

**BOARD OF VARIANCES AND APPEALS  
REGULAR MEETING  
FEBRUARY 10, 2011**

**(Approved: 2/24/2011)**

**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, 1:35 p.m., Thursday, February 10, 2011, in the Planning Department Conference Room, first floor, Kalana Pakui Building, 250 South High Street, Wailuku, Island of Maui.

A quorum of the Board was present. (See Record of Attendance.)

Chairman Randall Endo: Good afternoon. This meeting of the Board of Variances and Appeals will now come to order. It's February 10, 2011 and 1:35 p.m. Let the record reflect that we have a quorum present of eight Members. At this time, I have been advised, and I'd like to let everyone know in the audience and on the Board that at least two Members have prior commitments and will have to be leaving at 3:30. And actually, there might even be three Members that may have to leave. So let's try and be expeditious today, if we can, and get through our two major items. So we'll go first with Item B-1.

**B. APPEALS**

1. **DANIEL and KYOKO WIGHTMAN appealing the Director of the Department of Public Works' Notice of Violation for an addition of a second floor lanai deck without a building permit for property located at 7 Puukani Street, Kahului, Maui, Hawaii; TMK: (2) 3-8-070:037 (BVAA 20100007).**

Chairman Endo then read the agenda item into the record.

Ms. Kimberly Sloper: . . . (inaudible) . . .

Chairman Endo: Good afternoon, Ms. Sloper.

Mr. Austin Russell Kalolo Wightman: Austin Russell Kalolo Wightman. I'm here for my parents, Daniel and Kyoko Wightman.

Chairman Endo: Okay. Good afternoon, Mr. Wightman. So you folks ready to proceed?

Ms. Sloper: Yes. I do have a kind of a procedural question, initially, if we can address something that I brought up in my pre-hearing memorandum about the scope of the appeal.

Chairman Endo: Okay, do you wanna just include that with – as part of your opening remarks, or is it purely a procedural item?

Ms. Sloper: I guess in terms of questioning my witnesses, it depends on what the Board's inclination is or what the Board's–

Chairman Endo: Okay, let's consider it a procedural item then. Go ahead.

Ms. Sloper: Whether the scope of this appeal is purely the appeal of the notice of violation which would be the lack of a building permit on the construction of the lanai deck, or because of the way that the appeal was presented, it appears that Mr. Wightman is appealing the designation as a single story versus a two-story, which is not within the scope of the NOV. So I just want to make clear what the appeal is actually dealing with.

Chairman Endo: Okay. Mr. Wightman?

Mr. Wightman: Yeah, the appeal would be for the actual violation, first, as well as including the setback problems which caused the delay creating the violation, you know, after having the grace period of trying to get an after-the-fact permit. I wasn't unable to receive an after-the-fact permit because of the setback problems.

Chairman Endo: Okay, I guess – well, do you wanna speak first, Mr. Giroux?

Mr. James Giroux: Because the BVA has limited jurisdiction, and also that Hawaii is considered a pleading State, which means that we're not gonna bounce things just because they're not technically accurate, if we can figure this out, then we'll find a way to make sure that you have due process, Mr. Wightman. It's just that as an issue of fairness to all the parties, it has to be clear about what the issues are, and how they're gonna prepare for those types of issues.

We have received your appeal application. And within the application, there is the notice of violation. So it's very clear that we do wanna give you a chance to give your defense to that notice of violation. What's not clear, as to reading your pleading on its face is, if the issue of the setback is a defense to your notice of violation, or whether or not you're trying to get a ruling from the BVA that the Administration has made a wrong decision. Those are two very different jurisdictional issues. So that's what we're trying to clarify today.

Mr. Wightman: Basically, I want to take care of the violation first. And by taking care of the violation, we're hoping that whatever comes there after will resolve the issues at hand.

Mr. Giroux: Okay. Just as a caveat, in all fairness, you're not represented by an attorney, so what I'm saying to you right now is not legal advice. I am the attorney for the Board. And at this junction, we're just trying to find the jurisdictional parameters to the case before us. But I do wanna bring to your attention that we have jurisdiction over decisions made by the Administrators who are in charge of zoning and also of subdivision law. So if there is a letter that is presented to you that has a ruling against you, you have a right within a certain amount of time to appeal that decision. In your application, I couldn't find a letter that came from any Department that we have this type of authority over. There's two issues that come up is, was a decision made and when was it made? And it really is determinative that we have some letter coming from a Department because we also again will have to make a determination of jurisdiction based on timeliness. And we went through this with the NOV. We heard your motion to extend the time to file your appeal on the NOV. And that would be a similar issue. So I just wanna make it clear that that's what we're trying to determine today.

Chairman Endo: Okay, so it's getting a little bit complicated, procedurally, but I think what we're hearing from our Deputy Corporation Counsel and as being alleged by Ms. Sloper is that you got

an NOV because of an addition to your house or your parents' house that was done allegedly without a permit. So you're appealing that. And you're gonna try and defend to say that that notice of violation is somehow incorrect. And you can bring up whatever reason and arguments you want, but to the extent you want to independently appeal some other decision of the County, say there was a determination that your house is two stories when you think it's one story or whatever, you cannot actually appeal it at this proceeding because that's not properly before us. To the extent and interpretation as to one story or two-story is somehow gonna be weaved into your argument as to why the notice of violation is improper, then that's okay. It's a subtle different, but I think you can understand that.

So I think what we'll do, Ms. Sloper, is to the extent testimony or argument goes too far into the realm of being an independent appeal, you can place your objection on the record and we'll try and deal with it at that time. Is that a Chair decision or a motion?

Mr. Giroux: I think the Chair can make a decision—it's appealable.

Chairman Endo: Okay, so that was a Chair decision on a procedural matter which can be appealed by the Board, any Member of the Board. Let the record reflect only smiles and snickers. Okay. At this time, then we will proceed. The parties have provided us with their exhibits. And generally, we'll proceed with an optional opening statement where you would just summarize your position in the matter. And you can also summarize what evidence you believe you're gonna put forward. That way you can just introduce us to the background of the case and the legal points that you wanna make. After that we'll go into the actual calling of witnesses. Is there any objections by either party as to the other side's exhibits? Mr. Wightman?

Mr. Wightman: No.

Chairman Endo: No objection.

Ms. Sloper: No the extent that – your procedural ruling. There are certain things that Mr. Wightman has provided to the Board that I think go more towards the determination of the single story versus two-story issue. But the Board has indicated that it'll take that into consideration to the extent that—

Chairman Endo: Okay. So with that being said, we'll consider all proffered exhibits submitted into the record. Since this is a NOV, we'll ask that the County start with their initial statement, and then we'll have Mr. Wightman go next.

Ms. Sloper: Thank you. Good afternoon. Basically, this is a pretty straightforward appeal case. What we're dealing with is that construction was done on the residence located at 7 Puukani Street in Kahului. That is a residence owned by Mr. Wightman's parents. No permits were obtained prior to the construction of this lanai on the – as you're facing the residence, it's on the right side of the residence. The construction was actually observed by the Building Inspector in November of 2009. Numerous contacts were made, including warning letters that were sent by certified mail to the owners. And again, more contact was made with Mr. Wightman who appears before you and ultimately resulting in the NOV that was issued.

