

**BOARD OF VARIANCES AND APPEALS
REGULAR MEETING
MAY 24, 2007**

A. CALL TO ORDER

The regular meeting of the Board of Variances and Appeals (Board) was called to order by Chairman Randall Endo at approximately, 1:38 p.m., Thursday, May 24, 2007, 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.)

B. APPEALS

- 1. AZALEA COMMUNICATION LLC, appealing the Planning Director's Notice of Violation (NOV 20060021) for a chainlink fence adjacent to public open space, readily visible to the public, whereby it is prohibited by the Wailuku Redevelopment Area Design Guidelines for property located at 2086 Main Street, Wailuku, Maui, Hawai'i; TMK: (2) 3-4-013:098. (BVAA 20070002)**

Chair Endo: Would the Planning Department staff please read the agenda?

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

Chair Endo: Okay. For the record, at our prior meeting of the BVA, we set forth – or we initiated the contested case hearing process for this matter for this appeal. Would the two parties state their names for the record or make their appearances?

Mr. Richard B. Rost: Deputy Corporation Counsel Richard B. Rost for the County.

Chair Endo: Good afternoon, Mr. Rost.

Mr. Cecil Morton: Cecil Morton, Azalea Communications.

Chair Endo: Good afternoon.

Mr. Morton: May I sit here?

Chair Endo: Mr. Morton, yes, you may. Okay. This is a contested case hearing, which we'll be conducting this afternoon, but it is also a public meeting, and pursuant to our rules, we allow public testimony. So at this time, I'd like to allow anyone in the public who wishes to give public testimony on this agenda item, or actually, any agenda item we have today.

Mr. James Giroux: Is this the only one or do we have more?

Chair Endo: This is the only appeal. We just have a Director's Report. Is there anyone wishing to give public testimony? Seeing none, we will close public testimony and move forward with our contested case hearing.

Let the record reflect that we have received submissions from both the appellant as well as the appellee. And have both sides received copies of each other's witness list and position statement?

Mr. Morton: Yes.

Mr. Rost: Yes.

Chair Endo: Okay. Have both parties had the opportunity to conduct sufficient discovery and are you prepared to proceed?

Mr. Rost: Yes.

Mr. Morton: Yes.

Chair Endo: Okay. What I'd like to propose, and let me know if you have any objection, what I'd like to do is ask the appellant to give an initial opening statement just summarizing his main theory of the case, or what evidence he's going to bring up, just an introductory remark, essentially. And I'd like you to keep it to approximately, five minutes. Then I'd like to allow the Corporation Counsel representing the appellees to do the same thing up to five minutes. And then I think what we'd like to do is, although this is an appeal, I think I'd like to have the County to go first and present the initial background facts underlying the appeal.

So I'd like to allow the County to call its witnesses. After you do your direct testimony of your witnesses, the appellant would obviously have an opportunity to cross examine and ask any questions you like. But having reviewed your witness lists, I notice that the witnesses are basically, identical. So in order to save time and keep things going smoothly, I'm going to just call the witnesses once. So in other words, even though we're going to let the County go first, when it's your cross-examination, the appellant can ask any questions you want. It doesn't have to necessarily be related to the direct testimony that was just given. So you can either cross-examine, or you can ask your own questions that you'd want to explore as to whatever your case is. Is that satisfactory?

Mr. Rost: Yeah, I have no objection to that.

Mr. Morton: Yes.

Chair Endo: Okay. As far as the exhibits, we have – excuse me – the County has submitted Exhibits A through D. Does the appellant have any objection to admitting these into the record?

Mr. Morton: Again, I believe they're identical to, except for the pictures, identical to what I submitted as well. And I included these, but the answer is no.

Chair Endo: Okay. Okay. And does the County have any objection to admitting the appellants' exhibits into the record?

Mr. Rost: No.

Chair Endo: Okay. That being the case, we shall consider all the exhibits submitted as being part of the contested case record. And with that, let's proceed. Okay. Let's proceed with the appellant's opening remarks.

Mr. Giroux: And let him know it's not evidence. He's just going to give us an outline of his case.

Chair Endo: Yeah.

Mr. Morton: Would you like me to stand or is it all right to sit? Whatever you like.

Chair Endo: As long as you're speaking into the mike.

Mr. Morton: Good afternoon. This is the first time I've ever been cited for something that is – what seems to be so severe and I respectfully want to address that issue. And I just want to give you a quick background.

I purchased the property a number of years ago. And when I purchased the property, it was closed, as probably everyone knows, a Shell Gas Station that was closed for many years prior to that. And I have no evidence that that fence was up there prior to the Redevelopment Design Guidelines, which is I understand what would be referred to as a pre-existing

Mr. Giroux: Nonconforming.

Mr. Morton: Nonconforming use, exactly. Thank you. However, what I did do when I purchased the property is I moved in. I own a company called Speedi Shuttle, and we operate shuttles from the airport to the various resorts on the island. And the fence was a wonderful security measure. People would tell me, and they kind of smirked when I

informed them that I had purchased the property, and was moving my business there from the airport location I was in to that location because they said that it's not a secure area. And there's homeless people that live in the back, the municipal lot, at times. And there's drug dealings and things like that. And I brushed that off as probably historical information and not current. And I was very pleased and I still am very pleased with the purchase of the property.

I stayed there for a while. I relocated because there was another property that came up that was more ideal for my business. However, during the time that I was in the property, we had many instances—I can only count them on one hand—that we did have people that would kick our fence in at the back, which is a wooden fence, and still is there. And I included that as evidence: pictures of our wooden fence on two frontages of the property, and we'd have to repair it. But no one ever broke into the middle fencing that fronts on the other two frontages. We did have to take people out of vehicles that our drivers would not lock at night that were sleeping in the vehicle. So there was a concern.

And if I step back, before we moved in, the property was boarded up by the previous owner: Shell Oil. And that's typically done so there is no vandalism. And fenced, again, to keep people off the property.

So I bought the property, moved in, and utilized the fencing, and was never informed up until one day when I received a knock on my door at my office down at Paahana, and it was Charles behind me. And he and I had a nice conversation. And he introduced the concept of how this fencing is not permitted. It should come down.

Well, I looked at the Wailuku Redevelopment Guidelines. And I looked at it, and then I said, well, it says "Redevelopment Area Design Guidelines." Thank you very much for coming here. We had a nice, pleasant talk, but I would like an official-written letter to state this fence has to come down. And I never received the letter. And time went on. And then I get this file now, and it shows evidence that were, in fact, notices: a first and a second notice.

I have an original of the second notice. I do not have the original of the first notice. I don't know how I would've received the second and not the first. And I did receive the – what's this called here? It's the notice – no, here we are. Why we're here today: the fine for a thousand dollars, plus a hundred dollars a day until the fence is taken down. And if I had an opportunity like the use of the property to go to the MRA, and say to the MRA, I would like a variance on the fencing for a period that will not exceed a certain length of time until I have plans approved for the new building, because I want to invest in a new project in the town, I would've done so just like I have done recently for the use. The use is not permitted under the Redevelopment – the Wailuku zoning, the Redevelopment zoning. Automobile uses are allowed, but not the sales and rental.

Well, typically, those are always included in that type of use. And when I look at the underlying zoning of B-3, it is use – it is permitted. And again, I felt that the Wailuku Redevelopment Area Design Guidelines and zoning refers to new developments. So in error, I'm sitting here today in front of you.

And what I would like to do is I would like to, as I'm responding now to this action, I would like to ask you, if you have the powers to, not charge the thousand dollars, not charge the daily penalty, and give me an opportunity to go to Wayne Steele at the Maui Redevelopment Agency to apply for a variance. Let the fence stay there until I – for a period of not to exceed 24 months, so I can get through the design process, the permitting process, to invest in a new project, one of the most high profile projects that this town is going to see in a long time. And I don't know exactly what it's going to look like. I have gone through designs. This is one of them right now. And – but in the meantime, we're here to discuss this fence.

And I'm sorry if I've taken up more than five minutes, but that's the history of the project, the security issues I'm talking about, the two different types of fencing that are up there: one that works, and one that doesn't. The one that does work happens to be not permitted. What is permitted by these Redevelopment Guidelines is an iron – beautiful, iron-type of cast iron fencing which I would think under redevelopment, that's something to consider. Thank you.

Chair Endo: Mr. Rost?

Mr. Rost: Thank you, Mr. Chairman. The issues that Mr. Morton has just been talking about, the County would submit are not relevant to the Board's determination today. The question is whether or not this chainlink fence is a violation of the Wailuku Redevelopment Area Design Guidelines. And I think it's very clear that it is. It's a chainlink fence fronting a sidewalk which is explicitly prohibited by the Guidelines.

You also heard Mr. Morton just say that he has no evidence to suggest that the fence was there before the guidelines came into effect. That being the case, it's very clear that the fence is a violation. Now considering the fence is a violation, the County is of the opinion that the notice of violation should be upheld.

