

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
June 10, 2015**

**A. CALL TO ORDER**

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Abbott at approximately, 1:35 p.m., Wednesday, June 10, 2015, 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 Abbott: The meeting of the Board of Variances and Appeals will now come to order. It is 1:30 p.m., let the record show we do have a quorum.

**B. PUBLIC TESTIMONY**

Chairman Abbott: Public testimonies are all the same, so that's fine.

**C. PUBLIC HEARING**

1. SCOTT A. SMENTEK AND MICHELLE R. SMENTEK applying for a variance from §19.29.020, Maui County Code (MCC), "District Standards" to allow 1) a portion of the 230 square foot unpermitted dwelling addition to remain between 12.2 feet and 8.3 feet from the side property line, 2) to allow a 60 square foot unpermitted dwelling addition that is used as storage to remain between 6.12 feet and 6.64 feet from the side property line, and 3) to allow a 510 square foot unpermitted storage structure to remain at 16 feet from the front property line when a 15 foot side yard setback and a 25 foot front yard setback is required for property located 3160 Akala Drive, Kihei, Maui, Hawaii 96753 (BVAV 2015/0010); (M. Balberdi)

Chairman Abbott: Will the staff read the agenda item and state the purpose of the application please?

Mrs. Malia Balberdi: *Reads item into record.*

Chairman Abbott: Thank you. Is there a presentation?

Mrs. Balberdi: Yes, just a short one.

Chairman Abbott: Thank you.

Mrs. Balberdi: This is just to familiarize you with the property. This is an aerial view and the property's right here. If you can see. . . these lines over here, they're not a 100% accurate but you can kind of tell where the property is right here. This is the front of Akala Drive looking in their driveway and this is an outline of their lot, where the house is here, and the lots out here. That's it.

Mr. Howard Kihune: Malia, can you go back to the overview map aerial? Yeah, perfect. Thank you.

Chairman Abbott: Will the applicant please come forward, speak into the mic and state your name please?

Mr. Scott Smentek: My name's Scott Smentek.

Chairman Abbott: Are you willing- - agreeable to waive the staff report Mr. Smentek?

Mr. Smentek: Am I willing to waive the staff report?

Chairman Abbott: The reading of the staff report.

Mr. Smentek: Yes sir, I'm willing to, that's fine.

Chairman Abbott: Thank you. Please make your presentation.

Mr. Smentek: Ok. I bought the property and inherited pre-existing issues, and I'm just trying to do what's right with this and I have some key points that I'd like to bring up. My lot has a major drainage ditch ...(inaudible...stepped away from the mic)... Thank you. - -and the lot slopes pretty steeply away in this direction.

I got some—maybe my wife would be willing to give everyone- -there's some photos here that I can provide that shows the location of the house and the steepness of the lot. And the location of the house is due to the fall away of the land. It was the logical place to put the home. And the original cottage that was put there is within the legal setback and it does have a permit.

Did everyone have an opportunity to look at those pictures showing the geographical challenges, the house pad and the lot? Then I'd like to hit a second point, is that when I purchased the home, four people, myself, my wife and two daughters moved in. That's four people sharing approximately 1,300 square foot home. It's a two bedroom, one bath home. And in my opinion removing a quarter of the house, will prevent reasonable use of the property and it will create a hardship for the four of us that are sharing the dwelling.

A third point is that the applicant's actions- - my actions didn't cause the conditions that are creating this hardship. Actually when I purchased the property I was unaware at the time of setback violations. That was not disclosed to me in the disclosure. There were actually several items that were not disclosed at the time of the sell. One of them was in fact that I was told the property had a septic system and actually it's only got a cesspool.

So I have gone to the County and I have acquired a permit to do the upgrade and to put in a septic system. I'm just waiting to get through the variance process so that I can move forward with that.

Two months after we purchased the property, I was told by my agent, the buyer's agent. . . I was told that what I needed to do was go to the County and get an After-The-Fact Permit. And I was told that for the non-conformance, it was in the disclosure that the house was non-conforming to the County record, it shows a 643 square foot cottage. The previous owner in 2006 came in and built the property out to approximately 1,300 square feet without a permit.

That's where this arises; this whole thing has come up. Because two months after we moved in October, we bought the place in August of 2013; and October 2013, I went down and applied for the Building Permit for the After-The-Fact Permit. It was during the Plan's review portion of that process, when the setback violation was noted.

And so, I haven't moved forward with the Building Department on the septic issue. There's an issue of an eave, there's oversized . . . there's two garages on the property. . . those are oversized, I'll need to get a permit for those. They're also, two close to the property line on the . . .(inaudible)...drive side. And I'm more than willing to move those garages to comply with that. But it's my house that I'm wanting to save, which is the reason for this update- - for the variance.

Also, I'd like to bring up a forth point, the County is recommending that - - naturally there will be a Hold Harmless Agreement, that will be on my record, if I ever choose to sell the home in the future or something, that will be there for everyone to see. And I totally understand that and accept that.

However, they are also recommending that I'm required to purchase a Commercial General Liability policy, for the life of the variance. Which means I would be paying the insurance, my kids would be paying the insurance, my kid's kids would be paying the insurance. And I currently have- - I'm insured through Geiko insurance and they are already providing me with the \$300,000.00 in liability coverage. And the County is recommending that I bump that up and I go additionally to that with a million dollar policy.

So, I called Geiko what they would charge for something like that. They actually don't even offer it because they don't do Commercial Liability Insurance, they're not that way. So I called my commercial agent on Oahu who covers my commercial truck for my hauling business and he was able to get me a quote, a rough quote for what it would cost me a year to get a policy like that and it would be starting at about \$1,500.00 and going up.

So, I feel like that's a little excessive and then that would actually create a burden for myself financially, for my children and so on and so on and so on into the future. And it does seem a little redundant in that once I sign the Hold Harmless Agreement; I mean that's basically allowing the County to legally be free from any suits or anything as well.

The papers that my wife dropped to you were two photos depicting the slope of the lot and the challenges on where to put a house on that lot. The back page that you'll find there is a letter from my closest neighbor. They run a business there, it's the Pineapple Inn.

Our dwellings are currently 28 feet apart. They have a level lot and they chose to put their home further from the property line than what's required. So, we do actually have a pretty good space in between us. And it would actually probably cause them more disruption if the variance

isn't granted in that there would be demolition and construction and things going on. They stay booked year around. They have- - I think they've got four couples in there right now, in the off season. So they're a very busy operation so I wouldn't want to interfere with what's going on there.

Regarding the building permit. . . I did apply for that about two months after . . . after moving in. All I was applying for was a permit to cover the pre-existing structure that had been built to the 1,300 square feet. It does state in the letter from the County that I also applied to extend a deck and I never made an application for that and I don't- - I was never intending to expand the footprint on the home. All I'm trying to accomplish here today is getting the variance so that I can move forward and get the After-The-Fact Permit and make legal what is already there- - you know the pre-existing structure.

And I have spoken with the department recently letting them know- - I've been out of touch with them for a while because my understanding was that I needed to get this variance taken care of first before I move forward with the moving of the sheds and things like that, because if I don't get the variance for example I don't need to do certain things, cause it's going to change certain things.