So based on the evidence that will be presented to you by the County, our argument is that there

was no clearly erroneous finding of material fact or application of the law. The NOV was not arbitrary or capricious, and it was not an abuse of discretion by the Department. Thank you.

Mr. Wightman: My father is the owner of the home. From the time that he purchased the home till today, I've been pretty much in charge. I have been in charge of that home on that property. At no time at all have I ever discussed what I would be doing to the home, how I would be doing it, how, and when I would be doing it. This particular violation is, I believe, addressed to the wrong parties. The party should be me. I acted as the owner in any and all ways except holding ownership.

In the definitions of ownership in your Housing Code, I think it's 16.08.30, Housing Code, No. 41, the definition of owner is one that I believe I fall within and that I should be the one held responsible, and not the owners of the property being that they knew nothing about this until it was brought to their attention even though the violation says that they— I believe it was— Let me find that particular violation.

Chairman Endo: Mr. Wightman?

Mr. Wightman: Yes?

Chairman Endo: The purpose of the opening statement is to just give the overview of what you're gonna be testifying to. We wouldn't want you to go through your entire case now because you're not under oath. So to the extent that you're trying to get into details of the exact nature of your defense, you should probably save that, and then put yourself under oath, and then testify into the record.

Mr. Wightman: Okay. So therefore, I feel that the violation should be overturned due to the fact that this was addressed to the wrong parties.

Chairman Endo: Okay. How many witnesses do you plan to call, Ms. Sloper?

Ms. Sloper: Two.

Chairman Endo: Okay, please proceed.

Ms. Sloper: I call Inspector William Scrote.

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

Mr. William Scrote: I do.

Chairman Endo: Thank you. Please have a seat and state your full name for the record. And please speak into the microphone for our transcription purposes.

Mr. Scrote: My full name is William Edward Scrote. I'm a Residential Inspector for the County of Maui.

Chairman Endo: Thank you.

Ms. Sloper: Thank you. Could you please describe your duties as a Residential Building Inspector?

Mr. Scrote: My duties are to enforce the 1997 Uniformed Building Code and the Maui County Code, Chapter 16.

Ms. Sloper: So as part of your responsibilities as a Building Inspector, you're familiar then with the requirements and the exemptions under Chapter 16.26 of the Maui County Code?

Mr. Scrote: That's correct.

Ms. Sloper: Are you familiar with the residents located at 7 Puukani Street in Kahului?

Mr. Scrote: I am.

Ms. Sloper: And did you receive a – or did you initiate a request for service on November 12<sup>th</sup> 2009 for that residence?

Mr. Scrote: I did. When I was doing an inspection on a property behind and one lot over from the Wightman property, the – I looked over. I heard construction work going on that was not related to the property I was inspecting. And I looked over and I noticed that there was a deck attached to the upper level of the house that did not look as though – or I should say, I had not seen before and I had not previously seen any permits cross my desk for that particular residence. I am the Inspector for the Kahului area. And I would be privy to any permits that would come up for inspection in that area. So I went over to that residence and I spoke with the workman on the property, and I specifically asked them, "Do you have permits or plans on site for this work that you're conducting?" They said, no, they did not, and that if they needed any permits, I would have to talk with the owner of the property, at which point, I asked them to please close their work down and to cease all work until permits were found for the project.

Ms. Sloper: Did you do any further searches once you got back to your office?

Mr. Scrote: A search of KIVA revealed that there were no current permits active for that property.

Ms. Sloper: And was this all on November 12<sup>th</sup>, 2009?

Mr. Scrote: Correct.

Ms. Sloper: That type of work that you observed at the residence, is a building permit required?

Mr. Scrote: Yes.

Ms. Sloper: And can you describe what you saw?

Mr. Scrote: At the time that I saw it, they had just gotten there. The posts were up, and the deck itself was in place, and they were starting to put up the handrails. And they were building a

stairway between an upper and lower deck area.

Ms. Sloper: Under Chapter 16.26, the Building Code, are you aware of any exemptions for this type of a deck?

Mr. Scrote: No, there are no exemptions.

Ms. Sloper: So how did you determine who the owner was?

Mr. Scrote: I went through County tax records. And – well, actually, the first thing I did was I went in and I found the TMK for the property. Then I went to tax records and found Mr. Daniel and his wife's names on the tax records. And I wrote to them. At the time that I was on the site, the workman did not know how I could contact who they thought was the owner of the property at the time.

Ms. Sloper: And how did you contact Daniel and Kyoko Wightman?

Mr. Scrote: Through letters.

Ms. Sloper: So when did you send your first letter?

Mr. Scrote: I would have to look at my files, but I believe it was within two weeks after that time.

Ms. Sloper: I would ask you if it was November 18<sup>th</sup>, 2009.

Mr. Scrote: That would sound very close.

Ms. Sloper: I see you have a copy of the exhibits. Can you look at Exhibit no. or Exhibit H?

Mr. Scrote: Yes, this is the first letter that I sent to them.

Ms. Sloper: And how many warning letters did you send to the Wightmans?

Mr. Scrote: I sent three.

Ms. Sloper: And are those all the three letters in Exhibit H?

Mr. Scrote: Yes, they are.

Ms. Sloper: And do you know if they received them?

Mr. Scrote: Yes, they did because the certified mail return receipt is attached to them.

Ms. Sloper: Now, have you also dealt with Russell Wightman, this gentleman that's seated here?

Mr. Scrote: I would say approximately, 60 days into the process, somewhere around the time of the second letter, I finally heard from Russell Wightman.

Ms. Sloper: And what was your understanding of his role in relation to the owners?

Mr. Scrote: Only that he was the son and doing the work for the parents.

Ms. Sloper: What was – I guess what kind of contact did you have with him about two months in maybe around February of 2010?

Mr. Scrote: He did come by the office and he did bring a structural engineer, Mr. Joel Corpuz with him, and tried to convince me that there was no permit required for the deck that he was building. And I had to tell him that, yes, there was one at that time, and just – well, there was no convincing me at that point, I guess.

Ms. Sloper: Since the time that you initially observed the deck being built in November of 2009 until now, is there a permit for – even an after-the-fact permit for that deck?

Mr. Scrote: There is an application in process, but there has been no permit issued.

Ms. Sloper: And is the deck – what stage of construction is the deck in at this point?

Mr. Scrote: Actually, the deck is finished and has been expanded upon in that there is a larger deck area in place. I did take some pictures of it and did provide them to you so that you could show folks. It's right there toward the front. That would be it, right there.

Ms. Sloper: Sorry. If I can ask that it be marked, "Exhibit M?" Maybe you can pass that around.

Mr. Scrote: Yes, this is the deck that's been expanded upon.

Ms. Sloper: Are you aware if there were any attempts, I guess, at working with Mr. Wightman in his granting extensions or—?