Mr. Morton can talk about his plans to redevelop the property, but those are not – those potential future developments are simply not relevant to the notice of violation before the Board today. So on that basis, the County would ask the notice be upheld.

Chair Endo: Okay. So now let's proceed with calling your first witness, but before you do so, I just wanted to make a procedural disclosure for the Board members. I think what I wanted to do was if the need arises for an evidentiary ruling, I would make one as the Chair, but since we have adopted the whole Board as a hearings' officer at our

prior meeting, what I'd like to do is I'll make an initial ruling, but anyone of the members, not the parties, by the way, just the members of the Board can appeal my ruling. So if you don't like what I'm doing, what I ruled, you can appeal it, and then the whole Board would vote on whatever the particular procedural issue might be. And we'll just do that as a standing rule throughout this contested case hearing. Is there any objection to doing it that way by the members? Okay. Seeing none, that's how we'll proceed. The County want to call your first witness?

Mr. Rost: The County will call Jay Arakawa.

Chair Endo: He needs to have a mike. Where do you guys usually sit? Jay, can you raise your right hand? Do you swear or affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Mr. Jay Arakawa: I do.

Chair Endo: Proceed.

Mr. Rost: Could you state your name?

Mr. Arakawa: Jay Arakawa.

Mr. Rost: Okay. And what's your occupation?

Mr. Arakawa: Zoning Inspector for the Planning Department.

Mr. Rost: And how long have you held that position?

Mr. Arakawa: About eight years.

Mr. Rost: Okay. I'm going to show you what the County has marked as Exhibit B. Did you issue that notice of violation?

Mr. Arakawa: Yes, I did.

Mr. Rost: And was that notice of violation issued for a chainlink fence at 2086 Main Street?

Mr. Arakawa: Yes.

Mr. Rost: Okay. Could you flip to Exhibit A? Do those photographs in Exhibit A accurately reflect the fence?

Mr. Arakawa: Yes, it does.

Mr. Rost: And to your knowledge, is a chainlink fence fronting the sidewalk a violation of the Wailuku Redevelopment Area Guidelines?

Mr. Arakawa: Yes, it is.

Mr. Rost: Are you aware of any evidence to show that this fence was in existence prior to the guidelines taking effect?

Mr. Arakawa: Could you please repeat?

Mr. Rost: Yeah. Are you aware of any evidence to suggest that the fence was in existence before the guidelines came into effect?

Mr. Arakawa: Just through one of our planners.

Mr. Rost: And is 2086 Main Street within the area controlled by the Wailuku Redevelopment Area Guidelines?

Mr. Arakawa: Yes, it is.

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

Mr. Morton: Jay, I didn't understand your answer to the question. The question I believe was, was the fence in existence prior to the Redevelopment – Wailuku Redevelopment Area Design Guidelines? And I believe your answer was someone from the County – the Planning Department know – informed you?

Mr. Arakawa: My understanding of the question was, do I know or did I know that whether the fence was there prior to the adoption of the MRA rules. And my response was to – my response was that we were informed by a planner of our department.

Mr. Morton: That it was or that it was not?

Mr. Arakawa: That it was in existence prior to.

Mr. Morton: So then it would then qualify if we had some sort of evidence as a – Corporation Counsel, I'm sorry, I don't have your name.

Mr. Giroux: Preexisting nonconforming.

Mr. Morton: An existing nonconforming use. So a planner in the department stated that

the fence was there. This is news to me because I was trying to get Shell Corporation to return phone calls, and they're so big, and they're so busy, they haven't done the same. And so once again, someone in the Planning Department confirmed that the fence was there before the guidelines so it would be a nonconforming use?

Mr. Arakawa: No, the – I think I'm being misunderstood. The fence was there after the adoption of the–

Mr. Morton: Okay. After. Okay. So now we have clarification.

Mr. Arakawa: That's my mistake. My mistake.

Mr. Morton: Okay. That's fine. I wanted to make that clear, including myself, to misunderstand. Okay. So one of the – Mr. Chairperson, one of the questions you had was, do you have – does everyone have their evidence, and do you want to go forward? I said yes because trying to conclude a transaction with Shell was a very painful exercise. And to try to get them to return our phone call to say when did the fence go up was – I knew was going to be as painful. So I decided to go forward without any evidence that I had thought now maybe would've been beneficial for my case, but isn't. Okay.

I had asked the Planning Department last week when I received this file about these notices of warning. And you confirmed that the notice of violation was, in fact, yourself. But I believe – is this your signature? I'm sorry. Is this your signature?

Mr. Rost: I object . . . (inaudible) . . .

Chair Endo: Yeah. Mr. Morton, just so you understand the procedure, I know you're not an attorney, you're limited to asking questions of the witness on the stand. And just so you're clear, you're actually not supposed to be testifying yourself as to any facts. Later on, if you want to call yourself as a witness, or we'll figure out a time if you want to give your own testimony. At this time, you're supposed to focus on the witness on the stand.

Mr. Morton: Okay. Thank you. Now I understand. These two notices of warning dated one 8/28, and one 1/8 – 8, are those your signature on these?

Mr. Rost: He doesn't have those in front of him.

Mr. Morton: Oh, you don't? Oh. Here we are.

Mr. Arakawa: No, it's not.

Mr. Morton: Do you know who those are?

Mr. Arakawa: My partner, Charles Villalon.

Mr. Morton: And so it doesn't matter what area of the County that you work in? You can deliver and sign a notice of warning in any jurisdiction? It doesn't make it valid or invalid?

Mr. Arakawa: No, it doesn't make any difference.

Mr. Morton: Okay. So then I'll wait for Charles to talk to him about that. But you did say that this is your signature on the notice of violation, which would be B, notice of violation? Exhibit B from the Corporate Counsel?

Mr. Arakawa: Yes. Yes.

Mr. Morton: And these are typically sent to landowners who violate certain bylaws within a certain period of time after a first warning and a second warning?

Mr. Arakawa: Yes.

Mr. Morton: I see. And so if I was to have received a notice of warning on 8/28, and then – excuse me, on 8/8, and then 20 days later, a second notice, is that a typical schedule of providing notices?

Mr. Arakawa: Yes. Usually we issue two warnings before the notice of violation goes out.

Mr. Morton: I see. And then after the second notice of warning, then there is a notice of violation?

Mr. Arakawa: Correct.

Mr. Morton: And then how much time after that is typical?

Mr. Arakawa: There's no set time.

Mr. Morton: So when I received a pleasant visit from you or someone who works in your department to ask to take this down before any of these notice of warnings were prepared and sent to me, you could've also come to me afterwards if you wanted to, after the second warning, and say, you're about to get slapped with a thousand-dollar fine. We're going to go through this whole exercise. If you want to appeal, you really have to take this fence down. There was a courtesy initially. There could've been a courtesy after the second warning?

Mr. Arakawa: We're able to issue verbal warnings and written warnings. And we're obligated to issue two notice of warnings prior to a notice of violation.

Mr. Morton: I see. And is there any case that you have been involved in that after the second warning, the notice of violation wasn't processed in a timely manner like this one? It could've been months later? Years later?

Mr. Arakawa: A lot of times if the responsible is coming forward and dealing with the issues, then, yeah, we'll – we always look for compliance.

Mr. Morton: Right.

Mr. Arakawa: So if they're working to comply, the violation won't be issued until there's no due diligence or no really response.

Mr. Morton: And why would there be the right under the nonconforming use notice of warning to permit me to go to the MRA to ask for a variance in use, but not the same permission or route under this notice of warning for the fence when both are in violation of the use and design guidelines?

Mr. Rost: I'm going to object to that question. (Inaudible) . . . calls for speculation and isn't relevant.

Mr. Morton: Speculation? I don't understand. What does Corporate Counsel mean about speculation?

Chair Endo: Well, you're here to elicit the facts of what happened from – so when he says "calls for speculation," if you're asking him to answer hypothetical questions, or what would happen in this or that, that's what he means by calling for speculation. Why don't you restate your question and refer to the exhibits? And then let me – then I'll make a decision on that objection.

Mr. Morton: Thank you. Under a notice of warning for a nonconforming use, you're permitted to write under "Comments" that you could apply to the MRA for a variance. Why is it that in this case for the fencing that permission wasn't granted?

Mr. Arakawa: The fence, in this case–

Chair Endo: Hang on. Hang on, Jay. So I'm going to just – I'm going to overrule, allow the question, so go ahead and answer.

Mr. Arakawa: My understanding is the fence, under these circumstances, is illegal. It's not an existing nonconforming. It is just not allowed because the fence was put up after

the codes were – the MRA codes were accepted. So it's an illegal fence. It's not an existing nonconforming. It would be an existing nonconforming if it were established prior to the acceptance of the MRA regulations.