If I end up tearing away part of the house then the eave isn't even going to be issued because it's going to be gone. So I gotta kind of take care of this first, and then after I take care of this then I can move forward and work with them; and they've indicated that they are willing to work with me on the After-The-Fact project. . . the building permit project.

And on a last note . . . it does appear that several of the County's measurements are off. Depicting a greater problem than actually exists. For example-the storage area, the 60 square foot storage area, which is the food pantry, that measures 3'x12', that's 36 square feet, not 60 feet ok? -- To bid off.

And another example would be the two garages are actually separate. There is a sunshade on the top to provide some cover from the sun. So it does appear that the roofs are attached but it's actually a temporary sunshade, it's one of those - - like they put up at the flea market with the pipes and then its got bamboo on it and then its got one of those sun nettings, you know to keep the sun off that area. It could easily be removed.

But those structures are actually 12' wide by 17' long and my addition tells me that that's 204 square feet for each and if I times that times two I come up with 408 square feet not 510 square feet. So, it's - - some of the measurements are off . . . I believe.

Anyway, I just wanted to thank you all for taking time out of your busy day to hear my case and I do appreciate the opportunity to provide some background on this situation and for your consideration and working me on a solution to this problem. Thank you very much.

Chairman Abbott: At this time, we'll take questions from the Board. Please step to the microphone Mr. Smentek.

Mr. Raymond Sung: Mr. Smentek, will you please go over again . . . at the time that you acquired the property, was it by purchase or by inheritance?

Mr. Smentek: No, no, I purchased the property. It is my primary home. It's where we intend to stay for the rest of our lives and I intend to pass that down to my two daughters.

Mr. Sung: And what exactly did the seller tell you or not tell you regarding the status of the property that was being sold to you; as to whether it was permitted or unpermitted or - -

Mr. Smentek: Yes, on the disclosure the seller did make it clear that the property was non-conforming to the County record. Ok, so I knew that there were challenges on the property. It happened to be reduced to a price that I could get into Maui Meadows on and I was told by my agent that it was a fairly simple process to go into the County and going to get an After-The-Fact permit. He said, "Go down there, file the papers, it's either going to be a thousand dollars or twice the permit fee, which ever was greater.

So I did have knowledge that property had that issue. However, I had no previous knowledge, and it was not disclosed that there was a setback issue at the time of purchase.

Mr. Sung: By any chance do you know whether the deed that transfers title to you, was a Warranty Deed or a Quitclaim Deed or some other kind of deed?

Mr. Smentek: I'm not absolutely positive on that, but my realtor- - my current realtor who is different from the person who I purchased the home through; says it could more than likely be a Warranty Deed.

And I think I know where you're going with this because sometimes you can go back and they're liable to something like this and there's the clause where they can help you out with situations like this, financially and stuff. But I don't believe I have that course to pursue.

Mr. Sung: I'm sure that's what you believe; I have difficulty right now understanding why . . . if you have not fully pursued recourse with your seller . . . it seems to be the seller's actions that started this whole chain of events and situation why it is now essentially your problem and our problem as opposed to their problem to fix for you.

Mr. Smentek: Ok, if I may I'd like to elaborate on that and maybe I can clear something up. As I mentioned before, on the disclosure there were several things that were not disclosed that came up. And one of the things on the disclosure was that they did flip flop back and forth on the cesspool.

First they said, "it was a septic system", then they crossed that out and they said "it was a cesspool". Then they crossed that out and said "it was a septic system". So I had the seller's agent come out to the site and I said, "show me where the septic tank is"; and he showed me a spot in the ground, he said, "the septic tank is here" and I said, "where's my leach field?" And he said, "Your leach field is out here. So I said, "Ok." And the seller was in his 70's at the time, like mid 70's I believe. A Mr. Fitch.

After moving in, I probed the ground and I found a tank. I removed by hand a couple of tons of soil to get down to the tank. What I found was a crude tank that was made back in 1971, that's approximately six feet deep, five feet wide and about eight feet long. It had two lids on it that were locked in. I couldn't get those to pop up. So I used a mason resonator, I cut 'em free and popped 'em off. There was no baffle in there. It was just a crude cess tank.

And so, I called my relator who used to be an attorney as well and I ran that by him and I said "look, these guys told me I had a furnace and I ended up with a fireplace," you know . . . that was my analogy on it. And I said, "I wanna go . . . I wanna go after the seller and I want him to put in a septic system for me, because that's what they told me I had on the disclosure" and he said "Well, we can't really go after 'em until you get some estimates on what it's going to cost to put it in."

And so, I went out of pocket and hired Wayne Arakaki Engineer and applied for the permit, pay the monies to Honolulu and everything. And it actually- - forgive me; I'm a little fatigued from all this. . . I slipped my mind a little bit here. But, I hope I can regroup here, I apologize.

At any rate, I paid for three estimates . . . I didn't pay but I had three people come out, three people were supposed to come out and give me estimates, I had two come out and give me estimates. One was \$12,000.00 and the other one was \$15,000.00. So, I came up with the information that we needed so that we could send it to 'em and demand that they pay that.

We went back and forth for quite a period of time. And basically the seller . . . he moved to Phoenix somewhere. He was saying, "You know, I sold you the house and the system that's in place was adequate for the house at the time." It got grandfathered in by the County is what he told me. And so I did some more research and I found out that the County doesn't grandfather anything in. It's an illegal system that's in there, right now.

And if I go to get the After-The-Fact permit that would be one of the things that I need to do is spend the \$15,000.00 out of pocket and go and replace the unit. So I said, "Well look, I'm not a litigious person, I don't want to end up in court, I don't need the stress in my life, it's really going to not be worth it to go after \$15,000.00."

What he explained to me and he used to be an attorney is that it'd be throwing good money at bad money. Because for one thing, I could spend up to \$15,000.00 easily in the legal process and there's no guarantees that I'm going to win the case. So they could tell me, "No, he doesn't have to pay for it."

So on his advice, and on my own self, not wanting to stress and the hassle of going to court and doing everything else, I just chose to bite the bullet on that one and pay for the system myself when the time comes.

Mr. Sung: Well, thank you for explaining Mr. Smentek. I want to explain that although I am sympathetic to your plight in the situation that you find yourself in. But it really does seem to me that, from what I've heard and what I've read. . . really you should be looking at the seller and possibly their agent or your own original agent for recourse for insufficient or inaccurate legal advice.

It may be that legal recourse is your best avenue, because I really don't see why or how it can be that you're coming to this Board to fix your problem when you haven't fully exhausted your legal options with respect to your seller and other parties. And even though your application says, well, you yourself did not create the non-conforming situation that was not permitted, but never the less, you are the successor in interest to the party that did do that. And so you step into the shoes of the wrong doer and unfortunately for you, by contract you have stepped into those shoes.

And so, to me that condition as well as other conditions of the variance, I find a hard time with finding on how those can be possibly satisfied so that this Board, or at least me vote on this Board can even consider granting it. I just don't see where we can do that.