Mr. Scrote: Mr. Wightman did request an extension, but I do not have the authority to grant it. He was – I did tell him that he could go before the Public Works Director, and write a letter to him, and that the Public Works Director would consider an extension.

Ms. Sloper: And then if you could look – well, after the three warning letters, what ultimately, did you issue?

Mr. Scrote: I issued a notice of violation.

Ms. Sloper: If you could look at Exhibit J?

Mr. Scrote: Yes, this is the notice of violation that I issued.

Ms. Sloper: And what was the basis for the violation?

Mr. Scrote: The basis of the violation is that he had no permits to build the deck.

Ms. Sloper: I have no further questions for Mr. Scrote at this time.

Chairman Endo: Mr. Wightman?

Mr. Wightman: You said my first contact with you was roughly about 60 days in. Is that correct?

Mr. Scrote: That's correct.

Mr. Wightman: And when – when I explained to you that my father was – had no idea I was building this deck, I was the one building this deck, that I was in charge of everything over there, what did you tell me?

Mr. Scrote: I told you that I do not have any authority to deal with you on the subject because you are not the legal owner of the property.

Mr. Wightman: And did you – when I explained to you that the violation I believe should be coming to me due to the fact that I'm the one that's in violation, not my father, my father knew nothing about it, what did you state?

Mr. Scrote: I told you that I had no authority to do so.

Mr. Wightman: So you said the violation – basically, the violation would stick with the homeowner?

Mr. Scrote: Correct.

Mr. Wightman: Because the homeowner is the one that's ultimately, responsible?

Mr. Scrote: Ultimately, responsible, correct.

Mr. Wightman: This added onto deck, this deck that I had built, do you know about when that deck appeared?

Mr. Scrote: I first noticed it, like I said, on November 12<sup>th</sup>. And it expanded in its scope over a period of time that you had your 180-day grace period.

Mr. Wightman: So you don't know whether it was between the 12<sup>th</sup> of November and the 18<sup>th</sup> of November?

Mr. Scrote: I don't follow your–

Mr. Wightman: You said that this deck was expanded upon.

Mr. Scrote: Yes.

Mr. Wightman: Do you know when?

Mr. Scrote: It was expanded upon after that date, to the best of my knowledge.



Mr. Wightman: On the date after the 12<sup>th</sup> and—?

Mr. Scrote: Within the six – within the six-month period between the date that the notice of violation was issued and the date that I originally sent you your first warning letter, the deck was continually expanded upon.

Mr. Wightman: Was that deck completed prior to the 18<sup>th</sup> of November?

Mr. Scrote: Not that I'm aware of.

Mr. Wightman: Not that you're aware of. Okay. I guess that's it.

Chairman Endo: Okay, Board Members, do you have any questions for the first witness?

Mr. Bart Santiago, Jr.: I do have one. Is it Mr. Scrote?

Mr. Scrote: Scrote, correct.

Mr. Santiago: I just wanted to get clarification on you were in the neighborhood doing inspections of a neighboring—?

Mr. Scrote: Property.

Mr. Santiago: Property. And you noticed this construction going on nearby?

Mr. Scrote: Correct.

Mr. Santiago: So in the normal course of your job, is that something that's accepted that if you're within a job site doing an inspection and you see another property nearby, there's a violation or potential violation that you'd go over and would inspect on that property?

Mr. Scrote: If I feel that there is a potential for a violation there, yes. It's within my job description.

Mr. Santiago: How often does that happen?

Mr. Scrote: Not very often. Timeline wise, I would say maybe once or twice a year that I'll find something like that happening.

Chairman Endo: Any further questions?

Mr. Kevin Tanaka: Yeah, one question. Mr. Scrote, your three letters that you have, did you receive any response from the owners—Daniel or Kyoko Wightman?

Mr. Scrote: Mr. Daniel Wightman did call me, and we did have a couple of different conversations concerning that. And Mr. Wightman did indicate at that time that he was not living on the island and that his son was in fact, living in the house.

Mr. Tanaka: And during those two conversations, was a remedy proposed to him?

Mr. Scrote: I told him that he would need to, if he wanted to keep the decks, he would need to get a building permit to do so.

Mr. Tanaka: After-the-fact?

Mr. Scrote: Yeah.

Mr. Tanaka: Thank you.

Chairman Endo: Any further questions?

Mr. Stephen Castro, Sr.: Mr. Scrote?

Mr. Scrote: Yes, sir.

Mr. Castro: Irregardless of who's occupying the house, you notice the violation or a potential violation, would the violation notice go to the occupant or the owner?

Mr. Scrote: Well, the first thing I do is I go over to the house and I try to talk to the workman and see if there is a permit on property, because I certainly don't want to interrupt a permitted piece of work. And so if they can produce a permit and a set of plans, an approved set of plans, then I go about my way because obviously, I have missed something. And so far to date, I've only had that happen to me one time.

Chairman Endo: Okay. Any further questions? No? Alright. Thank you, Mr. Scrote. Well, unless you had redirect. No, right?

Ms. Sloper: No, no. Thank you.

Chairman Endo: You may call your second witness.

Ms. Sloper: May I just have a . . . (inaudible) . . . minutes?

Chairman Endo: Sure. Let's take a one minute bathroom break. Okay, we're in recess.

(A recess was then taken at 2:08 p.m., and the meeting reconvened at 2:10 p.m.)

Chairman Endo: I'll call the meeting back to order and the – Ms. Sloper is gonna call our second witness.

Ms. Sloper: Actually, thank you for that brief recess. There are no further witnesses.

Chairman Endo: Oh, no further witnesses, okay. Okay, so now we move on to – Am I pronouncing it correctly? Is it Mr. Wightman or Whitman?

Mr. Wightman: Wightman.

Chairman Endo: Wightman, okay. So go ahead. If you're only – are you only gonna call yourself?

Mr. Wightman: I'm gonna recall Mr. Scrote, if possible.

Chairman Endo: Okay. Before, or you gonna go yourself, too, or—?

Mr. Wightman: I'd like to go after I talk to Mr. Scrote, if possible.

Chairman Endo: Alright. Mr. Scrote, you're still under oath.

Mr. Scrote: Okay.

Chairman Endo: Just for your information.

Mr. Scrote: Thank you.

Chairman Endo: Okay.

Mr. Wightman: Mr. Scrote, on November 12<sup>th</sup> you said you went by the subject property and spoke to the workers. Is that correct?

Mr. Scrote: Correct.

Mr. Wightman: Did you get their names?

Mr. Scrote: No, I did not.

Mr. Wightman: You did not. So the RFS normally – I guess you requested the RFS yourself after seeing the work done?

Mr. Scrote: I did.

Mr. Wightman: On November 12<sup>th</sup> 2009, do you recall making a statement to Jeff about the work, the scope of work that's going on, and that you felt that there was work going on without a permit, and that you need to get over there because that's the way you make your money? Do you recall making that statement?

Mr. Scrote: No, sir, I don't recall making that statement.

Mr. Wightman: So on this – I don't know if it's an affidavit or on this letter here it states that you inspected on the 18<sup>th</sup> of '09. Was it the 12<sup>th</sup> or was it the 18<sup>th</sup> of November?