Mr. Morton: Right. So it's an illegal use to have a sign – to have a fence up on the property because it's subsequent to the Wailuku zoning and Redevelopment Area Guidelines. However, the use is a violation or illegal as is also stated. But I was permitted the right to apply to the MRA for a variance for that use which I have done. Why is it, and that's the question that I ask, why is it that I wasn't given the opportunity under a first warning or a subsequent second warning to apply to the MRA for a variance to the fence material, which is not permitted, the material of the fence, not the fence itself?

Mr. Arakawa: So your question – can –?

Mr. Morton: Why was I not given the right to apply for a variance to the MRA?

Mr. Arakawa: For the fence?

Mr. Morton: Correct.

Mr. Arakawa: We issue the warnings. When we issue the warnings, unless we get a response, we'll issue the violation. My understanding is, there was no response to the warnings. That's why the violation was issued.

Mr. Morton: Okay. And I just have to get these rules straight so I make sure I'm asking the correct questions. So the reason why I wasn't given the right under the two warnings has nothing to do with the fact that I didn't respond, because it's possible that I didn't receive either of the two warnings. But if I had received them, under Exhibit B from the County – excuse me, not B. I apologize. Well, under my exhibits of the two violations that were given to me, the first and second, there was no comment at the bottom that I'm permitted to go to the – giving me an opportunity to go to the MRA, the governing body, to ask for a variance.

Mr. Arakawa: If you had contacted us, we would have stated the options to you.

Mr. Morton: Thank you. Thank you. I did receive a notice of warning for the use. And I was – under the "Comments" I was permitted to apply for a variance. It states that "Apply for Maui Redevelopment Agency approval. Contact Wayne Steele." So that was the reason why I mentioned that, Jay, only because I was under this violation or as you stated, "illegal use." But under the illegal use of a fence, I was not given that opportunity, and I feel that is procedurally, sounds inconsistent. Thank you.

Chair Endo: Okay. Any redirect?

Mr. Rost: No.

Chair Endo: Okay. The County's second witness? Oh, wait. I'm sorry. Before we move to your second witness, we want to give the opportunity to any of the Board members who wish to ask any questions of the witness. No? Seeing none, you can call your second witness.

Mr. Rost: The County will call Charles Villalon.

Chair Endo: Thank you, Mr. Arakawa. Do you swear or affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Mr. Charles Villalon: I do.

Mr. Rost: Could you state your name?

Mr. Villalon: My name is Charles Villalon.

Mr. Rost: And what's your position?

Mr. Villalon: I'm a Zoning Inspector with the County of Maui's Planning Department, Zoning Division.

Mr. Rost: Did you ever investigate a complaint regarding a chainlink fence at 2086 Main Street?

Mr. Villalon: Yes, I did.

Mr. Rost: And looking at Exhibit A, which is in front of you, do those photographs accurately reflect that fence that you investigated?

Mr. Villalon: Yes.

Mr. Rost: Did you ever speak to—? Oh. And to your knowledge, was that fence in violation of a law or guideline?

Mr. Villalon: Yes.

Mr. Rost: And when was that?

Mr. Villalon: Actually, when I got the initial complaint, I wanted to assure that we weren't

being biased. There was another fence and old gas station doing the similar type of activity down the street maybe two blocks. And my report reflects that I investigated both parcels. So I found out the dates in which the MRA adopted the rules and which lot was exempted from the fence. So I issued the warnings appropriately to Azalea Communications and it was a Maui Meadows address. And both of those certified mails were returned to me unserved or unreceived in which I made further investigation and found where I could talk to the owner.

Mr. Rost: And did you ever eventually speak to the owner, Cecil Morton, regarding this?

Mr. Villalon: Yes, I did.

Mr. Rost: Okay. I'm going to show you Exhibit C. . . . (inaudible) . . . Exhibit C. Now, do you see near the bottom of the second page of Exhibit C where it states, quote, "Cecil Morton, upon substantiating his property was within the MRA boundaries when the chainlink fence was erected same agreed to have fence removed by 9/21/06?"

Mr. Villalon: Yes.

Mr. Rost: And that is an accurate report of your conversation with Mr. Morton?

Mr. Villalon: Yeah, like mentioned, I met at his office, and it was about a half an hour meeting. And the two warnings that were returned were rendered to him so he was well aware that there were two warnings that I needed to serve. And it was the first, the primary reason for the meeting. And then we went on. He made his presentation about this project. And before I left I was sure to indicate that I investigated another lot, and the other car sales activity, and that that fence needed to be removed simply because of the timeline of the adoption of the rules.

Mr. Rost: And you can tell from Exhibit C when that meeting with Mr. Morton occurred?

Mr. Villalon: Approximately, 9 – correction, September of 2006.

Mr. Rost: And in that conversation, Mr. Morton agreed to remove the fence by September 21, 2006, is that right?

Mr. Villalon: Yes.

Mr. Rost: Okay. And he acknowledged that the fence was erected after the guidelines took effect?

Mr. Villalon: Yes, we went through it and the dates. And if I need to mention the other property owned by Jonathan Starr.

Mr. Rost: And you – did you fully explain that the process – how the fence was in violation?

Mr. Villalon: Yes.

Mr. Rost: All right. I have no further questions. Thank you.

Chair Endo: You can cross examination.

Mr. Morton: Charles, I'm just going to this note that Richard pointed out. So it was in September that you visited me at my office. I mentioned that previously. And it was my clear understanding at our meeting that you were directed to my office. You had said that you had tried to find me for a while. You finally found where my offices were in Kahului. I was actually out-of-state when I received a phone call from my tenant saying that someone had arrived. I didn't know if it was you or someone else in your department at the Main Street property. And the tenant actually told me that he couldn't be there and the fence couldn't be there. But maybe I'm confusing dates, but I do recall our meeting. And I do recall, and I'm asking you if you recall this fact, and that was that I had asked you for something in writing because it was a pleasure to have met you, it was a pleasure that you gave me your business card, but I didn't feel like it was an official request to remove a fence. I wanted a notice.

Now, you mentioned the word, you "rendered" the notices to me. Did you mean that you actually handed me the hard copies?

Mr. Villalon: Yes, I had the two received – the evidence that's in the binder: the two first and final warnings that was returned to our office unserved. It was taken to Mr. Morton for that meeting.

Mr. Morton: I would not have ignored those. I would not have ignored – I don't have them.

Mr. Rost: (Inaudible)

Mr. Morton: But that's fine. That's fine, Richard. That's fine.

Chair Endo: Yeah, you should restrict yourself to asking questions. Remember, you're cross-examining.

Mr. Morton: Okay. I don't have those. So I can't say that you actually gave them to me, Charles. And that's why I had called your office last week because I had never seen these.

Chair Endo: Mr. Morton, you need to ask questions of the witness.

Mr. Morton: Okay. Could you tell me what sequential number is at the bottom of these notices because I cannot read them and—?

Mr. Rost: Again, he doesn't have those in front of him.

Mr. Morton: It doesn't what?

Mr. Rost: He doesn't have those in front of him.

Mr. Morton: Oh, well, I'm just wondering if the procedure was taken place properly, sir. I never received these originals. And I have doubt that A) I wasn't given the right to – excuse me. Charles, during our meeting, did you ever suggest that I could go to the MRA and apply for a variance for this fencing?

Mr. Villalon: There was a process in which you could get A) allowance to do car sales, because car sales are allowed through the approval by MRA. But the fence, and that's the differentiating point, the fence was illegal. If you wanted to do used car sales, you would need an approval, an administrative approval.

Mr. Morton: I don't know if everyone here understands because I clearly don't. Why is a fence and a use different as it relates to the violation? Why are we not permitted as landowners to apply for a variance for an improvement as we are allowed to apply for a variance for a use?

Mr. Villalon: It's a specific guideline. They specifically restricted fences along public walkways.

Mr. Morton: They specifically restrict car sales and car rental. The zoning does not permit it. It says, "This does not include new and used care lots." They meant "car lots."

Mr. Rost: Again, I'm going to object because that's not a question.

Chair Endo: Yeah.

Mr. Morton: Well, the question is, the question is, why – where is it written that you cannot afford the opportunity to a landowner to apply for a variance for a fence when you're allowed to – and where is it written where you're allowed to provide the opportunity to a landowner for a variance in the use? Where is it written?

Mr. Villalon: It's not allowed. The fence is not allowed along a public walkway, but the

used car sales can be allowed administratively.

Mr. Morton: Where is it written that—?

Chair Endo: Okay. Mr. Morton, let me interject here. For one thing, we seem to be going around in circles a little bit. But also, as – although we're not bound by the rules of evidence, one of the guidelines is to preclude irrelevant or cumulative evidence. So why don't you tell me what your point is that you're trying to prove?

Mr. Morton: I was never given the right to apply for a variance and I believe the right should exist. It exists under the use. Why doesn't it exist under improvements?