Mr. Smentek: Ok, I appreciate that. Let me elaborate some more. Mr. Fitch was not the person who did the build out in 2006. He purchased the property after the fact of that. So he may have been unaware of the setback violation as well, because he didn't choose to pull any permits, or do anything to the property during the couple of years that he owned it. So he is probably in the same shoes as I am. So for me to try to go back to the original person who did it, I'm not sure how the chain goes.

Mr. Sung: That's how it goes, it's a chain. So you and any other co-parties would pursue claims, cross claims, whatever it takes to try to find legal address for that. So again, you step into the shoes of the seller before you, that person may or may not step into the shoes for him or her but ultimately I still don't see why you are here before this Board when it seems to me that the proper channel to pursue is legal address and legal recourse with your seller and other parties. But that's my deal.

Mr. Smentek: Thank you.

Chairman Abbott: Juanita?

Mrs. Juanita Reyher-Colon: You mentioned two garage units.

Mr. Smentek: Yes.

Mrs. Reyher-Colon: Can you show where it's located?

Mr. Smentek: Sure.

Mrs. Reyher-Colon: Cause according to the application- -

Mr. Smentek: It's these two right here, those are the two that you're referring to.

Mrs. Reyher-Colon: Are they garage units or storage units?

Mr. Smentek: Is there a difference between a garage and a storage unit?

Mrs. Reyher-Colon: Yes.

Mr. Smentek: Oh ok, what is that difference? I'm sorry; I'm not using the right words.

Mrs. Reyher-Colon: The garage you house your- -

Mr. Smentek: Car?

Mrs. Reyher-Colon: - -your vehicles in it.

Mr. Smentek: Ok, ok. These are storage.

Mrs. Reyher-Colon: Storage units you store- -

Mr. Smentek: They're storage . . . it's elevated off the ground about three feet so you can drive into it. It's strictly for storage.

Mrs. Reyher-Colon: So my question is with these three essentially storage units, two that are tied together or . . . (inaudible)... why is there or what is the purpose for having a porch or lanai surround them? If they're storages.

Mr. Smentek: What it is-is a post and pier about three feet off the ground. It's got a big platform on it of plywood. And then you can kind of see it out front here, but it's like one big huge square and then it has the two storage units placed on top of it. As far as purpose, it allows you to go up the stairs and walk over and open the door. It's elevated off the ground, I mean that's the- - So could you repeat your question again?

Mrs. Reyher-Colon: Yeah, well see, I'm having a hard time because I can understand having a front porch area so you can actually access and take in and take things out. But to have it around the structure- -

Mr. Smentek: Ok. I can clarify then. This part is the porch, there's nothing on the side, there's nothing on the other side. It's straight . . . the building goes straight down and then the back goes straight down. So there's only one portion on the front. It's not a huge pad, the storage units are pushed out to the sides and the back. It doesn't have a surround porch.

Mrs. Reyher-Colon: So my next question is are you willing to move those structures within the setback?

Mr. Smentek: Absolutely.

Mrs. Reyher-Colon: For that particular one and the one that's under the- -

Mr. Smentek: This one isn't in violation.

Mrs. Reyher-Colon: It's not?

Mr. Smentek: No, that's why it's not mentioned.

Mrs. Reyher-Colon: Ok. And the other issues that you have are connected to the main residence? Correct?

Mr. Smentek: Yes, correct.

Mrs. Reyher-Colon: That's all I have.

Mr. Smentek: Thank you.

Chairman Abbott: Further questions? Howard anything?

Mr. Howard Kihune: Well, I understand the issue ...(inaudible)...in regards to the setbacks. My only questions or concerns would be pretty similar to Mr. Sung with regards to who was the original realtor or attorney. For him not to go after the seller to me sounds like he's protecting his own interests because otherwise he'd be called into court too.

Mr. Smentek: Ok, if I may interject and I don't mean to be rude and cut in. But Scott Berry . . . how long was it after we purchased the home he was diagnosed with stage four cancer (directing question to wife Michelle Smentek)? I don't believe he's here anymore.

Mrs. Michelle Smentek: Two months.

Mr. Smentek: Two months. Two months after we moved in. So it might be a little tough to get him to follow through with stuff, very unfortunate.

Chairman Abbott: Raymond?

Mr. Sung: This question is really more for Corp Counsel or for staff, but for the side of the main residence that's closest to the property line, which includes the unpermitted filled out, what is the - - what again is the side setback requirement in feet and inches? And what is the size of the violation? The non-conformance.

Mr. Smentek: The original cottage is approximately here and when it was built in 1971, the setback at that time was six feet. So it's legally six feet from the property line. This portion here was added on and this portion here was added on. But these are the portions of the home that are in the- - if it were to today's standards, the 15 feet would cut this in half and it would cut this half here like this.

Mr. Sung: What I'm trying to find out is . . . if you take the- - what would be required, what is the number of feet and inches of the part of the house that is now on the wrong side of the lawn.

Mr. Smentek: Yes, it's about eight feet down. And it's about eight feet down.

Mr. Sung: Ok. So this is a question more for Corp Counsel and staff. Is it theoretically possible for Mr. Smentek to go to his next door neighbor and say, "I'd like to buy eight feet of the property

along the side?" So that if he were to somehow acquire eight feet of what is currently the neighbor's, then he would be in compliance?

Mr. Smentek: I entertain that as well. But you've actually got - - right along here, you've got a big walk way and you've got washing machines and dryers.

Mr. Sung: I thought you said there was like 28 feet between their building and the property line?

Mr. Smentek: From the corner here to the corner here, is approximately 27-28 feet.

Mr. Sung: Right. So, if you cut into that by eight feet, and were to acquire that so that it now belongs to you; it's just a question of redrawing the boundaries.

Mr. Smentek: Sure.

Mr. Sung: But, it's a financial transaction, you would have acquired eight feet of their side yard that they didn't really use in the first place and now you've essentially would have made your house conform. So, I'm wondering if that's even possible. And if staff or Corp Counsel can tell me whether that's a feasible alternative.

Mr. Smentek: Well, you can't see it here but there's about a four feet rock wall. Their home is not on the level of my home. There's a four feet rock wall that runs the whole length of the property here. So their property was built up, the lot was built up and then the house was on.

So they actually looked down upon us and they've got extensive vegetation all along there, sprinkler systems and everything else. I don't know that they would be willing to let that go.

Mr. Sung: I think that before you even talk about whether they're willing to, I'm just asking staff and Corp Counsel if there's a - - whether that's even possible. Not if the parties are willing, it's if it's possible.

Mr. John Rapacz: Mr. Chair? Thank you. I'd just like to clarify one statement I thought I heard, but now I'm not sure. Did I just hear correctly that there are 27 feet between the building on the neighbor's property and the building on your property?

Mr. Smentek: Approximately.

Mr. Rapacz: Ok. Because if there's a 15 foot side yard setback requirement on each side, you need a total of 30 feet; and if the buildings are 27 feet apart, there wouldn't be enough room. Even by moving the property line. So some portion of some building would have three feet essentially.

Mr. Smentek: Yeah, cause that would create a setback violation for them. Because they would be too close to the property line at that point.

Mr. Rapacz: So if between the two buildings a total of three feet was removed, then there should be 15 feet between buildings.

Mr. Sung: And John, is it 15 feet that applies to the Smentek property? Or is it six feet?