Mr. Scrote: I inspected on the 12<sup>th</sup>.

Mr. Wightman: On the 12<sup>th</sup>.

Ms. Sloper: I'm sorry, I don't know what Mr. Wightman is referring to. An affidavit?

Mr. Wightman: I'm sorry. This—

Ms. Sloper: . . . (inaudible) . . . memo.

Mr. Wightman: Oh, her memo, okay.

Ms. Sloper: . . . (inaudible) . . . There was no affidavit by the witness.

Chairman Endo: I'm sorry. What? I missed it. You're objecting to reading from that, or his representation as to what the document was, or—?

Ms. Sloper: Both. So a lack of foundation as to basically, the basis for him questioning Mr. Scrote on this previous statement that wasn't his, if that makes sense.

Chairman Endo: Okay. So let's try and – the rules of evidence don't exactly apply, or do not apply to an administrative hearing. So we don't have to be too formal, but the general basic rules for conducting an administrative hearing of this nature would be that we don't wanna have any repetitive evidence because we need to get moving, and we do not wanna hear anything irrelevant to the matter at hand. So those should be primary objections. But to the extent we don't know, everything's getting all confused, you can always give it your best shot. So at this time, we'll just move on at this point. I don't think anything was – came of that question and answer. I mean, Mr. – the witness answered to the best of his ability.

Ms. Sloper: Okay.

Chairman Endo: So let's move on.

Mr. Wightman: So the violation you issued to my father, is it for building a second-story deck without a permit? Is that correct?

Mr. Scrote: It's for – yes.

Mr. Wightman: It is?

Mr. Scrote: I believe my letter does state that in there.

Mr. Wightman: Okay. No other questions.

Mr. Scrote: One second here, please. No, my letter does not state that it's a second-story – oh, no, it does. On the second level of your home without a building permit. It's the second level.

Mr. Wightman: Do I have a second level to my home or to my father's home? Is there a second level?

Mr. Scrote: It appears to me that that is the case.

Mr. Wightman: It appears to be, but you're not saying that it is.

Mr. Scrote: I'm saying, yes, it is.

Chairman Endo: Okay. Cross examination from Ms. Sloper?

Ms. Sloper: No, I have no further questions.

Chairman Endo: Okay. Any further questions from the Board? No? Thank you. Alright, Mr. Wightman, do you have another witness?

Mr. Wightman: No, just my statement.

Chairman Endo: Okay. So we'll consider yourself to be the witness. Do you swear or affirm that the testimony you're about to give shall be the whole truth?

Mr. Wightman: Yes, I do.

Chairman Endo: Okay. So since you're testifying on your own behalf, just go ahead and make your statement, and then we'll allow Ms. Sloper to cross examine you.

Mr. Wightman: Okay. Basically, I'm here for my parents being that their names' on the title, and they're indicated as having a violation on the property, on said property. I'd like to make it again clear that in no way, shape, or form did my parents – were they involved in the building process addition or renovations of that home since they've owned it. That I, myself, went about doing it, and acted as an owner as clarified in definitions under the Housing Code. I think it was 16.08.30, Definition 41. And I feel that under that definition, the wrong parties were and have been served upon, and I guess, served with the violation. Mr. Scrote, it was brought to his attention that I and only I did the work or approved the work. My father stated so as well to Mr. Scrote. My father wanted me to clear up whatever matters or issues that I created. And that's why I'm here before you today and tried to do the best that I could within the guidelines or the – within what I could within the Departments, with the Building Department, the Zoning Department. It kinda seemed like the left hand doesn't know what the right hand is doing. So I was unable to obtain an after-the-fact permit, and feel that we should be afforded the opportunity to get that after-the-fact permit due to the fact that there are issues that are out of our hands regarding the zoning and setbacks.

A violation – we, or I was, or my father was charged with building without a permit, but that, there was somewhat a grace period, if you wanna call it that, given to resolve the issues. So I went about that process. And again, at no fault of our own did we, or did I – was unable to obtain that permit, that after-the-fact permit. And that's what I'm asking the Board's understanding is for us to do everything we can to resolve the issues at hand for this violation to be overturned, as well as I have building permits that I had applied for in the past that I thought was still valid, although the deck that's in question was not part of the plans. I was told by the carpenters that it could always be added to the plans, after-the-fact. You know, turn it in, the Inspector comes in and inspects, and says what is this, you need to draw that in, and get it approved, and everything would be fine. So I'm not a contractor. I'm not a builder. I thought I had valid permits in hand. Nowhere on any of the application processes does it state about expiration dates on permits. I was not even given a

chance to renew a permit that I had in the past. I was denied, as well as this— we did receive a letter. I believe it was from — this is on February 3<sup>rd</sup>. I think it's Exhibit L in Corporation Counsel's folder. This deck that's in question that I'm asking to be — being told to remove. In this February 3<sup>rd</sup> letter it states that only if this deck falls within a six-foot setback should it need to be removed. And it does not. This deck does not fall in the setback area. So based on this, this just goes to show the left hand doesn't know what the right hand is doing.

Chairman Endo: Sorry. What are you reading from?

Mr. Wightman: The Department of Planning . . . (inaudible) . . . I guess the Department of Planning states that if this deck is within a six-foot setback, it must be removed, and this deck is not within a six-foot setback. And if this is within a six-foot setback, that basically means my house is a one story home, I mean, one story with a basement. So I'm being told by the Building Department to remove a deck that doesn't need to be removed other than it was built without a building permit, as well as the building permit was denied because it was within a ten-foot setback. So there's no way my father, or me, or whoever was at fault for building without a permit would never be able to be resolved. We never would've been able to get an after-the-fact permit based on this information other than maybe this February 3<sup>rd</sup> letter, but I was told that they could not approve it for one reason was that deck that's in question was within a ten-foot setback 'cause it's a two-story house. It cannot be within a ten-foot setback. But the original deck that was on this house that was enclosed for living space fell within the nine-foot setback. So this is — all of that what I just said is probably totally confusing because nine-foot setback, six-foot setback, but it's just as confusing to you as it is for me. But all I know is by this letter stating here on February 3<sup>rd</sup>, the Department of Planning says only if it's within a six-foot setback should I have to remove it. So I'm asking that the Board throw out the violation at hand for building without a permit being that I was unable to obtain a permit at no fault of my own. Mr. Scrote was put on notice that I was the acting owner, as well as the deck not being in violation based on the Planning Department's letter. Now, I'm just asking that you folks throw out the violation. Give us — let us go through a due process of obtaining an after-the-fact permit, and get the Zoning Department and the Planning Department on the same page so that we can unify the neighborhood, clean up the neighborhood, and to get an affordable unit that can be rented out on the market because it's been sitting empty for all this time. And we all know that we need affordable rentals out there.

Ms. Sloper: I object to this line. It's irrelevant.

Chairman Endo: Are you done?

Mr. Wightman: Yes, I'm done. Alright. Cross examination?

Ms. Sloper: Thank you. Mr. Wightman, you're aware that construction requires a building permit?

Mr. Wightman: Yes, I am.

