what exactly that last paragraph means, but for our purposes, it shows that Mr. and Mrs. McCasland were on notice in 2009 that to operate any of these enumerated properties including, 120 Kanani Road or any other property in the County of Maui, they needed to get a permit. And so it shows their state of mind. It also shows why the Planning Director chose to issue a notice of violation.

If you look at Exhibit 2, which is the notice . . . the notice of appeal, and if you could go to the second page, please, Mr. and Mrs. McCasland are saying that it was arbitrary and capricious for the notice of violation to be issued, and that it was issued for no apparent reason, and that the decision was a clearly unwarranted abuse of discretion. To suddenly cease communications with warning, with owners without warning, and to issue a notice of violation for no apparent reason other than a lack of a permit which they claim the County is preventing them from getting is a clear abuse of discretion. Well, you can't understand why this notice of violation was issued if you don't know that in 2009, the same parties were told that they could not operate without a permit. And so for that reason, we ask that it be admitted into evidence.

Chairman Tanaka: Thank you.

Ms. Wright: Excuse me, may I address one more thing?

Chairman Tanaka: Regarding your motion? Yeah, go ahead.

Ms. Wright: Just to let you know, another reason why this permit is not relevant, it was the agreement that was reached was under a totally different law than what they are now currently bringing the notice of violation under. This law wasn't in effect . . . sorry, this law wasn't . . . the law

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that governed that particular agreement is different than the short term rental statute that they're now bringing the notice of violation under. So I think despite all of that, the last paragraph does say that the agreement terminates. Whatever's in it, it terminates when they have complied, paid the fines, and complied with that property which is the Ilikai property.

Chairman Tanaka: OK. I have a question for either of you regarding this motion. Exhibits 1 . . . I guess I'm reading in Exhibits 1, 2, and 3? Or is it 1 and 3? Because Exhibit 1 is just a copy of the actual notice of violation. Is that correct?

Ms. Wright: Yes, I think the motion is addressed to Exhibit 3 of the County and our . . . it would then be the same for our Exhibit L which is the resolution agreements.

Chairman Tanaka: Oh, OK. So it's the way it's . . . OK. Board Members, any questions specifically regarding the motion before us at present? I guess, James, the Board's action regarding this motion in limine is to just address their objection to Exhibit No. 3, which is just making reference to something whether it be irrelevant to this case, or if we decide it is relevant to . . . we are making a decision if that agreement that . . . that they're referring to?

Mr. Giroux: Basically they're referring to Exhibits 1 through 3. Any ruling on that would . . .

Ms. Wright: I apologize. We had to put the motion together in less than 24 hours. It really is only addressed to Exhibit 3 and Exhibit L. And so I apologize if we stated it incorrectly, but we withdraw it as to 1 and 2, and only as to 3.

Chairman Tanaka: Just to the resolution agreement?

Ms. Wright: Yes, I'm sorry. I wanted to make that clear and I apologize because we had short time to put this together.

Mr. Giroux: Thanks for the clarification. So basically the effect of the ruling would . . . if the motion's granted, what would happen is that this document would not be referred to, or relied on, or mentioned during the case in . . . (inaudible) . . . or any further arguments. If it is allowed in, you would do the standard weighing of the evidence as far as how much weight you're gonna be giving it or deciding how relevant it is to the different defenses that have been presented in the case. And that's the normal procedure that you would do for all evidence that came in as being submitted and received.

Chairman Tanaka: Yeah. OK. So that leads to my next question would be as the remaining items on our agenda is the exhibit lists. Now, the parties have exchanged their exhibits. And at some point there would be an objection to or is . . . or are we still gonna . . . (inaudible) . . .

Mr. Giroux: Right. If this motion is denied, there would opportunities to make objections throughout the case as far as running objections, and those would have to be ruled on at the time.

Chairman Tanaka: OK. OK. Board Members, are we . . . we understanding we're . . . OK. With that, I would entertain a motion regarding the approval or denial of Item B, the motion in limine regarding Exhibit No. 3, County's Exhibit No. 3.

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Mr. Abbott: I'll make the motion to deny B as whatever . . . the motion in limine as presented now.

Chairman Tanaka: OK. We have a motion. Do we have a second?

Mr. Patrick De Ponte: Second.