Mr. Rapacz: That's 15 feet. I'm sorry, it's a 15 foot requirement and the - -

Mr. Sung: And not six feet?

Mr. Rapacz: That's correct.

Mr. Smentek: The current law is 15.

Mr. Rapacz: Right.

Mr. Smentek: The existing cottage when it was built in 71' was six feet. So that's not going to be moved. That's legal, it's permitted.

Mr. Sung: But the addition- -

Mr. Rapacz: - -That's correct, yes and the additions were not permitted.

Mr. Smentek: Right and that's the whole cusp of it is I'm trying to get those legal with that After-The-Fact Permit. Because if- - let's just theoretically say that the whole house was unpermitted, it would make sense to then require me to take off the whole side of the house, you see? But really what they want to do now is they just want to impose the current law and make me take off eight feet on either side.

And the cottage is still going to be there, the cottage is always going to be six feet from the property line. No matter what the decision is here today. The cottage is always going to be there, I'm going to be right there. It's not going to move.

So it seems just torturous to have me tear down part of the house just for the- - I mean that's - - legally? Yes, that's the way it's supposed to be legally, but that's why I'm here before the Board today. Is I'm trying to save the home the way it is, because regardless if you make me tear it down or not, three quarters of this run here is still going to be there.

It just seems to me like we're going in the wrong direction. I'm trying- - you know I went down voluntarily to the County to try to get my property legal. I want to pay my proper taxes; I want to have a legal home to leave to my children.

This is all just - - well the law says- - today standard says, "You gotta be 15 feet away". Ok, so make him turn down the house on either side. Well, I still got the cottage around there. To me it seems really crazy. Thank you.

Mr. Howard Kihune: Mr. Chair?

Chairman Abbott: Yes please Howard.

Mr. Kihune: Mr. Smentek, if the Board decided to move forward and if the Board decided to grant you a variance, are you willing to bring the entire property up to code?

Mr. Smentek: Absolutely.

Mr. Kihune: Including everything in that existing house?

Mr. Smentek: Absolutely.

Mr. Kihune: Now, cause it looks like the person who prior owned this property might've built the cottage in the intention to build a main house somewhere else on the property. That's what it kind of looks like from the original thought process.

Mr. Smentek: It could be and if the Board grants the variance, I'm not going to wait a year or two years to work with the Building Department and get this thing legal. I mean we're living in it. I don't want it to burn down. My kids are in there, we're in there, I want it to be safe. I want it to be legal, that was my whole objective of going to the County for the After-The-Fact Permit. I know eight different inspectors are going to come through the house. I know it might be a year or two before I get the thing straight. But then it'll be straight. I'll have something; I'll have a legal property. I don't like living in an illegal property.

I never have before and - - here I go losing my train of thought again here, sorry about that.

Mr. Kihune: Well, I commend you for coming forward to the County and stepping up to the plate to get this rectified in whatever way you can.

Mr. Smentek: I appreciate that.

Mr. Kihune: Your neighbor Mr. Warner on that side, that's that house that's above you right?

Mr. Smentek: Yes sir. The Pineapple Inn.

Mr. Kihune: He sent an email with regards which we have here that he has no objections to the variance, correct?

Mr. Smentek: That is correct.

Mr. Kihune: Do we have that on file staff at all? Or is that something that we just got now?

Mr. Smentek: I tried to turn that in previously to this appointment and I was told that I couldn't do that. I was told just to bring it here.

Mr. Kihune: Ok. Can this go into the record? Or that's part of the . . . ?

Mr. Smentek: Oh, I gathered my thoughts again. . .

Mr. Rapacz: Yes, if it's submitted to the Board it can be part of the record.

Mr. Kihune: Thank you.

Mr. Smentek: This area here is where they may have decided to put the main dwelling at some point. Actually what happened was I think the guy went bankrupt and had to fire sell the house. So he ran out of money to do anything.

But, if the Board grants me the variance, I'm going to jump through all the hoops, bend over backwards, do whatever I gotta do to get the property legal because my intention from day one when we purchased the property was to tear this down and put a 700 square foot cottage back here.

So once again, this is why I haven't moved forward with the building permit process till we get the variance done. It's like you're saying "Scott, you're garages . . . storage sheds are too close to the street. Well, if all this goes well, then it's a non-issue those are torn down and gone, cause that's where the cottage is going to go. That's the only other logical place on the lot that's flat that can handle another dwelling. Thank you.

Mr. Kihune: No problem. Thank you.

Chairman Abbott: If there are no further questions. John? Please.

Mr. Rapacz: Just one other factual question for the record. Could you point out where on the aerial shot these photos you submitted would've been taken from?

Mr. Smentek: Yes.

Mr. Rapacz: Just so we have the correct orientation.

Mr. Smentek: Absolutely. Sure. By the way, this lot slopes really deep down into the drainage ditch. In fact, it's about 10 feet below the highway. So I've got these- as the cars come down, that noise just goes straight "boom" right into the house. I mean we hear the traffic, it's ferocious.

So these shots were taken- - let's see, the first one I was standing approximately here . . . shooting up at the house to show the corner here- - down here.

Mr. Rapacz: Ok, and where would the truck that's shown in the photo, where would that be on the - -

Mr. Smentek: Yes, there's a little drive . . . this bamboo surrounds the home and the truck would be parked approximately right here.

Mr. Rapacz: Ok. So on the photo it would be just below the home.

Mr. Smentek: Yes.

Mr. Rapacz: Ok. Thank you.

Mr. Smentek: And then the other shot is basically I just tuned this way and shot up the drainage ditch here. This is the . . . it's hard to see but the drainage ditch just goes down like this . . . all the way down like this.

Mr. Rapacz: Ok.

Mr. Smentek: And so I was trying to take a shot to show the steepness of the lot here and then I was trying to take a shot up the drainage ditch to show the - - here's the- - let's see where's this keawe tree? Here's the keawe tree right here, see?

Mr. Rapacz: Ok. I got it.

Mr. Smentek: Ok. Thank you.

**B. PUBLIC TESTIMONY (Continued...)**

Chairman Abbott: I'm going to open it to the public. Anyone who wishes to speak, will you please come forward and state your name and address the Board please?

Mr. Charlie Jencks: Good afternoon members of the Commission, Board of Variances and Appeals. My name is Charlie Jencks.

I got involved in this application with Scott and Michelle. As full disclosure, I'm a realtor I am not here representing Scott and Michelle as a realtor. My wife works for Hawaii Life Real Estate with Josh Jeman and Josh called me asking me some questions about this issue and the issues of the setbacks and the variance.

I volunteered my services to hopefully not make it any more confusing than it already is. I wanted to just briefly - - I think Scott's done a good job, he's already told you today that he would be willing to move the structure that's closest to the right-of-way. I think it has a setback issue as well. I think that's probably the right thing to do.

As I got into this project of this issue I started looking- - I'm very familiar with Maui Meadows for a number of reasons. I have a very large project that's immediately adjacent to Maui Meadows to the south, Honuaua. In my discussions with the Homeowner's Association Maui Meadows, I learned that the Maui Meadows community has gone through various setback and zoning performance standard issues over the last three or four decades.