Chairman Endo: Mr. Wightman, could you stand next to one of the mics?

Mr. Wightman: Yes, I am.

Ms. Sloper: And on this residence, you have a history of building and then obtaining permits after-the-fact?

Mr. Wightman: Negative. I've had situations where I've applied for permits after-the-fact, but not built. I have not built. Nor have I – other than this most recent time that I thought I had a permit. My ex-wife had stuff built, but not I.

Ms. Sloper: So building has occurred on the property, though, and you have applied for after-the-fact permits?

Mr. Wightman: Yes, I've had to.

Ms. Sloper: And the initial contact, I guess, with Inspector Scrote was back in November of 2009, correct?

Mr. Wightman: Well, via a letter, not from me.

Ms. Sloper: Right, but for this deck?

Mr. Wightman: Yes.

Ms. Sloper: You didn't apply for the after-the-fact permit for the deck until September of 2010?

Mr. Wightman: Yes.

Ms. Sloper: So it took almost for you to apply for the—?

Mr. Wightman: It took almost a year to go through all the red tape with the Planning Department not being able to find my plans, a. B, not being able to locate an application for a building permit.

Ms. Sloper: But you didn't apply for this permit.

Mr. Wightman: I could not apply for it without all my paperwork. I needed to know what I was dealing with. I attempted to apply, but they told me that I could not because I had problems with upstairs deck/lanai being built without a permit.

Chairman Endo: Mr. Wightman, at this time, I'd like to ask you to please just respond to the actual question asked, yeah, so we can get through this.

Ms. Sloper: And I'll point you again to Exhibit L from the Planning Department, right? You received that letter. It was dated February 3<sup>rd</sup> 2011?

Mr. Wightman: Yes.

Ms. Sloper: The first sentence of that letter actually states, "We cannot approve the subject application because the existing lanai deck is within the six-foot setback area."

Mr. Wightman: Correct.

Ms. Sloper: Okay. I just wanted to clarify what the letter actually stated.

Mr. Wightman: But it's incorrect.

Ms. Sloper: I have no further questions.

Chairman Endo: Okay, Board Members, any questions for Mr. Wightman?

Mr. Tanaka: Question specifically to this February 3<sup>rd</sup> 2011 letter. It talks about that six-foot setback.

Mr. Wightman: Yes.

Mr. Tanaka: So what you're saying is that there was – it's not within the six-foot setback?

Mr. Wightman: No, there's nothing within that six-foot setback.

Mr. Tanaka: So is that your logic to not responding to this letter specifically?

Mr. Wightman: Which letter? The—?

Mr. Tanaka: The February 3<sup>rd</sup>.

Mr. Wightman: I haven't. I just received it, so I haven't— I called the guy and asked him which deck he was talking about, and he stated the one on the right-hand side, which was the one that does not – that is not within the setback. There's nothing within the setback. That's all. And that's all I've had a chance— That was two days that I had a chance to talk.

Mr. Tanaka: Was that Russell Higa?

Mr. Wightman: Yes, Russell Higa, yes.

Chairman Endo: Okay, the Chair has a couple of questions. So, Mr. Wightman, I would like to try and just quickly summarize what we're doing here. It sounds like you admit that you do not have a permit for the deck that is the subject of the violation. Is that correct?

Mr. Wightman: Yes.

Chairman Endo: And all that you're stating now is that you're having difficulties and issues in trying to get an after-the-fact permit?

Mr. Wightman: Correct.

Chairman Endo: Any further questions?



Mr. Santiago: I'd like to ask a question. Can you summarize the difficulties that you're encountering in trying to secure an after-the-fact permit?

Mr. Wightman: Yes. The majority of it is based upon like Mr. Scrote had mentioned when I asked him about what – if my house was a one story or two-story, and he stated that it was a two-story, most definitely. As well as when I went to Ernie Takitani, I asked him about the situation, and he said, "No, we do not have—" I asked him – I have a one story home with a basement. I was told there are no basements in Hawaii. I was told that as well as by the person at the – when I applied, tried to apply for the permit. They said this is gonna get kicked back because you need as-builts for your upper second story. This is not a single story with a basement, although the original building permit that was signed off showed it is a single story home with a basement. So the problem I'm running into is trying to obtain an after-the-fact permit based upon setback issues being that it's a two-story – being that I'm told it's a two-story home.

Mr. Santiago: So their interpretation of a dwelling is that it's a two-story dwelling?

Mr. Wightman: Yes.

Mr. Santiago: And that's the basis for the denial?

Mr. Wightman: Some of it. There are other issues within there that were merely things that I did not include in the – in the blueprints. I forgot to put in some smoke detectors. And now they require you to put electrical outlets where they were or where they are now. But other than that, the main issue at hand is being a two-story or a one story home which would resolve the setback issues, which I would not have, and more than likely, get approved on the permit.

Mr. Santiago: So the assertion of that it's a two-story dwelling. Has there been an inspection of the home to determine that?

Mr. Wightman: No, there has not been.

Mr. Santiago: Okay.

Mr. Wightman: Well, excuse me, yes, there has been when they initially signed off back in 1981.

Chairman Endo: Member Kamai?

Mr. Kamai: Mr. Wightman?

Mr. Wightman: Yes?

Mr. Kamai: So in your attempt to obtain an after-the-fact permit, was there any work done to the house by itself by your carpenter, or anybody else for that matter, since you applied?

Mr. Wightman: No, everything was completed before.

Mr. Kamai: Between your third notice and first notice of violation to the – you attempted to—?

Mr. Wightman: Yes, I believe all the work was done prior to receiving a notice. So I haven't done any additional work since.

Mr. Kamai: With response to Mr. Scrote's observation, the deck was expanded?

Mr. Wightman: Yes, that was done between possibly the time that he first noticed and the time we were put on notice, between those two times.

Mr. Kamai: So your application is complete with smoke alarms and all that stuff?

Mr. Wightman: That's all there already. It's there. It just was not written into the blueprints to turn back into the permitting office. At my – I'm at the point of where I need to hire a professional to come in and do these drawings to turn everything in and get everything done. But I don't wanna have somebody come in and start doing all these drawings of stuff if I don't even have a chance of it being allowed to be within–

Mr. Kamai: So the work was done without any drawings?

Mr. Wightman: No, there were drawings, but there was no – nothing was turned in. No professional drawings, but it was all to code. All the work's done is to code, I was told.

Chairman Endo: Any further questions from the Members?

Ms. Bernice Vadla: I have a couple. I just – I need – if you could clarify something for me? You said that your first violation, the work was already done before the first violation?

Mr. Wightman: Before the letter came in.

Ms. Vadla: Before your parents received the letter?

Mr. Wightman: Parents received the letter, yes.

Ms. Vadla: Everything was already done? There was no more construction done after the first violation?

Mr. Wightman: The only that I recall doing is painting after receiving the letter. My dad said, "You cannot do any more work. You need to stop." And I said, "We're done already."

Ms. Vadla: From the first violation, and then you received two more?

Mr. Wightman: Yes.

Ms. Vadla: And there was no work again?