Chair Endo: Okay. But he's not an expert on the law. So if you're going to make a point that's legal, you can just make that in your closing. Okay?

Mr. Morton: Oh, I see. Okay.

Chair Endo: So whether or not he thinks you can do one way or the other doesn't matter. What the law is, the law is.

Mr. Morton: No, it's just that the gentleman writes a notice of warning. And at the bottom of the notice of warning, they have a comment section. And the comment section permits you to apply for a variance. In this case, there is no right. And I wanted to know why under his responsibility, he didn't give me that opportunity.

Chair Endo: Right. And I'm going to rule that he's already answered that to the best of his ability. So let's move on.

Mr. Morton: Okay. Thank you.

Chair Endo: Okay. Does—? Excuse me.

Mr. Rost: No, I have no redirect.

Chair Endo: No redirect. But hang on, we might have questions from the Board members. Jim?

Mr. James Shefte: Yes. There seems to be confusion here between the two of you on this one point. And it keeps referring back that it's against the rules. So that rule must be somewhere. Could we see that rule that says fences are not allowed? Is it somewhere in those rules that are—?

Mr. Villalon: Should be. I just saw it in here. Hold on.

Mr. William Kamai: It says so on the notice of warning what section. Section 3D.17.0–

Mr. Shefte: No, my copy, it doesn't – you can't even read it.

Chair Endo: For the record, there's also Exhibit D that has a copy of the actual design guidelines.

Mr. Kamai: But it's written on the notice of warning, too.

Mr. Shefte: Down at the bottom?

Mr. Kamai: In the middle.

Mr. Shefte: Okay. Thank you.

Chair Endo: Okay. Kathleen?

Ms. Kathleen Acks: I have a question. On – in Exhibit C, on the bottom of the page, it says, "However, this inspector met with owner . . . one: Cecil Morton, upon substantiating his property was within the MRA boundaries when chainlink fence was erected same agreed to have fence removed by 9/21/06." Did you agree to do that?

Chair Endo: Hang on. Hang on here. Kathleen, we're supposed to be asking the witness questions. You can certainly ask the applicant that question, the appellant.

Mr. Morton: I'll be happy to answer.

Ms. Acks: Okay.

Chair Endo: No, but not yet.

Mr. Morton: Not yet? Okay.

Chair Endo: Yeah, because we gotta stay kind of organized.

Ms. Acks: Okay. So I can ask him if that is what you remember occurring on that date?

Mr. Villalon: Yes.

Ms. Acks: Okay. Thank you.

Chair Endo: Okay. Any other questions?

Mr. Kamai: Yeah, Mr. Villalon, so just so I'm sure that these notices of warning, they were hand-delivered at this September 21st meeting because you couldn't--?

Mr. Villalon: Right. He actually had a secretary and not an associate. There was a secretary that told me he's in conference, wait a while, and then I went in. But the day I went in, that was the reason for the meeting so that I could give him the two warnings that I couldn't serve via certified mail.

Mr. Kamai: Okay.

Chair Endo: Warren?

Mr. Warren Shibuya: Mr. Villalon, I just wanted to ask you for confirmation here because I'm a little bit mixed up with the date of September 2006. I believe you said or at least there was some mention that you met with Mr. Morton on September 2006. Was that correct or was there another transaction of September 2006?

Mr. Villalon: Well, I met with him twice. Initially, when I finally got to first initially meet him and render the warnings, and again when I met with Mr. Arakawa, I knew exactly where his office was, and we both went up there. And we again, left documents with his secretary, if that's what you're talking about.

Mr. Shibuya: Well, there's two times. So can you give me the dates on the two times that you did talk to him? The first one was initially just you. And I believe it was September. I thought I heard that.

Mr. Villalon: Well, I have a September 11, but that when I was doing my investigation on the other parcel. So when -- I actually had time so I could get the information, and give that information so he knew that we were being equitable and fair about implementing the rules with another lot because I knew it was going to come up. I can't be honest and tell you the exact date, but it's between the 11th and the 21st.

Mr. Shibuya: Oh, no, I just wanted the month.

Mr. Villalon: Oh, in September.

Mr. Shibuya: 2006?

Mr. Villalon: Yeah.

Mr. Shibuya: That's fine. That's close enough for me because I'm looking at the actual warning dates and it does say "November." Is that correct?

Mr. Villalon: I've got August 8, 2006 on my first warning. And I had listed the section for the chainlink fence and automotive sales both. It could be misconstrued that both could be granted via administrative rules.

Mr. Shibuya: Okay, but we don't have a copy of that.

Mr. Villalon: We do?

Mr. Shibuya: We do have?

Mr. Villalon: Yeah.

Mr. Shibuya: Is this the exhibit that the appellant--?

Mr. Villalon: Right. If you can see my signature and the date on the top, it says "8/8/06" right under the County logo.

Mr. Shibuya: Oh, I see an 11. Okay, but -- and that's why I guess I'm getting confused.

Mr. Villalon: And that's Jay Arakawa's 11/28/06.

Mr. Shibuya: Okay. So this 11/28/06, what is that? Is that something different from the August 2006?

Mr. Villalon: Yeah, that's a separate warning trying to initiate compliance again by our division. And the second one with that service, you can see my signature as well as Jay Arakawa's signature on the final second warning which we met at his office again.

Mr. Shibuya: I see. Okay. Well, thank you very much. I'm now beginning to understand some of the little problems here. So there was actually two appearances that you've made with the appellant serving him the warnings?

Mr. Villalon: Yes, at his office, yeah.

Mr. Shibuya: Yes. Thank you very much.

Ms. Acks: Can I ask a quick clarification?

Chair Endo: Sure.

Ms. Acks: Were the notices given to the secretary or to Mr. Morton?

Mr. Villalon: The second one, myself and Jay Arakawa, was to the secretary. He wasn't

in.

Ms. Acks: They were given to the secretary?

Mr. Villalon: Yeah, he wasn't in at the time. But when I met with him, my first meeting, I had the two initial warnings in my hand.

Ms. Acks: Thank you.

Chair Endo: I have a quick question. These things that we we're referring to, Exhibit C which are like your log notes, I'm just wondering for background purposes, how do you keep these records? Do you – were these reports made soon after the events actually happened as they're described in here, or is it months later? Or how do you normally – how were these prepared?

Mr. Villalon: You can see the confirmation dates to the left where my name is. That's when the report was actually made. So it's not within a near proximity of the contact or investigation.

Chair Endo: Okay. And you do these types of logs or notes for all of your investigations?

Mr. Villalon: It's automatic. We got a pretty tight system.

Chair Endo: Okay. Thank you.

Mr. Rost: The County will call Joe Alueta.

Chair Endo: Do you swear or affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Mr. Alueta: Yes.

Mr. Rost: Could you state your name?

Mr. Alueta: Joseph Alueta.

Mr. Rost: And what's your position with the County?

Mr. Alueta: I'm the Administrative Planner Officer.

Mr. Rost: And how long have you been – held that position?

Mr. Alueta: I've been with the County 15 years. I've had the APO job for three years now.

Mr. Rost: Okay. Are you aware of a property located at 2086 Main Street in Wailuku, the former Shell Station?

Mr. Alueta: Yes, I am.

Mr. Rost: Okay. And to your knowledge, does that property have a chainlink fence around it?

Mr. Alueta; Yes.

Mr. Rost: Okay. Could you look at Exhibit A in that folder in front of you? Do those photographs accurately reflect the fence around that property?

Mr. Alueta: I believe so, yes.

Mr. Rost: Did you see that chainlink fence being constructed?

Mr. Alueta: Yes, I did.

Mr. Rost: And was that – when you saw the chainlink fence being constructed, was that after the Wailuku Redevelopment Area Guidelines came into effect?

Mr. Alueta: Most definitely.

Mr. Rost: Okay. I don't have any further questions. Thank you.

Chair Endo: Cross-examination?

Mr. Morton: Thank you for the evidence. So the previous owner put up the fence and it was illegal?

Mr. Alueta: Yes, it was put up by your representative.

Mr. Morton: My representative? Who was that?

Mr. Alueta: It was put up by Blue Hawai'i Realty Company, which is – Mr. Bronstein had been working for you, and he was the sales agent for the property. And they had – when he had took over the property, he had put the fence up.

Mr. Morton: When he—? I'm sorry. He what?

Mr. Alueta: When he was selling the property, he – when Blue Hawai`i Property sold it, they put the fence up sometime around – I think it was in '05.

Mr. Morton: Blue Hawai`i is a real estate brokerage.

Mr. Alueta: Correct.

Mr. Morton: The owners of the property were Shell Oil. Is that correct?

Mr. Alueta: Correct, as far as I know.

Mr. Morton: The fence was put up by Shell Oil, for everyone around this room. It was not put up by the real estate broker.