I'm going to handout some documents here to the members that I'd like to reference if I may. Originally Maui Meadows in 1966 was designated Rural by the State Land Use Commission and given a Rural Boundary Amendment in 1966. In 1969 the County of Maui zoned Maui Meadows as Rural 0.5 Acre lots. But the County of Maui at the time did not have a Rural Zoning Ordinance with all the performance standards.

And the handout I'm giving you has all this information. I just referenced paragraph three and paragraph four on the first page. At the bottom of the first page which is a letter date May 8<sup>th</sup> of 2007 from a Mr. Jeffrey Hunt to Matt Shaffer who is a president of the Maui Meadows neighborhood association. He made it clear that the County at the time was then using the Housing Code, which had different setback requirements for Maui Meadows, which Scott referenced. The side yard setback being six for a single-story and 10 feet for a two-story structure.

If you go to the next page, which is page two on the first paragraph, it's clear that Maui Meadows which has over 600 lots between the years of 1979 to 1997, over 1,200 building permits were issued. Most probably all utilizing the Housing Code for setbacks and building heights.

You'll go to the next page which is page three, the first paragraph talks about the history of Chapter 19.29 and the automatic zoning provisions that were subsequently inactive for Maui Meadows. Mr. Hunt in the second paragraph - - which is the key issue that I want to bring up talks about this issue of non-conforming uses; even Mr. Hunt at the time who was the Director of Planning said, "look you can't - if you pass an ordinance that super imposes new zoning requirements on this community, you're creating an untenable situation for the landowners." If you pass an ordinance that says, "well the side yard setbacks are now 15 feet", you've got 1,200 building permits, god knows how many dwellings in Maui Meadows that are going to be non-conforming that were built with the Housing Code; creating a huge, enormous problem for these folks.

Scott buys the property, he's trying to correct a situation, whether these additions were permitted or not, they were built. And frankly if anybody goes to the County system and tries to find building permits that go back to 2006, I wish you a world of luck because it's virtually impossible. If you go to the County KIVA system, you're not going to find them. The County had the file stored in the post office they got mildew so they got rid of them all. So there really isn't any - - there isn't a very effective track record of what was approved and not approved County wide. So trying to find exactly what happened could be really difficult.

I'm going to just continue on briefly. In 2008 they passed the Rural Zoning Ordinance, which now creates this conflict between the setbacks and the Housing Ordinance or the Housing Code and the Zoning Code, they're different. One's 15 and one's six foot. Then in 2012 the County of Maui repeals the Housing Code, so it's gone. No longer referred to, it's not available they don't use it for enforcement at all.

So my point here is, I think the County has a much larger problem then just dealing with Scott's - - Scott and Michelle's BVA Application. I think the issue here is, how do you reconcile or resolve the non-conforming issue you've got in Maui Meadows with a substantial number of dwellings that were built with the Housing Code requirements verses an existing Zoning Code that says you're non-conforming?

Now I'm not - - I am a realtor, but I don't sell property, I don't know why I got my license frankly, but I did. I deal on a regular basis with folks, my wife-who calls and says, "Look, I have a client

who wants to buy this house but there's some non-conforming issues. These non-conforming issues aren't easy to solve and many times they will destroy the ability to finance.

So, these aren't- - these issues shouldn't be taken lightly, they need to be addressed. I say to you today, I think you ought to work with Scott, he came to you I think Mr. Kihune made a good point. He came in and said, "I want to solve the problem here, I'll work with you halfway and move that shed that's close to the right of way."

Give him the variance for the structure but at the same time, I think there's a bigger fix here which is referenced in the staff report, talking about this is a bigger issue, I think it needs a legislative fix as well. You gotta resolve this lack of this inconsistency between what was approved or the Housing Code and the Rural Zoning Ordinance. That's a huge problem.

So I would just say to you, I would work with Scott; make it work if you can. I support him; he's trying to do the right thing, he's spending a lot of money. Give him the variance; have him move that structure back. But at the same time, get someone to resolve this issue because if it isn't Scott, it's going to be somebody else coming in saying, "Hey, I got a non-conforming structure" or "I can't modify my house, cause I can't explain a non-conformity".

Some serious issues, so, I thank you for your time. Thank you. Any questions?

Chairman Abbott: Thank you. Any questions for Mr. Jencks. Thank you Charlie.

Mr. Jencks: One thing I want to add.

Chairman Abbott: Yes, please.

Mr. Jencks: With regard to the idea of changing the property lines. That's been done when I was a director that would happen from time to time for some folks. The problem is, you have to make sure you don't create either A, a non-conforming setback or a non-conforming lot by doing that. If you take a square footage you may have to give some square footage and maybe the other guy doesn't want that square footage. It creates a whole lot of other problem, but it's possible in some circumstances.

Chairman Abbott: But in my opinion, the Board of Variance is not in a position to make rules or laws . . .

Mr. Jencks: I agree.

Chairman Abbott: It's not part of our decision making process here, we have to deal with what's in front of us.

Mr. Jencks: I agree 100%.

Chairman Abbott: So, that's what we're stuck with.

Mr. Jencks: Unfortunately you're right.

Chairman Abbott: Raymond please.

Mr. Sung: Just as a comment, you don't have to come back. But I'll just say, a lot of what Mr. Jencks says makes sense, but on a macro level that is what needs to be addressed. But this Board deals with individual applications and individual circumstances. And while we might feel for the applicants in the particular case regarding the situation, the plight that they're in. . . .

But under the rules, as I understand that we have to operate under, in looking at the case and whether the requirements for even granting a variance would be met. Right now I don't see that they're met. At least I feel constrained that if we were to vote on whether to grant or deny, I could not justify granting it, no matter how much I feel for the applicants and the plight they're in.

It does need to be addressed upon a macro level through the County. And this Board cannot look at every single applicant from the Maui Meadows or other similar neighborhoods with similar situations or problems. It would just be chaos for the Board of Variances to be granting all over the place with variances. You'd have a hodgepodge of some things conform and some things don't, but are allowed if a variance were granted. It does need to be fixed at the macro level. Thank you.

Chairman Abbott: Thank you.

Mr. Kihune: Comment.

Chairman Abbott: Please.

Mr. Kihune: Mr. Jencks made a really important point. And I thank you very much for your presentation and comments Mr. Jencks. The homeowner will be stuck with the financing issue if they don't get a variance. They'll be stuck with trying to move forward. With that regards, they would have to remove the structure and then try to get the property- - or get a new structure financed for your home- - a new home that you may have to build.

I agree with Mr. Jencks that there's a lot of issues up in Maui Meadows. I live out - - not in Maui Meadows but close to that area. I've seen a lot of these issues with a lot of homeowners. I do take Mr. Sung's comments to heart, but I think the overall - - I think from this Board, we need to be consistent no matter what we do regardless.

So, if we were to vote for or deny, then we need to make sure that we're consistent with every other applicant that comes before our Board. Because what we do here will set precedent in the future. So, we need to always keep that in mind. But that's my comment.

Chairman Abbott: Thank you. Any other comments? May we have- - If there's no further public testimony, I'll close public speakers. . . public testimony at this time.