Mr. Wightman: No work done.

Ms. Vadla: Okay. The letter that came to your parents, when your parents received the first letter–

Mr. Wightman: I believe they received it November 20<sup>th</sup> or so, if I'm not mistaken.

Ms. Vadla: Right. And the work was already completed at that point?

Mr. Wightman: Yes.

Ms. Vadla: Thank you.

Mr. Ray Shimabuku: But in Mr. Scrote's testimony, he had mentioned that it was added on—

Mr. Wightman: After the 12<sup>th</sup>.

Mr. Shimabuku: After the violation?

Mr. Wightman: I believe he stated it was after the 12<sup>th</sup>.

Mr. Shimabuku: So the last picture that he gave us, it seems like there were more construction being done after the violation?

Mr. Wightman: I don't think there was any work done after November 18<sup>th</sup>.

Mr. Santiago: Is the November 18<sup>th</sup> a letter or a violation?

Mr. Wightman: Oh, I'm sorry. What was that?

Mr. Santiago: It was a letter, right?

Mr. Wightman: No work was done after a violation was issued, none whatsoever, yes, that's correct.

Mr. Santiago: So there was a letter sent by Mr. Scrote on November 18<sup>th</sup> 2009 informing you that the work needed to stop?

Mr. Wightman: I don't think it ever stated that. I don't think it said I needed to stop. I believe it said—

Mr. Santiago: That was not a violation notice?

Mr. Wightman: No, no, that was a warning letter. It was a warning letter. I believe all the work was done prior to my father receiving that warning letter.

Ms. Vadla: The warning letter, not the violation?

Mr. Wightman: Yeah. Mr. Scrote came — he says he came by on the 12<sup>th</sup> and talked to the workers, and then on the 18<sup>th</sup>, sent out some documentation. So within that two-week or so, I believe, two weeks or so, those workers were done working already. But as far as after the violation, no work was done after the violation was given. Everything was completed. Painting, everything, was done.

Chairman Endo: Any further questions from the Board? Alright. So that's done for cross examination.

Mr. Castro: Mr. Chair, I just have one quick question.

Chairman Endo: Sure, go ahead.

Mr. Castro: I'm looking at these pictures here, and this is the garage?

Mr. Wightman: Yes.

Mr. Castro: So is it backfilled?

Mr. Wightman: That is -- that's the grade.

Mr. Castro: The grade is what?

Mr. Wightman: Up, yes, up.

Mr. Castro: Way up here?

Mr. Wightman: Actually, the grade is above -- maybe about one block below the tile block you see. Actually, one of the pictures, it shows the grade.

Mr. Castro: What I'm trying to figure out is if this qualified as a single story or a two-story. What was the actual permit?

Mr. Wightman: The original permit is a one single story with a basement in 1981. And I believe the grade, the first level is five feet above grade, yes, three feet and five feet above grade. Or the basement is three feet below grade.

Mr. Castro: As a single level, this would qualify for the six-foot setback?

Mr. Wightman: Yes, it would.

Mr. Castro: Thank you.

Mr. Wightman: Thank you.

Chairman Endo: Okay, do you wanna give yourself redirect examination, Mr. Wightman?

Mr. Wightman: No, I'm fine.

Chairman Endo: Okay. At this time then we will proceed with closing remarks or closing statements. And we'll start with Ms. Sloper and let Mr. Wightman conclude.

Ms. Sloper: I'm sorry, Chair, can I do rebuttal?

Chairman Endo: Yes, you can reserve some time for rebuttal.

Ms. Sloper: Oh, do we not get rebuttal witnesses?

Chairman Endo: Oh, rebuttal witnesses, yeah, I guess you can try. They have to be limited to stuff that have come up recently in Mr. Wightman's testimony and limited to that. Who did you wanna call?

Ms. Sloper: Jarvis Chun.

Chairman Endo: Jarvis Chun. Okay.

Ms. Sloper: I can give you an offer of proof.

Chairman Endo: No.

Ms. Sloper: No? Okay. Sorry, at court—

Chairman Endo: That's okay. We'll just cut you off midstream if the testimony . . . (inaudible) . . . Mr. Chun, could you raise your right hand? Do you swear or affirm the testimony you're about to give shall be the whole truth?

Mr. Jarvis Chun: Yes, I do, Chair.

Chairman Endo: Thank you. Please state your full name for the record.

Mr. Chun: Jarvis L. G. M. Chun.

Ms. Sloper: Can you state your position with the Department, please?

Mr. Chun: I'm the Supervising Building Plans Examiner.

Ms. Sloper: And are you familiar with the plans and the permits, kind of the history of this 7 Puukani Street residence?

Mr. Chun: Yes, I am.

Ms. Sloper: There were some questions about I guess what Mr. Wightman would need to do to get that after-the-fact permit, the application that he has out — in right now. Is it limited just to, as he stated, smoke detectors and— I mean, he made it sound like there's very little things that he needs to get done. Are there — how would you characterize it?

Mr. Chun: My office sent a four-page letter.

Ms. Sloper: And is that what's Exhibit K?

Mr. Chun: Yeah, I don't have that exhibit. Yes, that is correct.

Ms. Sloper: How—? I guess if you were to remedy this or if you were to offer a suggestion on how

to remedy a lot of these issues, what would your suggestion be?

Mr. Chun: The first thing Mr. Wightman should do or what I would recommend is to have professional drawn plans.

Ms. Sloper: In your opinion, do you think that the lack of professionally drawn plans is what is at the root of this one story, two-story designation?

Mr. Chun: I think that's correct, to summarize.

Ms. Sloper: And Mr. Wightman also referred back to the plans from 1981, that initial building permit for the original structure on the property. Have you seen those?

Mr. Chun: No, I have not.

Ms. Sloper: I have no further questions for Mr. Chun, his testimony.

Chairman Endo: Mr. Wightman, cross examination?

Mr. Wightman: I totally agree on the professional plans. And as far as – so you're saying that my lack of professional plans is possibly part of the reason why it's being denied?

Mr. Chun: That is correct.

Mr. Wightman: But not all of the reasons?

Mr. Chun: Well, if you provided sufficient plans, it's a lot easier for the reviewers to review too.

Mr. Wightman: Would I have your cooperation when I get my professional plans? Will I have your cooperation or your Board's cooperation to try to work through this and remedy all – whatever issues we have?

Mr. Chun: Yes.

Mr. Wightman: Okay. That'll be great. Thank you.

Chairman Endo: Board Members, any questions for Mr. Chun?

Mr. Tanaka: Mr. Chun, the Exhibit B, I guess, is the 1981 building permit. It says stories as one, meaning a one story. And in your letter, in your response letter, anyway, your four-page response letter, you defined what a basement was, what a story is. In this case, and I'm assuming that it's happened before, what happens when you go back 29 years to something that was designated as one story so the owner at that time assumes – makes an assumption the difference between a six-foot setback and a ten-foot setback, or a one versus two-story when it's actually in – as part of the record that says it's a one story dwelling, and he proceeds on the assumption that it's a one story dwelling to get to where we're here right now where you're saying that it's not a one story dwelling? How do you remedy that?