Mr. Rost: I'm going to object to that. (Inaudible)

Chair Endo: Yeah, again–

Mr. Morton: How can you object to the fact?

Chair Endo: Well, because you're not testifying. You're asking questions of the witness.

Mr. Morton: Joe, excuse me, the fence – you are purporting to state that the fence was put up by someone other than the owner of the property. And that was–

Mr. Alueta: No, I am not indicating that. I'm indicating that when the property went up for sale, and it was Blue Hawai`i, because they hung their sign from the fence, so it was put up. When the property was decided to be put up for sale, the sign – the fence was pounded into the ground, and that's when Blue Hawai`i hung their sign from it. So, I'm sorry. I made the assumption that they had put it up, but it was put up by someone in the process of the property being sold.

Mr. Morton: And when was that? Do you recall what date? Like year?

Mr. Alueta: I believe it was sometime in '05, is my general recollection, but I could be off.

Mr. Morton: So Shell closed down their business sometime in '05?

Mr. Alueta: I'm assuming so. They may have closed down earlier. I do know that it was operated – the reason I know – I mean, if I can expound? I lived within the MRA. I lived about a hundred yards from this property. So I moved into right into Wailuku Town in June of '04. I was born and raised on Maui and in Wailuku, so I know Wailuku pretty

well. And I happened to lived right into town and I walk around town. And I was walking my dog going down to get some pizza when they were installing the thing. And I thought it was pretty hilarious that they were trying to pound these temporary spikes into the asphalt. That's what I found funny. It was like – and at the same thinking, God, this is an ugly fence. So that's why I'm pretty sure I know when the thing was done. And I know that – as you can see, I was the one that filed the complaint. So I do when – pretty sure when it was done. And that's when my initial contact–

Mr. Morton: So your department that you're in advises the department that Charles is in that there's a violation? Or you initiate the violation? How does the process work? The notice provision and then the violation?

Mr. Alueta: Okay. As the Administrative Planning Officer, when I took the job, my initial duties, one of my initial duties was staffing the Maui Redevelopment Area, Maui Redevelopment Agency. So I was staffing the Board prior to being spun off. The enforcement arm for the Planning Department both as far as zoning in Title 19, as well as enforcing the MRA rules falls within the Zoning Administration and Enforcement Division. So if there's a violation or anything like we would send a complaint in to the Zoning Administration, they would then investigate, and they would then confer back with us as to what – potentially, what sections they're violating.

Mr. Morton: I'm going to ask you the question. I don't know if you have the authority to answer it because now I understand, but these two notices of warning that were – one was delivered to me, if I understand the facts correct, and the other one was delivered to my secretary. Since these notices weren't delivered to me in a timely fashion by mail, they were returned, and then they were hand-delivered to me one month later, wouldn't it have been in the normal course of this procedure correct to allow that same amount of period, that extra month, to rectify the situation: apply for a variance if one was permitted or take down the fence?

Mr. Alueta: It is not uncommon for people who receive notices of violation not to accept the mail because they know it's a violation. So they don't want to touch – they refuse to accept it. And it's typical delaying tactics. We see this also in other zoning, other use violations.

As far as timeframe, you were made aware of this violation or that the fence was not permitted several months, I would say, almost a year possibly, when you first arrived at the property because I did have a meeting with you as well as your representative over your proposed plans. And at that time, I told Mr. Bronstein who was representing you in your pursuit of the MRA permits, because I was meeting with him on your behalf that the fence was not a permitted use. And I verbally told him that. And that you had intended to redevelop the property with larger plans and you wanted to have the fence up temporarily. At that point, I said, well, it's really ugly. You need to try to address this

up. I said I'll let you temporary. If you're going to pursue something in the future as far as developing something, I'll let you, but you gotta put something up. At that point, you hung up – they – he had arranged for the hang up of those signs or those murals that were painted to try to disguise the— And I said, that's not a wooden fence. It's just a chainlink fence with some ugly – I mean, some nice student pictures, but wasn't exactly to my – to the taste and did not qualify.

We then had a meeting up at One Main Plaza and we discussed these plans. And I said – and at that point, you presented your plans for your building. I said, the building and scale of it would not, in my opinion, would not make – would be appropriate for that location. You're not going to get that permit. You know, you're going to have to rethink this. And I said, you can still apply for a variance or go to the MRA. But I said – and again, I reminded you that the fence is not . . . (inaudible) . . . If you're not going to pursue this plan, you need to remove the fence. And – but – you can keep the fence provided you're going to pursue a project. Okay. Our goal – I mean, we try not to be heavy-handed. We're trying to encourage development, but we still want tasteful development. We're not about to allow any development.

No progress since the meeting occurred. At that time, my understanding is that the project was a no-go because at the time you said you didn't want to pursue a project that we were going to recommend denial for. I was informed by Mr. Bronstein that he was no longer representing you, that the project was not going anywhere. I asked him about the fence. He said, I'm not involved anymore because – and at that point, I filed a notice – the complaint to ZAED to say, hey, this guy is not pursuing a new project in the future, and I don't want this fence anymore. If he's going – if he wants to keep the project as it . . . (inaudible) . . . he's going to have to get all the permits now. And that's when the whole cycle of things–

So as far as timelines, there was adequate time as far - in my mind. What the legal – this Board decides as far as legally, that's a different story. But the fence has been a known issue. We didn't go out there and crack the whip from day one because we try to work with the landowners. We try to get – if they're going to pursue something in the future. At this point, we don't believe that there's a viable project. He hasn't pursued a viable project. So therefore, if he's not going to do that, then we need – we know delaying tactics when we see it. So we're not going to – so we'd like to see it redeveloped, but that's fine.

Mr. Morton: I remember years ago my mother wanted to return the milk to the milkman, and the milkman said, everyone does that. It's a tactic. I take offense to that and your comment. My mother never used the milkman again.

Mr. Rost: I'm going to object again . . . (inaudible) . . .

Mr. Morton: Anyway, that's fine. I just wanted to put some humor into this. I'm sorry. But thank you. Thank you for your time. I have no more questions.

Chair Endo: Okay. Redirect?

Mr. Rost: I have no redirect.

Chair Endo: Okay. Board members, any questions for the witness?

Mr. Giroux: From Corp. Counsel, Joe, you're the Administrative—?

Mr. Alueta: Administrative Planning Officer.

Mr. Giroux: Okay. Are you aware of how the Redevelopment Code, the Zoning and Development Code for the Wailuku Redevelopment Area was adopted?

Mr. Alueta: There's two codes. There's your Zoning and Development Code.

Mr. Giroux: Yeah, I'm looking at the September 2002.

Mr. Alueta: Yes, that's what I have.

Mr. Giroux: Are you aware of how that was adopted?

Mr. Alueta: It was taken to the – no, honestly. It occurred after – prior to me taking over. The previous Administrative Planning Officer, John Summers, took it through the process. And it was, I believe, approved by Council, ultimately.

Mr. Giroux: Okay. Do you know if it was approved by Council as an ordinance, or a resolution, or how was it adopted?

Mr. Alueta: I can't – it would take me some research to give you the exact process.

Mr. Giroux: Do you know if there's anything in the code itself that would direct this towards an ordinance?

Mr. Alueta: The whole MRA, the Maui Redevelopment Area is under – I want to say Chapter 53 of the HRS in which it came about to create – came about to create the area. And the State legislature granted the counties the right to declare a certain urban blight. It was part of that whole urban renewal program that was going on during the '70s that was – that the Country's had. It was going across the Country. By resolution, or by reso, the Council created the MRA, and that created the first plan. And then for many years, it sat idle, you could say. And the kind of urban renewal of Wailuku kind of

turned into – when the first plan came out in 1973, because I like I said, I lived in Wailuku, and we – my family was like, oh, wow. But they basically said demo the entire Wailuku. And that kind of raised a fervor over a lot of the residents. And the MRA kind of morphed into the Wailuku – into a save Wailuku, or save the old character of Wailuku, and that's how it's kind of morphed itself. And so that's where you – since then, we've created – we've expanded – when this came about, we expanded the boundaries of the MRA to include larger areas, and created this Small Town Code, okay, which separates . . . (inaudible) . . . So whenever it's – when he refers to B-3, B-3 doesn't exist anymore in the Wailuku. It's now commercial mixed use. So it's not – whenever you look up what is a permitted use, you don't look up B-3. You look up what's in this book. This is the Title 19 for Wailuku, for the redevelopment area. And this book subsequently, and through ordinance, references the design guidelines. And so those are the only two main things you need to look at as far as what you can develop it. How are the enforcement – you know, procedures? It would still follow through 19.

Mr. Giroux: Joe, is there anything in the Redevelopment Agency Zoning and Development Code that specifically mentions chainlink fences within the code itself?