Chairman Tanaka: OK. It's been moved and seconded. Before we take a vote, I just wanna state again what James explained to us that this is a . . . basically, an objection to Exhibit . . . County's Exhibit No. 3 for whatever the reasons being that it is not relevant to this specific case. They will have the opportunity to object to any exhibits at a later date. OK. With that said, it's been moved and seconded to deny. All those in favor, please say aye. The Chair votes aye.

It was moved by Mr. Abbott, seconded by Mr. De Ponte, then

VOTED: To deny the motion in limine.

**(Assenting: G. Abbott, P. De Ponte, J. Haraguchi, B. Vadla,
K. Tanaka.)**

(Excused: R. Shimabuku, T. Espeleta, B. Santiago, R. Tanner.)

Chairman Tanaka: OK. **The motion in limine has been denied.** OK. Next, do we . . . OK. Yeah, OK. In continuing on that, for both parties, if . . . you have seen the . . . each other's exhibit lists. Are there anything at this point that you would have objections to?

Mr. Wright: Could you just allow one moment, please?

Chairman Tanaka: OK. If . . . we'll ask Ms. Lovell that question first.

Ms. Lovell: OK. Thank you very much. The County formally offers its Exhibits 1 through 15 in evidence. As I mentioned in my opening statement, we're offering Exhibits 14 and 15 pursuant to Rule 12-801-97(G) which is official notice. And all the rest we are offering just under the ordinary rules. We have no objection to the appellants' Exhibits A, L, "M" as an in "Mary," "N" as in "Nancy." We object to appellants' Exhibits B, C, D, and E, because these are printouts from some of the entries in the County's KIVA system. And we object to these exhibits unless a person with the proper expertise is called to testify as to what those entries mean. So that's kind of a conditional objection. As to appellants' Exhibits F, G, H, I, J, K, O, P, Q, R, S, T, U, V, W, X, Y, Z, we do not believe that any of these are relevant to the issue of whether or not the appellants are operating a short term rental without a permit. However, we leave it to the Board's discretion as to whether you want to hear that evidence or whether you believe that it unduly prolongs the proceedings.

Chairman Tanaka: OK.

Mr. Wright: May I have an opportunity to reply?

Chairman Tanaka: Yes.

Mr. Wright: OK. Thank you. With regards to the request to deny our exhibits that were KIVA

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results, that is essentially a request to deny something that the County produced. That is something that is relevant, and that is something that the County, being the other party, produced themselves. They're objecting to something that they created.

Chairman Tanaka: Mr. Wright, sorry. Sorry to cut you off.

Mr. Giroux: We just wanna focus on what the parties don't have objections to first. And then that way then we can whittle away at the end.

Mr. Wright: I don't object to 1 and 2 for the appellee. I don't object to 6, 7, 8, 9, 11, 12, and that's it. Do you want me to repeat that?

Chairman Tanaka: No, I think . . . OK, so . . . OK. Procedurally, we will, as part of our record, what was just labeled by both as no objections. OK. Trish, did you get all of that on . . . ? Whether it be as part of the recording, you can get . . . we can confirm that. OK. So we . . . this Board will accept all those mentioned that both parties do not have any objection to. At this point, and correct me if I'm wrong, James, when we get to that point of arguing . . . well, presenting the exhibits, the parties may object to at that point, specifically to that . . . is that agreeable to . . .

Mr. Giroux: Right. And those items that are, I guess, listed as objectionable, it'll be the burden of the person presenting that to make sure that it is presented, and then entered into the record for those that we haven't already agreed on.

Ms. Lovell: Right. So what you're saying is that for anything that is not agreed to, the parties will have to formally offer it in evidence before it's to be shown to any witness or to the Board?

Mr. Giroux: That's correct.

Ms. Lovell: OK. But as to appellants' Exhibits 1, 2, 6, 7, 8, 9, 11, and 12, those have been offered and are in evidence?

Chairman Tanaka: It's already in.

Ms. Lovell: Thanks.

Chairman Tanaka: Yes. OK. OK. Is that agreeable and understood by both parties?

Ms. Wright: Yes.

Chairman Tanaka: OK.

Ms. Lovell: Oh, but I think you need to rule on our objections to theirs or not as the case may be. However, if . . .