Mr. Chun: Well, based on the drawings that were submitted, it's a two-story. It meets the definition and the definition did not change. May I maybe elaborate a little bit more? Mr. Wightman applied for two permits in 2000: one, which he got for a garage; and one he applied for after-the-fact work to do additional work to the house. So that's not – I'm only assuming that it might've been part of that application which he did not get a building permit for. We don't have a building permit on record for that additional work, and that's why our letter was so long.

Mr. Tanaka: Yeah. But I mean – you know, my question that – I mean, giving him the benefit of the doubt that it's a part of record that it's on file as a one story dwelling, so there are different standards to be set. So now, in reference to the last letter of February 3<sup>rd</sup> from the Planning Department that says it's within the six-foot setback, or if it's a one-story unit, it's a ten-foot setback so that wouldn't be the case, how is that you look at this? Or do you just go back to the owner and say by definition, it's a two-story dwelling so you must conform? That's a typical – or does this happen at all?

Mr. Chun: Well, first of all, I do not represent the Planning Department. So their comments are – their requirements are different from mine. The second thing about your one story, I cannot answer what was there originally. We just go by the records.

Mr. Santiago: So the record states that it's a one story dwelling, but your assertion now is that it's a two-story dwelling. So how do you reconcile that discrepancy?

Mr. Chun: The 2000 application which was never issued.

Mr. Santiago: I don't get it. On record, it's a one story dwelling. What does that got to do with anything with the 2000 application?

Mr. Chun: There was this extensive work that was supposed to be done on the 2000 permit application.

Mr. Santiago: So your assertion is that the roof line went up?

Mr. Chun: Either the roof line went up or the building went down and was re-excavated around the property.

Mr. Santiago: Have you made an inspection of the property? Or is that something that you don't normally do?

Mr. Chun: I usually don't go, but our Inspection Staff, from my understanding, has tried to, but they were denied access.

Chairman Endo: Okay, in the nature – without trying to deny any of the parties' rights to a full hearing, I think we probably should ask Corporation Counsel maybe for some quick advice because in this case, the Appellant has already admitted that he does not have a permit, which is the subject of the notice of violation. So to a certain extent, the fact that he's trying to get an after-the-fact permit is good and everything, but the fact that he's getting delayed in it doesn't affect the basic fact that he's got a notice of violation and he has admitted that he was in violation. So it's not like he

has a legal right to an after-the-fact permit. In other words, I'm saying it's somewhat irrelevant to the notice of violation. He didn't have a permit. He admitted it. So I don't wanna keep going off onto a track about one story, two-story too much. I thought we should try and at least hear some of it because you never know how it might somehow interweave into a valid defense, but in this case, it just doesn't get me there. Mr. Corporation Counsel?

Mr. Giroux: I think the Chair's trying to rule we've expended all our inquiry into the matter, so maybe we should move along.

Chairman Endo: So any further questions for Mr. Chun? No? Thanks, Jarvis.

Mr. Chun: Thank you.

Chairman Endo: Okay, so we wanna just quickly do closing arguments, if you wanna say anything, and then we will try and make a decision starting with Ms. Sloper.

Ms. Sloper: Thank you, Chair. Basically, I think you've kind of summarized it just now. Mr. Wightman has admitted that he didn't have the proper building permits prior to – or even at this point to build that extension, the lanai, onto his house or his parents' house. His parents are the owners. They're listed on the title so they are the proper – they are proper owners as receiving the violation. I would ask that you uphold the NOV at this time.

Chairman Endo: Thank you. Mr. Wightman?

Mr. Wightman: Again, I feel that the notice of violation is warranted for me, not to my parents. My parents should not be the ones that are held responsible for something that I acted on my own. And as in the definitions state that if I'm gonna act as the owner, I should be treated as such. And therefore, I should be the one that was served with the violation. Bill Scrote was notified of that. And he chose to continue to go after my parents, the homeowner, versus me, the acting owner. And under that, as well as I thought I had – I have stamped blueprints in front of me here that – from that 2000 application that I thought was a valid blueprint that was stamped, and was told that I could always add to on my final inspection to that blueprint. And if the Board would like to see the blueprints, I have that copy of the blueprints here for everybody to see. Other than that, that's all I have to say.

Chairman Endo: Thank you, Mr. Wightman. So at this time, we would like to deliberate. Discussion or a motion? Oh, sorry. Oh, I'm sorry, Ms. Sloper, you have rebuttal?

Ms. Sloper: No, thank you.

Chairman Endo: Okay. So, Members?

Mr. Santiago: I have a question. Can we get an interpretation of the actual definition of what an owner – who on the notice is considered for this, owner of record and title, or an acting owner, and whether or not the notice of violation was sufficiently served properly?

Mr. Giroux: Maybe we can ask the attorney if they have a copy of the – that would come out of Title



16?

Ms. Trisha Kapua`ala: I can pull it up on the smart board.

Ms. Sloper: It's under 16.08.030. Owner is defined in no. 41. And it states:

Owner means any person who alone or jointly or severally with others shall have legal title to any dwelling unit with or without accompanying actual possession thereof; or who shall have charge, care, or control of any dwelling or dwelling unit, as owner or agent of the owner, or as executor, executrix, administrator, administratrix, trustee, or guardian of the estate of the owner. Any such person thus representing the actual owner shall be bound to comply with the provisions of these regulations to the same extent as if he were the owner.

Mr. Santiago: So reading that, hearing that, that – would Mr. Wightman's assertion that the NOV was served to the wrong person or parties, isn't that an adequate or an accurate assessment?

Ms. Sloper: The NOV was served to the owners, the parents.

Mr. Santiago: But hearing and reading what you just – what was up there, doesn't he fall into that category as acting as executor for—?

Ms. Sloper: Well, there's no evidence that he is authorized by the parents to act on their behalf. There's no power of attorney. There is no trust document. There's no – I mean, I'm just kind of trying to think of different ways that it could be shown.

Mr. Santiago: Or an agent that's contractual?

Ms. Sloper: I would interpret that, that way, but I would point you to your Corporation Counsel for that.

Mr. Giroux: Yeah, as far as the issue of ownership, I think what really you're looking at is the issue of service and the issue of notice. And generally, the purpose of service is so that a person has notice. So when you make an objection that you haven't been served, it's usually – the underlying assertion is that you haven't been noticed.

Now, in property law, the issue isn't necessarily that somebody who committed the infraction is served. The issue is, is that as the property owner, you are ultimately responsible for the condition of your property. If somebody comes on your property, breaks their leg, and your assertion is that I wasn't home when it happened, that's not gonna fly. You get served with notice. You're the owner. And that's how the County looks at it as far as anybody who owns land within the County, cannot avoid service by saying that I'm not present on the island.

And that's why in that definition of owner, if the County were to find out that there was a contractual relationship between father and son, and served only the occupant, being the son, later on the son couldn't assert the defense that, well, you should've served my father. That's the purpose of the broad definition of owner is so that Maui County can get some service to somebody who's

responsible.