Mr. Alueta: It doesn't – not – by sub – by cross reference into the design guidelines. And I believe you have a section of it photographed in your code, I guess it's Exhibit D, and where it prohibits the use of chainlink material.

Chair Endo: For the record, that was Exhibit D as in dog: County's Exhibit D.

Mr. Giroux: Is there anything in the Maui Redevelopment – Zoning and Development Code about enforcing the design guidelines?

Mr. Alueta: Any development within the MRA requires review and approval by the MRA either through its administrative arm or through its – through the MRA Board itself. The procedures are what constitutes a development. And within the – if you look on the Administrative and Enforcement, that's page 55. I'm sorry. You don't have this section, but under the Zoning and Development Code, there's 55, which has the purpose of intents, the general application procedures, as well as how you run your meetings, how you give notice, review process, as well as enforcement. So if it's determined to be a development, it needs to get either a use or a design. Okay. So the two things that the MRA review for is both use and design. And so the development or the change in use at the property, as well as the construction of the fence was development. And therefore, needed to have review. When we saw the fence, it didn't meet the criteria. So it wouldn't have been able to get a permit or wouldn't have been able – we could not approve it. So therefore, it was a violation.

Mr. Giroux: As far as – just as far as permits go, do you – to build a fence, do you need

a permit in the Wailuku area? Is that accurate?

Mr. Alueta: Yes, you need a permit.

Mr. Giroux: So if somebody did pull a permit, it would've been entered into KIVA, and tracked? Is that—?

Mr. Alueta: That is correct. Whether it be a new development or a redevelopment, they would need to come in. And a lot of times like – as I said, we list what is permitted. So someone would come in. We'd determine what exactly are you getting. Are you going to get—? Is it a permitted use? If it's an outrightly permitted use, we say, okay, fine. If the design is okay and it meets the criteria, we say, fine. That's all you need. You don't need a special permit. It's only if you are doing a use or it's specifically listed that you need to get an MRA – either design review or a use permit.

Mr. Giroux: Okay. Joe, I'm looking at 30.17.030. Do you have a copy of that?

Mr. Alueta: 17, yeah, Review Permit Process?

Mr. Giroux: Right. And right above it is 30.17.020, Design Guidelines.

Mr. Alueta: Yes, that's where it references the design guideline booklets.

Mr. Giroux: Okay. And it says, the design guidelines shall be used by the MRA to review plans, right?

Mr. Alueta: Yes.

Mr. Giroux: Okay. And then in 30.17.030(A)(3), it says, "The Director may submit any application to the MRA if there are outstanding questions of compliance with the design guidelines?"

Mr. Alueta: Yes. What section are you on again?

Mr. Giroux: 30.17.030(A)—

Mr. Alueta: Subsection three?

Mr. Giroux: Subsection three.

Mr. Alueta: Yes.

Mr. Giroux: Can you explain that to us?

Mr. Alueta: The design guidelines, if someone comes in with alternative material such as either concrete or stucco, a lot of times it has to do with – you know, they're talking about vertical boards. Some people want to use V-Groove, T1-11. The most recent case of design where someone came in and said they want a board and batten look, they came in with the – if you know cementitious board, the new hardy boards, that's not listed or it's not a traditional building material, but it has the look and feel of wood or vertical boards. And you see that on the corner of Vineyard and Market Street – so – where the gentleman used vertical cementitious board. Those are not where – instead of using your traditional pine board. So that's the type of material as to whether that was called out. We get that – you know, a wide variety of materials are allowed. In the case of this one where it's – you know, it's pretty clear in the design guidelines where it's a prohibited material. So it's very different. That's a no-brainer as far as from our standpoint. That's not something that the Director would take to the Board for interpretation because it's clearly not permitted or–

Mr. Giroux: So to your knowledge, there was no application for this type of fence to the MRA then?

Mr. Alueta: No, and – no.

Mr. Giroux: Joe, I'm looking at 30.16.100, Enforcement. That's on the page prior. And right above it, it has 30.16.090, Appeals. You see that?

Mr. Alueta: Yes.

Mr. Giroux: And Appeals says:

Appeals by any government agency, organization, or citizen alleging administrative or Maui redevelopment agent actions were erroneously rendered or inconsistent with this chapter may appeal to the Board of Variances and Appeals pursuant to Maui County Code, Chapter 19.520.

That's correct?

Mr. Alueta: Correct.

Mr. Giroux: And under it is Enforcement. And it says:

Any approval or permit issued pursuant to the provisions of this title shall comply with all applicable requirements of this title. Enforcement of the provision of this article shall occur pursuant to the provision of Maui County Code, Chapter 19.530.

Mr. Alueta: Yes.

Mr. Giroux: And as far as you know that this fence never went through any approval process?

Mr. Alueta: No.

Mr. Giroux: That's all the questions I have.

Chair Endo: Okay. Thank you, Joe. The County have any more witnesses?

Mr. Rost: I have no further witnesses. Thank you.

Chair Endo: Okay. At this time, the appellant can call any additional witnesses, if you have any.

Mr. Morton: No other witnesses.

Mr. Giroux: If he wants to call himself as a witness and testify to any—

Chair Endo: Do you want to call yourself as a witness because you wanted to make a lot of statements during the process so—?

Mr. Morton: Yes.

Chair Endo: Okay. So what we'll do is since you're calling yourself, you can just make your statement under oath, essentially. So I'll just swear you in, and you can just make any points you want to make, factual statements. Do you swear or affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

Mr. Morton: Yes.

Chair Endo: Oh, and you actually – just for the record, you actually weren't listed as a witness, but I'm assuming the opposing side has no objection?

Mr. Rost: No, I'm not going to object.

Chair Endo: Okay. So go ahead.

Mr. Morton: All right. I was just curious what your questions were leading to. It made my understand that it's a possibility that under enforcement and appeals, as well as the right to erect a fence or not, it's all subject to an MRA body. And I was given to notice to remove it. And if it's my understanding, I wasn't given notice to apply for approval for

the fencing.

However, the long and short of this is that I understand from what we've all heard today that I was given notice to remove a fence. I didn't remove the fence. I'm here to tell you that I still do not want to. Do I feel that it's right that we have to remove the fence? I included in my exhibits many, many photographs of many, many chainlink fences in our town of Wailuku that require them for security purposes. I understand the written word. Whatever your decision is will be understood, and I'll follow through with it.

There are issues with security in our town. The pictures that I showed you of our wooden fence have to be repaired at times because people decide that it's fun to damage other people's property. They can't damage the chainlink fence nor the tenant's personal property.

I did indeed donate time and funds to the Wailuku public school in an effort to create a nicer environment there by donating materials for an after-school project. And there were 12, I believe, that were beautiful pieces of art that these children painted, and we fixed them on the fencing that I was informed was installed by the previous owner, legally. And then when I did relocate down to Kahului and moved out of the location, I took them with me because I was so proud of that project that I did with the children.

In terms of the notices, in terms of my intent to develop, as we all know, the construction today is very, very high, and it's getting higher. And I've been trying to develop a project there and I have every intention of doing so. And I take offense to anyone suggesting that I was trying not to accept certified mail, that I have no intention of developing a project. We go through consultants and then we go through other consultants. And the fact that the gentleman Joe spoke to a consultant that I no longer engage, and use that as my agent of record to determine that I wasn't going to go forward, and enough was enough, and this is just another stall tactic was, I don't think, the proper position to take.

But regardless, I would like to keep the fence up. I'm asking if you'd like me to make it look nicer – there seem to be a comment by Joe that, in fact, if you could dress it up a bit. And that's why I did what I did with the children. But I'll be prepared to dress it up in some form or fashion. I don't know what exactly that could be, but I could discuss that with the departments that would be responsible for addressing appeal.

But the security is an issue. I sent pictures to you that show board – one building with the window boarded up. I'm not sure if that was violence or if that was an act of God that broke the window. It's a property on Main Street. That's not the evidence from the County. It's the evidence from myself. There's a lot of vacant property that have paper on the windows so people can't look inside because it's not a vibrant town just yet. And I want to be part of creating vibrance here. And I want some leniency. And I have a feeling that Corporate Counsel doesn't look at that sort of heartbeat, that the facts are

the facts. The only fencing that's allowed is cast iron. The only fencing that is specifically identified as not allowed on the frontage is chainlink.

And all the facts are on the table. I wasn't in any way trying to waste our times here today. I truly feel that sometimes a little bit of leniency in a project like this makes sense. I'm going to go back to my secretary and ask her why I never got those hand-delivered notices. But I clearly am not fond of the fine or ongoing fines. And I ask you for your support to let me keep the fence up for the two businesses that operate there, and bring people to Wailuku to shop. To shop not only at their establishments, but the establishments around in the neighborhood, and to keep their personal property safe. Thank you.

Chair Endo: Mr. Rost, do you want to cross-examine?

Mr. Rost: No, thank you.