**C. PUBLIC TESTIMONY (Continued...)**

Chairman Abbott: At this particular time, seeing no one approaching the podium. May we have the staff's recommendation?

Mrs. Balberdi: The staff recommends denial, because they didn't meet two out of the three criteria that were needed in order to grant the variance, according to the application that was provided.

Mr. Smentek: May I approach the Board?

Chairman Abbott: Just one second please Mr. Smentek.

Mr. Sung: A comment, chair.

Chairman Abbott: Yes, I was going to say do we have any discussion regarding the staff's. . .

Mr. Sung: So I would also just point out to the staff that in fact. . . I've read the Staff Report and Recommendation, but I would also view it as they've actually not met all three of the conditions, not only two of the three. I believe that the staff's concurrence with the applicant's argument that they themselves personally did not create the non-conforming situation is a not accurate interpretation and taking into view that they step into the shoes of their predecessors and interests then in fact under the law, it is as if they and their predecessors interests collectively did create the non-conforming structure.

So I believe that the better interpretation of that fact and application of the requirements to those facts, is that the fact they have not satisfied any of those three requirements.

Chairman Abbott: Ok, any discussion by the Board members at this time concerning the staff report or anything. At this point in time, do we have a motion? Is there any further discussion or anything?

Mr. Smentek: Do I get to say something?

Chairman Abbott: Yes, please.

Mr. Smentek: In my initial application for the variance, I believe and I agree that I did fill the first two of the three criterion, alright? And that's why the staff report reflects that. However today when I spoke with Malia regarding her PowerPoint presentation, she said, "All you need to do, don't worry about it, all you need to do is go down there and establish what is unique about your property.

Because when I initially filled out the application, I kind of grouped all of Maui Meadows as being quirky and so that didn't make my property unique. So I worked hard and I tried to come up with something that would be acceptable to the Board and I thought I made a clear presentation that there's a geographical issue on my lot that makes it unique.

And so the staff report is a recommendation saying that I didn't pass on two of the three; and, actually needs to be updated with the new information that I provided today. Because I did

provide a geographical uniqueness about my property, also secondly, it's the staff's opinion that taking away a quarter of the existing home isn't going to create a hardship for the four of us that are living there. And I believe that I beg to differ with that, they're not the ones who are living in there in that small space and having to deal with it.

So, even though I may have stepped into the shoes and yes I'll fail on number three, I beg to differ that I haven't failed on number one or number two. And she's saying. . . You folks are saying that I failed on all three, and I don't believe that's fair. Thank you.

Chairman Abbott: I don't think we've said along anything one, two or three right now Mr. Smentek. So let's discuss everything in calm, cool, rational....

Mr. Smentek: Sure, absolutely.

Chairman Abbott: John, do you have a comment please?

Mr. Rapacz: First of all, there is no finding of or recommendation from the Department that there is not a hardship. That's not one of the criteria. That's not part of our recommendation or our analysis.

As to the first criteria that there is an exceptional unique or unusual physical or geographical condition, meaning unique to the property. . .in the application, we did not have the information pertaining to the drainage ditch or to the steep slope. That was not in the application, there was no such statement, no recommendation of that.

Given that, I'm not sure that we would've reached the same conclusion and said that there was nothing unique about the property. We may have taken a different position on that if we had known that and if we had seen evidence of that actual physical condition on the property and that it is unique. I see that there is a slope; I see that there is a drainage ditch; I have no idea whether those things are unique in Maui Meadows.

Just my own limited exposure to it, would tell me I've seen steep slope in Maui Meadows. So I can't say that we would've taken a different position but with that information we might've asked for more information or reached a different conclusion on number one.

Chairman Abbott: Thank you.

Mr. Kihune: Mr. Chair I've got some more. . .

Chairman Abbott: Please Howie, go ahead.

Mr. Kihune: Now this original- - I just want to go back a little bit. The original shed was built in 19- -

Mr. Smentek: The original cottage was built in 1971.

Mr. Kihune: Ok. And then the addition for - - to this cottage was done when?

Mr. Smentek: 2006.

Mr. Kihune: 2006. Ok. Unpermitted right?

Mr. Smentek: Correct.

Mr. Kihune: I think. . . I'm looking at it from this standpoint, up until 2008 the setbacks (correct me if I'm wrong John) the setbacks were 15 feet front, six feet side. Correct? And we're looking at Housing Codes up until 2008 is that correct?

Mr. Rapacz: That's correct. It would've been 2008 when 15 feet was established.

Mr. Kihune: Thank you. I look at it this way, if Mr. Smentek came to me before 2008 and the setback being . . . from what I can see here . . . within the six foot setback. . . I think that one was 5.1 feet the other was 4.8- -

Mr. Smentek: That's an old map. Actually, I had a surveyor come out and it's - -

Mr. Kihune: Right here, this one here?

Mr. Smentek: Yes sir, that's an old survey and so I paid a different surveyor to come out and re-survey it and - -

Mr. Kihune: But what are the distances now?

Mr. Smentek: The closes corner is 5' 8".

Mr. Kihune: 5' 8"? Ok.

Mr. Smentek: Yes.

Mr. Kihune: That's the closest part of that building that's to your property line?

Mr. Smentek: The property line goes at an angle like this.

Mr. Kihune: Right.

Mr. Smentek: At an angle, from this corner of the house- unpermitted ...(inaudible)...I eye balled it, thinking this isn't right and he was saying it was 5'4" but it's actually 5'8".

Mr. Kihune: No, so what I want to make sure is that the closest part of that structure to your setback is 5.8 feet.

Mr. Smentek: 5' 8".

Mr. Kihune: Ok. 5' 8", sorry my clarification.

Mr. Smentek: Yes sir.

Mr. Kihune: Ok, so humor me for a bit. I'm going to take a trip back in time. If I was looking at this right now in 2006 for a variance, being a minimum setback of six feet and we are within the setback of four inches, I would definitely look at approving the variance based on 2006 or 2007.

Mr. Smentek: Yes, I can appreciate that.

Mr. Kihune: Right? And I think as a Board, and again it's just my comments . . . I think we need to look at from that standpoint too. The County changed the setback rule. The house was already in place at the time prior to 2008. So, if I was looking at in 2008 or prior, I would definitely look at approving the variance for the owner at that time.

Mrs. Jennifer Oana: I think if you're looking at in 2008 though, with the setback at six feet he wouldn't need a variance, he would just need an After-The-Fact permit. That's it.

Mr. Kihune: Correct.

Mr. Smentek: Well, wait now.

Chairman Abbott: Back up now.

Mr. Kihune: Cause he would still be four inches - -

Mr. Smentek: Correct, I would still be in setback violation of four inches on that corner.

Mrs. Oana: Oh ok.

Mrs. Reyher-Colon: Quick question, is that setback from your eave or from your wall?

Mr. Smentek: From the wall?

Mr. Kihune: Mr. Chair, again humor me. I feel like that second survey that you have had done is important for us here to look at because the numbers and what's showing here does not reflect the most current. And because of that, I'd like to defer the application so that we can definitely take a look at this and give it a once- - give it one more look over with the correct information.

Mr. Smentek: Ok.

Mr. Kihune: Because I think it's imperative to know exactly how far you are from your property line.