Mr. Giroux: What we can probably do—we're gonna run out of time here—is that it seems like that we can bundle that objection into one, and we'll probably take that up as soon as we take up a hearing again if we don't get to finish today, just so it's clear.

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Ms. Lovell: But I take it that the appellants' Exhibits A, L, M, and N are in evidence?

Chairman Tanaka: Are in evidence, yes. OK. OK. The appellants' witness list . . .

Ms. Wright: Wait a second. Exhibit L is not in evidence because . . .

Ms. Lovell: Oh, I'm sorry. I'm sorry.

Ms. Wright: Exhibit L is objected to by us.

Chairman Tanaka: Oh, yeah, that's what you said.

Ms. Lovell: Oh, oh, OK. So you're withdrawing Exhibit L?

Chairman Tanaka: No, you . . .

Ms. Lovell: Oh, I see. I have no objection to Exhibit L, but the appellants have an objection to their own exhibit.

Chairman Tanaka: Which is County Exhibit No. 3.

Ms. Lovell: OK. Got it. Got it.

Chairman Tanaka: OK. Appellants' witness list, Ms. Lovell, have . . . is that . . . oh, I'm sorry, Mr. Wright, is that your final witness list, at this point anyway? OK. So, Mr. Wright, the list that you have submitted is your witness list. If you do have any additions to, keep in mind proper notice to the County in order to add any witnesses to your case.

Mr. Wright: I appreciate that. That's part of trying to understand the procedure that's . . . there's nothing established. It's unclear as to how to proceed, to be quite honest.

Chairman Tanaka: OK. Ms. Lovell, what is the typical notice time?

Ms. Lovell: Well, I think it depends on when we are reconvening. But generally speaking, you list your witnesses, and then you're free to call other witnesses for rebuttal or for impeachment. If you're going to subpoena a witness, the . . . usually the standard courtesy is at least ten days. And I don't know when we're going to be reconvening.

Mr. Wright: The rules of evidence as had been cited by the County don't apply. And so we were looking at part of the scheduling order to have you determine what rules apply so that we have something that governs our procedure. And that's what we were looking for . . . (inaudible) . . .

Chairman Tanaka: OK. Well, let's put that on the record, then. Typically as far as . . . so let's put that limitation upon both of you at this point, then, as far as witnesses and limiting their testimony.

Ms. Lovell: If I could point out, there was . . . with the hearing notice, there was a notice sent out by the staff that the parties were to put their witness lists, and documents, and briefs, and anything

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else in by February 28th. So there was a scheduling order. We all did that. And I congratulate Mr. Wright on getting his in on time. So the rules of the Board provide in Subchapter 10, and particularly, Rule 12-801-98 that any party based on a written demand timely filed with the Board and served on the other party may request the other party to disclose the identity of all witnesses to be called, all exhibits, and so forth. But we've done that already.

Mr. Wright: I disagree with the characterization. We did ours within 24 hours to do our complete investigation. We have filed supplemental lists as well. I haven't heard any objections to it, so it's unclear how we . . . If we continue the same process, the 48 hours, the four . . . whenever the next hearing is set, at least that would have some manner of consistency.

Chairman Tanaka: OK. I think . . .

Ms. Lovell: Well, I would object to 48 hours. I don't think that's really enough time particularly if we're talking about County officials such as the Mayor, who has a very busy schedule, the Public Works Director, the Planning Director, and so forth.

Chairman Tanaka: Yes, I would tend to agree with that. If it's something submitted in writing, I would not be opposed to something that is printed and placed before us before the Board's meeting. As far as witnesses, yes, let's put that on the record. Would ten days be . . . would ten days suffice to both parties? Does that seem reasonable?

Mr. Wright: When is the hearing?

Chairman Tanaka: Yeah, whichever that hearing date may be.

Ms. Wright: Well, it depends on how soon you set the next hearing. Ten days is almost there.

Chairman Tanaka: OK. A reasonable amount of time, I guess that's . . . that could be argued—reasonable. Let's take a look at that. Now . . .

Ms. Kapua`ala: Are we looking at a regularly scheduled hearing date, meeting date, or are we gonna have a special meeting for the continuance of this case?

Chairman Tanaka; Yeah, if possible, I mean, on our normal meeting date and time. Times can be flexible somewhat, but preferably on a regular . . . yeah, because of the possible . . .