Chair Endo: Okay. Do you – at this point – or does any of the Board have any questions now for the appellant? Uwe?

Mr. Uwe Schulz: I just would like to have a clarification that was said, I think, twice by the witnesses that you had agreed to remove the fence. Is that a fact that you at one point agreed to remove the fence a year ago or whenever it was?

Mr. Morton: Yes, I had agreed to remove the fence. We wanted to discuss about camouflaging the fence as well. And we also discussed a number of other issues, including the design of a proposed project. So there were many discussions and many agreements about the fence. I never removed the fence because I was waiting for an official notice, and I had asked for that, and I never received it. And it wasn't until both gentlemen said that they were hand-delivered that I never received. And I'm here today because I received an official notice. I actually had it in my hand.

Mr. Schulz: So but anyway, it is the truth that during these personal meetings, you did agree to remove it.

Mr. Morton: I did. And I answer it that way because we sometimes make decisions and we retract our decisions. And I did because of security. I went home and I realized that, yes, I made a – I promised to do something that is not a viable promise. It's not promised. It's just – if you had a business here, and if you do, sir, then you know what I'm talking about security.

Mr. Schulz: I'm just wondering after you made this promise or commitment to remove the fence, did you notify the County and said, well, I changed my mind? Did you write them a letter? Did you make a phone call? Did you send them an e-mail or a fax

saying, well, I committed myself to remove the fence, but after I thought about it a little bit longer, I will not remove the fence? Did you do that?

Mr. Morton: No, I did not. I was waiting for a notice. During the meeting that I agreed to remove the fence down, I asked for a written notice so I knew that this meeting was official.

Mr. Schulz: Okay. Thank you.

Mr. Morton: Thank you.

Chair Endo: Kathleen?

Ms. Acks: When do feel that you have received an official notice?

Mr. Morton: When I have it in my hand and I read it?

Ms. Acks: I'm just asking. There seems to be a perception that the County should've done more than they did. The County sent you letters that got returned. They came to your office on two separate occasions with the intent of giving you the documentation. To me, in good faith, the County made an attempt. I'm not making any accusations here either. I'm just saying that I think the County made an attempt. You keep saying you never got any of these notices. I'm asking you the question now: when do you feel that you, in fact – did you ever see the notice of violation?

Mr. Morton: Yes. No, I did receive the notice of violation and that's why I appealed. I did not – the fact that these gentlemen purported that they delivered them to my office. I'm not doubting them. I don't have them. And I'm going to go back and ask my secretary where they are. I now have a copy of the notices, the two notices, which the violation. Once I received the violation which was the first written notice that I received as it refers to the fence, I responded with this procedure. I was not ignoring–

Ms. Acks: So this is November?

Mr. Morton: Notice – date of notice: November 29.

Ms. Acks: Okay, so prior–

Mr. Morton: Oh, excuse me. That's not true. This date of notice is one of the notices that I never received. That's what it says on this notice of violation. The date of violation is – can anyone read this to really identify what date this is? This notice of violation? February 29th?

Ms. Acks: November 29.

Mr. Morton: Oh, yes. Okay. We're in May now. Yes, November 29.

Ms. Acks: I'm just baffled by a perception that you didn't get the notices.

Mr. Morton: I'm not – no, there's no perception. No, it's clear. I did not receive the notices. It is also clear what the gentlemen said that they have come to my offices. I met with Charles, personally. I didn't – I was not there during the time when he was there he said with the other gentleman. I did sit down with Charles. He did tell me. I did not receive anything from him. And if he did, I don't have it. But I did discuss the fence with him. And I did ask him for an official written letter. That is so clear. And the only official notice that I have in my file is this one. And that's why I'm here. I responded. I responded to it. I wanted to respond to it, but that I needed something in writing. Two notices go to an address that I don't have anything to do with.

Ms. Acks: They probably have that address based on information you had given them?

Mr. Morton: No, they probably had that address from the consumer department where the LLC was registered in the State. And then the address was changed. And we know how files sometimes don't get updated electronically as fast as they should. So from the records that they had, they pulled up the Kupulau address, and sent the information there. It came back. And then they hand-delivered it.

Ms. Acks: Who normally opens your mail at work?

Mr. Morton: Different, various people in the administrative offices.

Ms. Acks: Your secretary?

Mr. Morton: Various people in my administrative offices.

Ms. Acks: Do they always give you all of the things that are opened, or do they sometimes file them or—?

Mr. Morton: It's possible that they filed it because I didn't receive it.

Ms. Acks: Thank you.

Chair Endo: Any further questions from the Board? Okay, I think what we should do now— The appellant essentially, gave testimony, but also essentially, gave closing remarks. So we probably should allow the County to give closing remarks, if they want to.

Mr. Rost: Thank you, Mr. Chairman. Just very briefly, I think it's been clearly established that this fence violates the rule and should not be grandfathered in. It's also been established that Mr. Morton knew about the violation quite a long time before the actual notice of violation was issued. Mr. Alueta testified about his conversations with him as did Mr. Villalon. Their September 2006 meeting, Mr. Morton said he was going to remove the fence. So it's obvious he was aware what was going on: the fence was in violation. And being that it's clearly established the fence is a violation, the County would request that the notice of violation be upheld. Thank you.

Chair Endo: Okay. At this point, let me just go over some procedure, one way that procedurally – the procedure we could follow, and which is allowed under the rules especially, when a hearings' officer, separate and apart from the Board, is retained to do the contested case, they would normally have all of the parties do proposed findings of fact. Those would all come up. And then there would be a recommendation by the hearings' officer to the full Board, and then we would take action. And then there's various other pieces to it, but that's generally, how it works.

In this case, since we've made the entire the hearings' officer, or essentially, there is no hearing officer, we're just taking the matter up right now, I believe it's permitted under the rules, but I would also like to hear from the parties, I think we – and the matter is fairly simple, and so it might not be necessary to ask both parties to submit written briefs and proposed findings. We could just have final remarks as they've been made, and we can just deliberate and take action. Do any of the parties have any objection to proceeding in that manner?

Mr. Morton: No.

Mr. Rost: I have no objection to that.

Chair Endo: Okay. Does any Board member have any objection to proceed into – to take action based on the testimony we've heard? Okay. Then in that case, we should close the evidentiary portion now, right? Okay. So we will deem the record closed. So everything that we've heard, all the documents we've admitted into evidence, all exhibits, those are all considered part of the record for us to consider in rendering our decision. Let's take a ten-minute recess, and then come back, and go into deliberations, and take action. So we stand in recess.

(A recess was taken at 3:08 p.m. and the meeting reconvened at 3:25 p.m.)

Chair Endo: All our members are back here, our seven members. So we gave both parties an opportunity to make closing remarks. So at this point, the Body can begin discussion or make a motion, one or the other on this matter.

Mr. Schulz: Randy?

Chair Endo: Yes, Uwe?

Mr. Schulz: It really does bother me that when I was questioning the applicant that he made a commitment to remove the fence. He knew of the violation. Otherwise, he wouldn't have committed himself to remove it. And it really bothers me that he didn't find it necessary to go to the County and say, look, during our meeting on date so and so, I made a promise, and I would like to withdraw that promise. And I think that would've been the right thing to do. That's the comment I have because if he – it was brought to his attention during those personal meetings that there was a violation, he cannot say, well, I didn't know anything about it because during those meetings, he did commit himself to the removal. And now it's nine months later, and it's still there. Thank you.

Chair Endo: Kathleen?

Ms. Acks: I guess I'll move that we deny the appeal.

Chair Endo: Okay, so the motion will be to affirm the decision of the–

Ms. Acks: The inspectors.

Chair Endo: The inspectors.

Ms. Acks: That's correct.

Chair Endo: Okay.

Mr. Schulz: I'll second.

Chair Endo: Okay, it's been moved and seconded to affirm the decision. Let me just state the standard of appeal, just for our information. And we probably would want this to be incorporated as our findings. Basically, if you wanted – our options are to affirm the decision below, or to reverse it, or I believe we can do a partial reversal and a partial affirmance. If we are going to reverse some or all of it, we would have to be based on a clearly erroneous finding of material fact, or erroneous application of the law, or arbitrary or capricious – wait – or that the order, the violation, was arbitrary or capricious in its application, or that there was a clearly unwarranted abuse of discretion. So I'd also incorporate if nobody has any objection that you're saying that there were none of those three things.

Ms. Acks: I agree that there were none of those three things. I think that each one of

those was demonstrated that there was an intent not to be capricious, not to – I mean, I guess in my listening, it seems that this has been ongoing for up to almost two years. There was a year in which Joe had talked to this person and said there was a problem with the fencing, but given the fact that you're going to be possibly doing something, we'll kind of little bit of time. Nothing seems to be moving. And I guess the thing that bothers me as much as anything is the MRA clearly states no chainlink fences. It doesn't say fences or other materials that could be applied for. There is a specific statement about no chainlink fences. And that, to me, there's not much variation in that particular interpretation.