Mr. Smentek: Ok. And that was the whole problem I was having is because we're talking about a 205 or something foot run there with one pin here and one pin here. So there was no way I could take an accurate measurement for the County.

Mr. Kihune: But your surveyor can.

Mr. Smentek: That's why I begged off and I hired another surveyor to come out and shoot it and put pins. . . I had him put pins here and put pins here, so I can actually string a line and I have his- -

Mr. Kihune: If you can have him put it on his map to show us exactly the measurement.

Mr. Smentek: Yes, I have that at the office, it's Carl- - no it's not Carl Moostow (so?), a guy from Lahaina Survey Company, Sherman.

Mr. Kihune: If we can have that I think it would be important for my decision making as far as where I would stay with approving or denying the variance. Because 5' 8" is a lot . . . its critical compared to 4.1.

Mr. Smentek: Yes, and the 4.1 he had popped out the sidewall of the bathroom and he had a Jacuzzi tub in there and it was nonfunctional when we purchased the property and I knew - - I felt that in pursuit of this application for the After-The-Fact Permit and the variance, I knew it would be tougher to get that 4'1" to go through. So we removed that. So that is actually gone, it is no longer there. So now the closest one and it'll be on the survey map that I'll get to you is showing the 5'8".

Mr. Kihune: I appreciate that. Again I think it's important for us as a Board to take a look at that and with the actual house footprint and the actual discrepancy or measurements.

Chairman Abbott: Juanita had a point, if she could. . .

Mr. Kihune: Go ahead, sorry.

Mrs. Reyher-Colon: Yeah, that was going to be my suggestion, if you could provide up to date pictures of your current property so we can compare it to what you currently have there. As well as if you could show where- specifically on your plot plan where the drainage easement is as well as elevation line, that would help me a lot.

Mr. Smentek: Ok. I'll need to hire him to come out to shoot for the elevation on the lot then, cause I don't have that.

Mrs. Reyher-Colon: I'm not sure if the County would have that on file, but that would help.

Mr. Smentek: Ok.

Chairman Abbott: Raymond?

Mr. Sung: Procedural question. If we were to defer consideration of this issue, my question for Corp Counsel and staff is what is the running clock date-after which an application is being automatically approved for the variance if the Board- -

Mrs. Oana: Page three of your staff report- -

Mr. Sung: What's the date that we're talking about?

Mrs. Oana: Page three, it has.... If we have the Public Hearing today, which we did and we closed it, which we did, 60 days after the close of the Public Hearing is Monday, August 10<sup>th</sup>.

Mr. Sung: Can we get that date tolled? The running of the clock tolled or suspended? We cannot- - even though we're asking for more information?

Mrs. Oana: I think you can. Let me just check.

Mr. Sung: I wouldn't want this Board to be operating under the gun any more than it already is because we're asking - - because obviously the longer - - and I'm not saying that they would intentionally delay - - it's actually in their interests to provide the information promptly. But, if for whatever reason there were a delay and that requires this Board to have even less time to consider things, I just don't think that's in anyone's interests, especially the applicant's. I'm wondering if we can toll or suspend the running of that clock.

Mrs. Oana: There is a section in the BVA rules; I'm just trying to find it.

Chairman Abbott: John?

Mr. Rapacz: Thank you Mr. Chair that would be Rule 12-801-22 part D as in Dog and it says the Board should render a decision on a variance within 60 days from the close of the Public Hearing on such variance otherwise the variance shall be deemed granted. But then it lists four exceptions.

The foregoing shall not apply, one, two, three and four exceptions, the third exception being when review of the variance application has been delayed or deferred due to inadequate information concerning the nature, scope or description of the subject matter of the variance application. So if the Board is deferring the matter finding that it needs more information that would stop the clock on the 60 days.

Mr. Sung: Ok. So for the record, I would not be opposed for this Board to deem there to be inadequate information in order for this additional supplemental information to be organized, gathered and submitted properly and presented.

Mr. Smentek: And as I mentioned, I do have that current survey on my desk and it would just be a matter of finding a surveyor who can get out right away and shoot the topo.

Mr. Kihune: Yeah, and then rescheduling - -our meeting- - getting back on the schedule so that we can actually revisit this again, with all the correct information.

Mr. Rapacz: Mr. Chair, if I may, will the applicant be amenable to that deferral to obtain additional information?

Mr. Smentek: Absolutely.

Mr. Rapacz: Thank you.

Mr. Kihune: Can I make a motion Mr. Chair?

Chairman Abbott: Please do.

Mr. Kihune: I'd like to make a motion that we defer the application until we receive additional information that we required from the applicant.

Mr. Sung: I'll second that.

Chairman Abbott: Motioned.

Mr. Smentek: And just for clarification purposes then you'll want the current survey map and a current topo of the lot, is there anything else that I can provide for you?

Chairman Abbott: I would say Mr. Smentek anything you can bring us that would help justify your cause, any piece of information is helpful to the Board.

Mr. Smentek: Ok, great.

Chairman Abbott: Because we're foundering, we need to know specifically what we're doing.

Mr. Smentek: Ok.

Mr. Sung: However the new surveyor decides to present his information, that's the way it is, but I would just suggest that - - I find this piece of paper very informative, so if that new survey could be super imposed on this one with the different sets of measurements, in different colors so I can see what is old and what's new, that would be very helpful to me personally in looking at the info.

Mr. Smentek: I can certainly take care of that.

Chairman Abbott: Ok, so we have a motion and a second. Howard? Further comment?

Mr. Kihune: No.

Chairman Abbott: May we have a vote? All those in favor?

Members: "Aye."

Chairman Abbott: **Is deferred.**

It was moved by Mr. Kihune seconded by Mr. Sung then,

**VOTED: Motion to defer application until additional required information is submitted to the Board.**

**(Assenting: P. DePonte, H. Kihune, R. Sung, J. Reyher-Colon)**

**(Excused: C. Fukunaga, T. Espeleta, W. Greig, M. Kincaid)**

Chairman Abbott: Ok. So is it up to Mr. Smentek when? Or we can present the new information- so we can get it scheduled? So we have a track run so we know where we're going in the time frame.

Mr. Smentek: My experience in getting that other survey was that the guys on the island here are super busy and it's hard to get anybody. As soon as they will start answering their phones tomorrow, I will try to contract with someone to come out and do the topo. I'm not really sure if they can get to me in a day, I doubt it. In a week possibly, more than likely it could take possibly maybe two weeks on the outside. They do stay booked up.

Chairman Abbott: Ok. Let me just - - question to John. John? If the 60 days has been suspended due to this deferral, so we're not cushioned, we're not under the gun for really anything?

Mr. Rapacz: That's right. So we're looking at the calendar that we have here to see when the next available might be.

Chairman Abbott: So we're not being smashed into something, we want everybody to be prepared with everything that's necessary.

Mr. Kihune: Mr. Smentek, basically once you have gathered all the correct information in a timely manner, whether it's two weeks or a month, you can deliver that to the staff and they will notify us and put it on schedule.

Mr. Smentek: Perfect.

Mr. Kihune: Ok.

Chairman Abbott: Ok? Raymond?