Ms. Kapua`ala: We're looking at May 23rd.

Ms. Wright: I'm sorry. I am out of the country until . . . from April 24th to May 22nd. And so that would be the very next day after I got back. I'm afraid I'd be a little jetlag. Could it be possible to be one meeting later because that way I won't have that problem?

Chairman Tanaka: Trish, sorry, you stated was April?

Ms. Kapua`ala: May.

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Ms. Haraguchi: Can we have a special Board meeting for this?

Chairman Tanaka: I'd rather not.

Ms. Lovell: Or would it be possible perhaps, on the 28th of this month maybe even in the morning?

Chairman Tanaka: Well, what is scheduled on the 28th of this month?

Ms. Kapua`ala: We have one variance at 1:30.

Chairman Tanaka: OK. Is that . . . sound possible to both parties?

Ms. Wright: The 28th—Mr. McCasland has to fly in from the Mainland. And so I'm afraid that isn't going to be possible, plus that doesn't give us . . . if you count back ten days to give notice and everything . . .

Chairman Tanaka: Well, ten . . . for additional witnesses anyway.

Ms. Wright: Yes, I know, but I'm just saying we're almost to a weekend. That means by . . . you know, we'd be out of luck on that particular time. So I don't think that . . .

Chairman Tanaka: OK.

Ms. Wright: I'm trying to see what I . . . yeah, I don't think the 28th is gonna work.

Chairman Tanaka: OK. Let's . . . so the middle of May, late May date, would that be doable?

Ms. Wright: Not the 23rd, but any other date after . . . after the 22nd, well, after the 23rd. I return back into the country the night of the 22nd. And so it would be very difficult for me to . . . (inaudible) . . .

Chairman Tanaka: So you would prefer the first meeting date in June would be the earliest?

Ms. Wright: Yes, that's . . . (inaudible) . . .

Chairman Tanaka: OK. Is that available? How is that . . . how does that look, Trish?

Ms. Wright: What date would that be? I'm sorry. June 13th?

Ms. Kapua`ala: Yes, ma'am, June 13th would be the first available hearing date in June.

Ms. Wright: We are clear on June 13th.

Chairman Tanaka: Ms. Lovell?

Ms. Lovell: Well, I will be retiring on May 1st. So I regret that I will not be able to continue with this proceeding. I'm very sorry that we will be delaying so long in what is an enforcement matter. But

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. . . and I really do object to it being put off that long. I really think there should be some other date that we could do it.

Chairman Tanaka: OK. So now it has also been proposed that we hold a special meeting for . . . Let's see if we can do that. It would be sometime in April.

Ms. Lovell: Could it be before April 5th which is my last day at work?

Chairman Tanaka: OK, well . . .

Ms. Kapua`ala: On April 5th, we are available . . . we are able to facilitate the hearing at this conference room at 12 o'clock.

Chairman Tanaka: Oh, I'm sorry. What date was that? Sorry.

Ms. Kapua`ala: Friday, April 5th.

Mr. Wright: Can I ask if, depending on the witnesses, would we then be committed to going however late we need to go then on whatever day we decide?

Chairman Tanaka: Yeah. I mean, as long as . . .

Ms. Lovell: Or is there some other day like April 4th perhaps where we could go all day?

Ms. Haraguchi: No, I have to be . . . I won't be here from April 3rd.

Mr. Giroux: Jane, who would take over? Not me, right?

Ms. Lovell: I don't know. I mean, we have other attorneys in our office so if necessary, one of my colleagues, I'm sure, you know, would be prepared to take over. I'm just very concerned about letting this drift for months.

Chairman Tanaka: Yeah, I would not . . .

Ms. Lovell: Particularly, since the motion to continue was denied.

Chairman Tanaka: Yeah. They're getting a continuation anyway. OK. So let's . . . let's . . . well, let's attempt a special meeting and go as long as necessary. Please be aware of the fact that in April, there will be two new Board Members sitting, as well as a new Chair. I don't mind this because we are at a breaking point where we're . . . actually, we have not taken testimony. We have just been introduced to the case. When it is heard, you will need to present an overview again being that at most, there will only be three Members that will remember what you presented today.

Ms. Haraguchi: Oh, yeah, no, April 5th, I'm not here. So now you're down to two Members.