Chair Endo: Any further discussion? Let me also request that you make a – that you incorporate as part of your motion, adoption of the County's prehearing statement as the findings of fact in addition to everything else that you've stated. Is that okay?

Ms. Acks: That's good.

Chair Endo: Does anybody have any objection to that being incorporated into the motion?

Mr. Giroux: Just maybe some guidance, as part of the discussion that you can also make statements of what testimony you thought was credible, and what testimony you thought not credible. I mean, if there was anything that was said that was under oath that you definitely want to reject or not have as part of your findings, you should probably make such statements to give guidance to whoever has to draft the findings of facts and conclusions of law.

Ms. Acks: I think everybody was – their perceptions of what was going on was clear in their heads, so I'm not making any statements there. I just have an issue with the idea that it clearly stated that there were no chainlink fences. Even giving the benefit of the doubt, there was formal notification in person, in September. Nothing has been done to remedy that situation since now. So even though there was given a deadline of December to take care of the problem, it did allow for some time to address that problem. It was never addressed at that point in time. So–

Mr. Giroux: Just one issue to clarify, I was looking at the application, as far as just to make it clear what the Board's view of the argument of the existing nonconforming, if the Board could just make a statement as far as what its position is of that because it was an argument that was raised as part of the notice of appeal.

Ms. Acks: I think it was clear that the fence was built after-the-fact, after the date of the MRA. So I don't think that's in dispute at this point in time.

Mr. Shibuya: I also would want to state that the fence, even though it was built, it was

built like Kathleen mentioned, in my mind it was clearly the Wailuku Redevelopment Agency had developed the rules and procedures at that time. And then the fence came in, and it was not done by the appellant. It was done by another party. And perhaps unbeknownst to him of some of the rules, but the rules were discussed with the appellant, Mr. Morton. And so therefore, I kind of feel that information was transmitted and communicated at that point. There were other opportunities for this violation, or at least warnings, and/or opportunities to correct and make good, and these apparently, were not done.

I also want to thank Mr. Morton for being so candid with us, and for providing the information. And, yes, I do understand your concerns and your reasons for submitting for a variance, or at least an appeal for your particular case. And I'm listening to both sides: the County side as well as your side. And I think the Board did just that, too. Thank you.

Chair Endo: Okay. Any further discussion? Okay, if not, all those in favor of the motion, please say aye. Oppose?

It was moved by Ms. Acks, seconded by Mr. Schulz, then

VOTED: To affirm the decision by the Planning Director as discussed.

**(Assenting: K. Acks, U. Schulz, W. Kamai, W. Shibuya,
R. Phillips, and J. Shefte.)**

(Excused: H. Ajmani and S. Castro.)

Chair Endo: Okay. **Motion is carried and the decision by the Planning Director is affirmed.** Mr. Rost, would you prepare a findings of fact and conclusions of law based on what we've described, incorporating the standards of appeal, as well as your brief? And we would adopt that hopefully, at our next meeting.

Mr. Giroux: So the County should give Mr. Morton a chance to look at that and make comment prior to our next meeting.

Chair Endo: Okay.

Mr. Rost: I'll do that.

Chair Endo: Thank you. All right, thank you.

Mr. Morton: Okay. Good afternoon, then.

Chair Endo: Thanks. The next item of business is the approval of the April 26, 2007 minutes.

C. APPROVAL OF THE APRIL 26, 2007, MEETING MINUTES

Mr. Schulz: I so move to accept them as presented.

Mr. Shibuya: Second.

Chair Endo: Okay. It's been moved and seconded to approve the April 26, 2007, minutes. Any discussion? Seeing none, all those in favor, please say, aye. Oppose?

It was moved by Mr. Schulz, seconded by Mr. Shibuya, then

VOTED: To approve the April 26, 2007 meeting minutes as presented.

**(Assenting: U. Schulz, W. Shibuya, K. Acks, W. Kamai,
R. Phillips, and J. Shefte.)**

(Excused: H. Ajmani and S. Castro.)

Chair Endo: Okay. **The motion is carried and the minutes are approved.** The next item is status of our contested cases.

D. DIRECTOR'S REPORT

1. Status Update on BVA's Contested Cases

- a. **ISAAC HALL, ESQ., representing MEDO, LLC, appealing the decision of the Director of Parks and Recreation, County of Maui dated April 29, 2005, refusing to grant credits for privately owned and maintained parks and playgrounds, pursuant to Maui County Code §18.16.320.E for the Liloa Subdivision located at 1585 Welakaho Street, Kihei, Maui, Hawai'i; TMK: 3-9-002:116, 150 and 151. (BVA 20050016)**

Mr. Giroux: As far as what I can report is that there was a settlement, conference mediation on, I believe, last Friday.

Chair Endo: James, do we – is there any reason why we should go into executive session on this or not?

Mr. Giroux: No. All I can report is the two parties, the Parks and the new owner of

MEDO, or not MEDO, but of the subdivision have reached a tentative settlement. So all that needs to be done is them to draft their order and sign it. And once it's signed, the appeal would be withdrawn.

Mr. Shibuya: So the question would be, is that a tentative agreement on what the BVA had passed? Or was that another tentative agreement other than what the BVA had agreed upon?

Mr. Giroux: As far as the exact terms, I'm not sure what the agreement was on, but it was between the Parks Department, because they have a new Director to negotiate with the new owner of the subdivision. And I believe some of the discussion was on whether or not there was going to be future changes to the actual size and shape of the lots, which would've affected a determination, which would, in effect, have to make the parties go back and do a reassessment anyway.

Ms. Acks: Is this the Kihei—?

Mr. Giroux: This is the Parks' assessment appeal. So we'll probably see whatever the final determination is. But once the appeal is withdrawn, we'll lose total jurisdiction. We won't have to worry about it at all because basically, the decision would be a mediated decision between the Parks Department and the developer.

Mr. Shefte: Question: but we passed a – we made a resolution, and that becomes a – that goes with the land, right?

Mr. Giroux: Well, because it's an appeal, the effect on the property is different than if we had done a variance. Our jurisdiction over variances are a lot more – we have a lot more accountability, I guess, in that we never lose jurisdiction over a variance. Once you pass a variance, and once there's conditions, there's a possibility that that variance would have to come back to you to be modified, or to have maybe an order to show cause of why the variance could be revoked. But an appeal is basically, you as an adjudicatory body, looking at decisions of other departments that actually have authority over those decisions. Once they withdraw their request for you to review that, then we actually lose jurisdiction. And they can basically, go back to the developer and renegotiate, and completely change the calculations that have been used, because in this case, it was the Parks Department that was not happy with our decision. In that case, if the Parks Department then either sees a change in the development, or goes back and recalculates their decision, then we basically, lose – that decision basically, becomes moot.

Mr. Shefte: In other words, we're wasting our time.

Mr. Giroux: In the sense that we are not the Parks Director, and we do not hand out or

take back park credits, it really is in the jurisdiction of the Parks Department. So again, we were asked to review the decision of the Director, and it was the Director that did not – was not in accord with our decision. So if there's a change of mind, then they have the right to withdraw the appeal, and then our decision is no longer reviewed by the Circuit Court.

Mr. Kamai: Who's the new owner?

Mr. Giroux: It's Zachary Franks. He bought it from Sturtz. So I guess we can see what the terms of it was, but at that point, like I said, once the appeal is withdrawn, we pretty much do not have jurisdiction over it because then our decision is rendered moot.

Chair Endo: If the appeal is dismissed, though, the Circuit Court appeal, our decision still stands, what we did, but it doesn't prevent them from doing other things.

Mr. Giroux: Right.

Chair Endo: Okay. Anything else?

Mr. Giroux: I think that's it.

Chair Endo: Okay, if there is no further business from any of the members, we are adjourned for two weeks. Oh–

Mr. Giroux: And, staff, you'll have on the agenda the – we'll be, I guess, approving the order from our appeal today?

Ms. Kapua`ala: Okay. Sure. When he submits it, then we'll send it out.

Chair Endo: Okay. So now we're adjourned.

E. NEXT MEETING DATE: June 14, 2007

F. ADJOURNMENT

There being no further business to come before the Board, the meeting adjourned at approximately, 3:43 p.m.

Respectfully submitted by,

TREMAINE K. BALBERDI
Secretary to Boards and Commissions II

RECORD OF ATTENDANCE

Members Present:

Randall Endo, Chairperson
Warren Shibuya, Vice-Chairperson
Kathleen Acks
William Kamai
Rachel Phillips
Uwe Schulz
James Shefte

Members Excused:

Harjinder Ajmani
Stephen Castro, Sr.

Others:

Aaron Shinmoto, Planning Program Administrator
Trisha Kapua`ala, Staff Planner
James Giroux, Deputy Corporation Counsel