Mr. Sung: May I make one more comment? I realize that there will be additional effort and expense at some sort on your part to gather information that's been suggested by other members of this Board.

I will say that I also take to heart Howard's comments earlier, which is that this Board will need to consider that although every case, every application before it is unique, nevertheless there is some presidential value in what's set by any decision and it is appropriate to act as consistently as we possibly can, one way or the other.

I would say, even if additional information were to be provided, there still remains the three requirements that technically need to be satisfied. And so, please bear in mind it may be the case, I'm not a fortune teller so I won't even try to read a crystal ball, but it may be the case that even with that additional information provided and expense incurred, the answer still might be that this Board will not be able to grant a variance.

I think that as Howard has pointed out and that I've picked up on, which is that to the extent that you can show under a 2006 or 2008 time frame of looking at things, that if the closest point of the structure to the property line were a more manini kind of infraction for a six foot setback of determination . . . that's helpful.

But, it may or may not be determinative or conclusive and so I'd like to just point out that you know . . . t's not a guarantee by any means that even if the additional information were provided and expense incurred that it may or may not change how we would've voted today without that information.

Mr. Smentek: I understand that completely and I understood that the moment I walked in the door. I just want to put out there one more time, once I do get this topo survey, it hopefully would provide enough information to show that the lot is unique in the Maui Meadows subdivision and not to rehash old wounds with the Planning Staff, but what I'm reading here, it sounds like - -when it's dealing with that strict compliance and saying that they say "strict compliance, will not prevent reasonable use of the property" and I mean- - I think it should say "will not reasonable use of the house".

The applicant's currently have a dwelling on the property and they will continue to have reasonable use of the dwelling even if they remove or relocate the portions of the structures that are within the setback. So Mr. - - well I don't see a name over there.

Chairman Abbott: Rapacz.

Mr. Smentek: But any rate he was saying that the County never said that by granting the variance or not granting the variance that wouldn't create a hardship for the family and the small home. But I still feel strongly that that's the case. So I don't know how I can elaborate on that anymore.

Chairman Abbott: We understand your feelings.

Mr. Smentek: Ok.

Chairman Abbott: Question for staff or Corp Counsel please. Is the requirement technically looking at reasonable use of the dwelling or reasonable use of the entire property?

Mr. Rapacz: The code refers to the property.

Mr. Sung: Ok. Thank you. I understand your perspective of you're looking at what can be reasonable use of the dwelling, but as I understand it from staff, the code or regulation says, you look through reasonable use of the entire property. Which includes the dwelling but also includes

un-built parts of the property too; it's a property as a whole, not just the dwelling that you physically inhabit today.

Mr. Smentek: Ok.

Mr. Kihune: Mr. Smentek, real quick.

Chairman Abbott: Yes please.

Mr. Kihune: You get to have one more chance, so get prepared and make sure we get all the information we need so that we can- -

Mr. Smentek: Absolutely. I appreciate the second chance.

Chairman Abbott: John?

Mr. Rapacz: Mr. Chair, we have available the meetings of July 9<sup>th</sup> or August 13<sup>th</sup>, those are the two first available.

Chairman Abbott: July 9<sup>th</sup> or August 13<sup>th</sup>?

Mr. Smentek: I'd love to get it taken care of as soon as possible. So July 9<sup>th</sup> would definitely be preferred. I had a little trouble with my speech today and everything because it's actually causing me a lot of stress and I'm not getting my sleep. So the sooner I get this thing resolved, one way or another, the better.

Chairman Abbott: Understand. Ok, so everything's- - we'll reschedule it for the 9<sup>th</sup>?

Mr. Smentek: And that's going to give me plenty of time to get my ducks in a row.

Chairman Abbott: That's what we need.

Mr. Smentek: Ok. Terrific.

Chairman Abbott: Any further comments regarding this situation? No.

#### **D. APPROVAL OF THE APRIL 9, 2015 MEETING MINUTES**

Chairman Abbott: Ok. Moving on. Motion to approve the minutes as read or however you want it? I do have a change or question that I have. I don't know what page cause it isn't listed but - - Oh, page five I'm sorry, thank you Jennifer. It says "will not cover those hooting- - " I think it's "Cooling towers".

Mr. Kihune: I make a motion to approve the minutes as presented.

Chairman Abbott: Thank you motion to approve, do we have a second?

Mr. Pat DePonte: Second.

Chairman Abbott: Second. Any discussion? All in favor?

Members: "Aye."

Mrs. Reyher-Colon: I'm abstaining since I wasn't present at that meeting.

Chairman Abbott: One abstention ok thank you.

Mrs. Reyher-Colon: Yeah, can I do that?

Mr. Sung: Technically it's a yes vote. I did that at my first meeting.

Chairman Abbott: So are we changing it?

Mrs. Oana: I think that we should just defer that to the next meeting?

Chairman Abbott: To defer the minutes? Very well, we can do that too.

Mr. Kihune: Do we have to take the other motion off the table?

Mrs. Oana: Was there a second?

Chairman Abbott: Yes there was, we had a motion and a second.

Mrs. So maybe you can restate your motion.

Mr. Kihune: Let me restate the motion that we defer the approval of the minutes for another date where we have more of our members in place.

Chairman Abbott: Someone second for that one?

Mr. DePonte: Yes.

Chairman Abbott: Ok, all in favor?

Members: "Aye."

Chairman Abbott: Ok, **carried unanimously.**

It was moved by Mr. Kihune seconded by Mr. DePonte then,

**VOTED: Motion to defer approval of meeting minutes to another meeting with more members.**

**(Assenting: P. DePonte, H. Kihune, R. Sung, J. Reyher-Colon)**

(Excused: C. Fukunaga, T. Espeleta, W. Greig, M. Kincaid)

**E. NEXT MEETING DATE: June 25, 2015**

Chairman Abbott: So the next meeting date is?

Mr. Sung: July 9<sup>th</sup>.

Chairman Abbott: No it's gotta be sometime in June.

Mrs. Balberdi: June 25<sup>th</sup>.

Chairman Abbott: June 25<sup>th</sup>?

Mrs. Balberdi: Yes.

**F. ADJOURNMENT**

Chairman Abbott: Any further business? If not, the meeting's adjourned.

There being no further to come before the Board, the meeting adjourned at 2:55 p.m.

Respectfully submitted by,

*Chalsey Kwon*

CHALSEY R. K. KWON  
Secretary to Boards & Commission II

**RECORD OF ATTENDANCE**

**Members Present:**

G. Clark Abbott, Chairman  
Patrick De Ponte  
Howard S. K. Kihune  
Raymond Sung  
Juanita Reyher-Colon

**Members Excused:**

Chad Fukunaga, Vice-Chairman  
Teddy Espeleta  
William Greig  
Max Kincaid Jr.

**Others:**

John Rapcaz, Planning Program Administrator, Department of Planning  
Carolyn Cortez, Staff Planner, Department of Planning  
Malia Balberdi, Staff Planner, Department of Planning  
Chelsea Rabago, Staff Planner, Department of Planning  
Nancy Mahi, Secretary to Zoning Administration Division  
Jennifer Oana, Deputy Corporation Counsel, Department of the Corporation Counsel