Mr. Wright: Can I just get clarification? That's direction that we should be prepared for—opening arguments again?

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Chairman Tanaka: Yes, yes.

Mr. Wright: Thank you.

Ms. Wright: And the other thing is, when do the Board Members begin, the new Board Members?

Chairman Tanaka: April 1st.

Ms. Wright: OK. So they wouldn't even had any . . . (inaudible) . . .

Chairman Tanaka: Yeah. They was . . . OK, yeah. And be aware, I'd hate to throw our two new Members into the deep end.

Ms. Lovell: Well, could we perhaps hold it then on March 29th?

Ms. Wright: No, that's Good Friday.

Ms. Lovell: Oh, I'm sorry, that's good Friday. March 27th?

Ms. Wright: I don't know how we're gonna be able to do March 27th. No, that's . . .

Chairman Tanaka: Wait. I'm sorry. Jane, did you say, "March?"

Ms. Wright: Yeah.

Ms. Lovell: Yes. I'm just still trying to find a time when we can move forward before we lose experienced Members of the . . .

Chairman Tanaka: Yeah. Please be aware of the fact that if we weren't under the constraint, we would be going . . . we would be moving forward today. So, you know, 13 days from now would give you an extra 13 days rather than having it done, continuing on today. So . . .

Ms. Wright: Would the two of you still be sitting at that time?

Ms. Haraguchi: Yes. You will, right?

Ms. Lovell: We will lose our Zoning Inspector witness, but I will try to work around that. Then perhaps her supervisor could testify in her place.

Ms. Wright: Mr. McCasland is going to have to fly back, and he came with today, for today. We . . . and it's not . . . we're not saying anything. It's not anybody's fault. We thought it was going forward today if our motion was denied. For him to be able to come back is not going to be possible at that particular time.

Ms. Lovell: Well, could we continue today, then?

Chairman Tanaka: We will lose quorum.

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Ms. Lovell: But you only need quorum for action, right? You don't necessarily need quorum for . . .

Mr. Giroux: At least five Members should be hearing the evidence.

Ms. Kapua`ala: Can we work based off of Mr. McCasland's schedule? When the soonest . . . when is the soonest that Mr. McCasland could return for a hearing?

Ms. Wright: We're looking right now at April 17th. The 18th, we're in a mediation all day. And then the next . . . we were looking at first Thursdays. But then the next, I'm out of the country. But on the 17th which is a Wednesday . . . We're trying to examine April 17th. I don't know what everybody . . . (inaudible) . . .

Ms. Lovell: Would it be possible to go tomorrow while Mr. McCasland is still on island?

Ms. Wright: It's not possible for us to go tomorrow. Maybe for him. It's not for us.

Chairman Tanaka: OK. Now, assuming that we would have continued today, it would've been highly unlikely anyway that we would've gotten to any point by the end of today, which would result in what we are attempting to do now is schedule our next meeting. Board Members?

Ms. Haraguchi: Yes, can I say something?

Chairman Tanaka: Yes.

Ms. Haraguchi: I think it's important to get this on schedule. I do understand that there's a conflict. I mean, even with myself in April, there's a conflict. But I would like it if the current Board that is here today can actually be at the next meeting because we've heard everything what we've heard so far, and it would just help us move along a little faster. And it gives you enough time to put your witness list together, to put your case together. Unfortunately, for him, because the case is about him, and it's his property, he will have to be here.

Chairman Tanaka: Or not.

Ms. Vadla: Or not.

Ms. Haraguchi; Or not, yeah. He can . . . (inaudible) . . . not to be here and you be his representative.

Ms. Wright: While I understand that, he does have to testify. And I don't think it's fair at this point with this not continuing today to then say that he has to come back for the March 28th hearing. While I do understand what you're talking about, it's none of our fault that we can't go forward today. But then I don't feel like that we should be penalized by the fact that we have to pick another date.

Ms. Haraguchi: Either way, it doesn't matter. Either you're penalized, or the Board is penalized because some of us won't be here, and then we'll have new Members here.

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Ms. Wright: The Board isn't penalized just because some of the Members are changing. We would have to make opening statements again, but that's all. The Board is being . . . can't be said to be penalized in any way. We appreciate the fact that it's a difficult time with the changeover and everything.

Ms. Haraguchi: Can I make a motion? You guys can deny it or not.

Chairman Tanaka: Go ahead.

Ms. Haraguchi: I wanna make the motion that we continue on March 28th.

Chairman Tanaka: Board Members, let's discuss this. Now, please be aware of the fact that the reason Mr. Spence is here, and resolutions were read today is because I will be off-island on the 28th. So today is my official last day. And that's the reason for . . . This is tough. I mean, we go through this a lot, and it gets deferred, and it gets deferred a lot longer than we prefer. Again, this is . . . I don't mind the fact . . . Oh, OK, I'm sorry. You know what? We have a motion before us, anyway, that we do this on the 28th. OK. We need to ask on that motion.

Ms. Vadla: I'll second that.

Chairman Tanaka: OK. OK. OK. So it's been moved and seconded that we do this on the 28th. Board Members, all those in favor? Let's discuss this and let's act on this.

Mr. Abbott: Excuse me. I'm sitting here trying to accommodate everybody and trying to find an open solution for everybody. There isn't gonna be one. He has a problem. She has a problem. She has a problem. He has a problem. So we're at a point where we're just gonna have to make a decision and everybody's gonna have to go do it. That's the only thing I can think of. Let's find the very first available date whether it's the 28th, the 29th, whatever. We're not gonna . . . We're gonna lose two people no matter what. We're gonna have . . . She's going out the first of April. It'll be Pat and I are the only ones that are gonna be here. We're gonna have four . . . two brand-new Board Members and three other that don't know anything about this. I suggest we get this done as fast as we can, if we have to go into a special meeting Tuesday.

Ms. Lovell: Tomorrow, or Monday, or Tuesday.

Mr. Abbott: I understand. I understand Mr. McCasland's problem. I really do. And it's not cheap to fly and he has other obligations too. We also have other obligations.

Ms. Lovell: Right. I understand that. That's why I would certainly be willing to come back tomorrow, or Monday, or Tuesday.

Mr. Abbott: Well, I don't think that gives them enough time to do anything. That's throwing a bone in the middle of a lake and hoping the dog is going to paddle out to get it.

Mr. Wright: I appreciate the concern about the new Board Members, but this . . . the whole . . . the case hasn't been presented yet. There's been no case that's been presented. Opening remarks will be made again, and whoever's already had the benefit of already considering whatever

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comments have been made, they retain that benefit, obviously, but the case has not been presented, and the Board will retain its function. I mean, that doesn't change, and we recognize that.

Mr. Abbott: Well, as we seem to be . . . the person who seems to be the most important is Mr. McCasland. When is his schedule available?

Ms. Wright: What we were looking at is April 17th. I agree to that date. Other than that, we end up being at that June date, which I don't understand that there's any problem with the June date except a different Corporation Counsel will be handling the case, which I don't think that's a problem.

Chairman Tanaka: Trish, April 17th, is that a regular Thursday meeting?

Ms. Wright: That's a Wednesday. It's a Wednesday.

Chairman Tanaka: OK. Why is it that you are requesting a Wednesday?

Ms. Wright: Well, he asked the first available date, and I was checking with Troy, and the 18th . . . I think the regular . . . your next regular meeting date in April is the 11th, and then the 18th, we're in a mediation all day. That's what we had talked about when we talked about regular . . . (inaudible)
. . .

Chairman Tanaka: OK. The 25th, then?

Ms. Wright: And the 25th, I'm out of the country. I leave on the 24th and I return May 22nd. This was planned a year ago so it's not something recent.

Mr. Abbott: It would appear then that we're going to have to go into June because there are so many obstacles that I can think of. I hate to lose any Corporation Counsel. I hate to lose anybody or inconvenience everybody, but we've got to call . . . we've got to get this done.

Ms. Wright: Is the first meeting . . . may I ask a question about what the meeting dates . . . what are the meeting dates in June? Is it the 13th? Am I counting right or is it the 6th? I didn't know what . . .

Mr. Abbott: The second and fourth Thursday.

Ms. Wright: It's the 13th, then. OK, so that's what we're talking about.

Mr. Wright: And just as another . . . it says at noon, but knowing what we know today about the possible amount of time, since we're . . . if we're planning in advance, would it be possible to schedule it a little bit earlier and make sure that we can get it accomplished?

Chairman Tanaka: Is that available, Trish, from the morning?

Ms. Kapua`ala: June 13th and 27th, yes.

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Chairman Tanaka: OK. Let's schedule the 13th and let's start in the morning. And that will be scheduled then. We'll just say it. We'll just set it because we're discussing for 15 minutes picking a date.

Mr. Wright: Can I confirm that we'll go back to how the start of the ten days then applies? Is that correct? Ten days for the exchange of witnesses?

Ms. Kapua`ala: No. The County would like to request, the County meaning the Board, that you submit everything by Thursday, May 30th.

Chairman Tanaka: Yeah, 14 days, yeah.

Ms. Wright: We just want it to be clear so that we get the right time.

Ms. Kapua`ala: And if you could kindly do . . . communicate if there is gonna be something that you're gonna be wanting to . . . if you're gonna expect opposition to . . . we would like this May 30th date to be final and no subsequent responses after that.

Ms. Wright: Is there a time that has been set for that or . . . ?

Ms. Kapua`ala: We can go as early as 7:45 in the morning.

Chairman Tanaka: Typically, we'll start something like this at the earliest would be nine o'clock because there are Members possibly driving in from Lahaina. OK. So we'll set that: nine o'clock, June 13th, scheduled Thursday, first regular meeting, 9:00 a.m. OK. So as far as what we need to address regarding this case, everything has been basically, deferred to that date and time. OK. Ms. Lovell, too bad we couldn't get you this. Enjoy your retirement as the next time this group meets, we'll have a slightly different cast of characters. OK. So this item is tabled to June 13th, 9:00 a.m. Thank you very much.

Ms. Lovell: Thank you. And Chair Tanaka, thank you so much for your service on this Board.

Chairman Tanaka: To you, as well, thank you very much. OK. Let's do this. Another 30 seconds, approval of February 14th 2013 meeting minutes.

C. APPROVAL OF THE FEBRUARY 14, 2013 MEETING MINUTES_

It was moved by Ms. Vadla, seconded by Ms. Haraguchi, then

VOTED: To approve the February 14, 2013 meeting minutes as presented.

**(Assenting: B. Vadla, J. Haraguchi, G. Abbott, P. De Ponte,
K. Tanaka.)**

(Excused: R. Shimabuku, T. Espeleta, B. Santiago, R. Tanner.)

Chairman Tanaka: **The meeting minutes have been approved.**

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

E. NEXT MEETING DATE: Thursday, March 28, 2013

Chairman Tanaka: Our next scheduled meeting is the 28th. Trish, do we have items on that agenda at this point?

Ms. Kapua`ala: Yes, a variance.

Chairman Tanaka: OK. And we'll make sure that our Vice-Chair, Rick Tanner, is here to run the meeting. And then he'll probably be elected the new Chair. Board Members that are here now and proceeding, if you are interested, please speak up, then, to become the Chair. Make the statement. Gee, four . . . I guess I didn't realize, four years ago when I became Vice-Chair, I kinda shook my head and was afraid of it. Two years later when I became the Chair, I was deathly afraid of it. James has been terrific. Trish and Tremaine have been awesome. And two years later, I've been saying that I'm glad I had that shoved down my throat.

Mr. Abbott: Well, I have to say I'm . . . (inaudible) . . .

Chairman Tanaka: Yes, think about it. You know, the Vice-Chair . . . I'm not sure how Rick feels, if he wants to be the Chair, if he wants to . . . Yeah, so, but that'll have to . . . that'll come up. The election of new officers will come up next meeting, the new Chair and Vice-Chair anyway. OK. So we'll . . . that's it. Thank you, all, very much for the last five years. Meeting adjourned.

D. ADJOURNMENT

There being no further discussion, the meeting adjourned at 3:42 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Kevin Tanaka, Chairman
Gene "Clark" Abbott
Patrick De Ponte

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Bernice Vadla
Jacqueline Haraguchi

Members Excused:

Rick Tanner, Vice-Chairman
Bart Santiago
Ray Shimabuku
Teddy Espeleta

Others:

William Spence, Planning Director, Planning Department
Joseph Alueta, Acting Planning Program Administrator, Planning Department
Trisha Kapua`ala, Staff Planner, Planning Department
James Giroux, Deputy Corporation Counsel, Department of the Corporation Counsel