If there was a hui relationship, you have 500 owners, you're not – for a zoning violation, you're not gonna serve all 500 owners. You're gonna serve one owner. You need to bring somebody in and allow that somebody to have due process. Whether or not that person would say, well, I'm not the one who built the house, that's not really the issue. The issue is, is that somebody needs to be responsible for remedying it. And that's the risk of going into a hui partnership is that people within your hui are not going to follow certain County ordinances.

So the definition of owner, really, when you're looking at it, you have to look at it in the sense of service and the sense of notice, not in the sense of culpability, because there is no state of mind that needs to be proven in this type of violation. The fact that there's a piece of property on Maui, it has something on it that does meet code or standard ultimately, the owner is gonna need to remedy that. Whoever built it is not really gonna be the issue.

Mr. Santiago: Thanks for the clarity.

Chairman Endo: Any further questions? Otherwise someone should make a motion.

Mr. Tanner: I would make a motion that the appeal be denied based on the fact that it does not meet any of our criteria to grant the variance.

Chairman Endo: To grant an appeal.

Mr. Tanner: Grant an appeal. I'm sorry.

Mr. Kamai: Second.

Chairman Endo: Okay. It's been moved and seconded to deny the appeal. Discussion? All those in favor of the motion to deny the appeal, please say aye. Opposed, please say no.

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

**VOTED: To deny the appeal.**

**(Assenting: R. Tanner, W. Kamai, S. Castro, R. Shimabuku,  
B. Santiago, B. Vadla. K. Tanaka)**

**(Excused: R. Phillips)**

Chairman Endo: **Motion is carried. The appeal is denied.**

Mr. Giroux: We're gonna need a findings of fact.

Ms. Sloper: I'll prepare that.

Mr. Giroux: Thank you.

Chairman Endo: Okay. We only have half an hour left before several Members have to leave, so let's quickly try and go to Item B-2.

2. **PAUL K. NISHIDA of the NISHIDA FAMILY TRUST appealing the Planning Director's Notice of Violation for maintaining a construction equipment storage and baseyard within the agricultural district for property located at 756 Pulehu Road, Kula, Maui, Hawaii; TMK: (2) 2-3-060:006 (BVAA 20100005)**
  - a. **Findings of fact, conclusions of law; decision and order; certificate of service.**
  - b. **Request by the Planning Department for the BVA to determine amount of daily fines.**

Chairman Endo then read the agenda item into the record.

Chairman Endo: Will the parties introduce themselves?

Ms. Mary Blaine Johnston: Deputy Corporation Counsel, Mary Blaine Johnston, appearing on behalf of the Director of the Department of Planning. May the Members be aware that Mr. Nishida, who is the Appellant, was previously represented by Attorney James Takeyesu. Mr. Takeyesu called me yesterday and advised me that he was no longer representing Mr. Nishida. I see Ms. Yokoyama is here. She is not a party to this proceeding. And I would object to her speaking. Mr. Nishida is here. If he wishes to speak, he certainly has the right to do so.

Chairman Endo: I think under the – since this is an administrative proceeding, you don't have to be an attorney to represent other people, so we'll let Ms. Yokoyama–

Ms. Tanya Yokoyama: Oh, he's here. I know where they are. He's here though.

Ms. Johnston: Let's give him minutes. I think we know where he is.

Chairman Endo: Ms. Yokoyama, if you do wanna speak for your – on your dad's behalf, just have him come up and confirm on the record that it's okay that you're authorized to speak for him.

Mr. Paul Nishida: She has my permission to do it.

Chairman Endo: Mr. Nishida, please use the microphone so we can hear you.

Mr. Nishida: Yes, she has my permission.

Chairman Endo: Okay. So you want to say something right now?

Ms. Yokoyama: No, that's fine.

Chairman Endo: No? Okay. Ms. Johnston?

Ms. Johnston: Okay, before the Board on the agenda today are two things: the findings of fact,

conclusions of law and order that you voted at the previous meeting on September 9<sup>th</sup> to adopt upholding – denying the appeal and upholding the notice of violation. My understanding before the Board today was going to be some kind of a report on the issue of fines. After you guys voted to accept the findings of fact and conclusions of law, there was some discussion, a concern, about the amount of the fines, a perception that maybe the Nishidas weren't really clear about what they needed to do. So what we had put on the record at the end of that meeting was that we would set up a time to go onto the property with Mr. Nishida, point out – have the Planning Department Inspectors point out exactly what needed to be done to correct the violation and proceed from there. The final thing is the final decision on the matter of fines is up to the Director of the Department of Planning. And we had nothing in the evidentiary hearing we had in September on the issue of fines. So the question that was – Chairman Endo said, he said, to the extent that you impose fines, and by “you” meaning the Planning Department, that the Appellant feels are excessive, in their point of view, an abuse of discretion, you could come back and appeal the fines. And I think that’s a correct reading that what will come out of the imposition of fines will be a letter from the Director assessing the fines. And Mr. Nishida will have a right, if he disagrees with that, to appeal to the Board and put evidence before the Board.

Pursuant to that discussion, we set up a time to go onto the property. We were to go on last Thursday morning at seven o'clock. We did. The County was represented by me; by Jay Arakawa, who’s here, okay, the Supervising Inspector; Ron Sandate, the Inspector that issued the notice of violation, did the inspection; and Frank Krau, the Investigator from my office who frequently goes and takes photos. We were not permitted onto the Nishida property. We were told they would not permit Mr. Sandate to go onto the property. That they would let Mr. Arakawa go on, but Mr. Sandate would not. Mr. Arakawa explained to them that it was not his job. That he was just there to be – to observe. That the final decision on whether or not, once the violations were pointed out where there had been a correction of them would be made by Mr. Sandate, but we were not permitted to do that. So our attempts to do an inspection before a fine was assessed were thwarted.

I believe that at this point in time, the best way to proceed is just to go ahead and have the Director, we have a new Director now, look at the situation, make a determination on the fines. If they wish to appeal that, they can then come back to the Board on that matter, and the Board then can address their concerns it expressed. It’s also possible, it’s always open that the County will enter into some kind of settlement agreement with the person that’s been served with the violation to terminate all matters. And that certainly is something that I know the Planning Department is open to. We’ve done that in a number of other cases.

So that’s the status report. What I would ask the Board today, just go ahead and have Mr. Endo sign the findings of fact, conclusions of law, so that’s in place. And then we’ll proceed. The Director will proceed to provide a letter to Mr. Nishida. And then if he wants to appeal, he wants to sit down and talk about it, if we can work out a way – I mean, if they still need an inspection, we’ll just have to deal with that at the time. But that’s where we are. We’re kind of stalemated right now. Thank you.

Chairman Endo: Ms. Yokoyama, you wanna say anything on the matter?

Ms. Yokoyama: No.

Chairman Endo: No?

Ms. Yokoyama: Yeah, it was short notice that we no longer have Jimmy. And we got this letter – actually, we only got his papers this morning about the meeting.

Mr. Nishida: Takeyesu.

Ms. Yokoyama: Yeah, Takeyesu, from Jimmy. So at this point, I guess being that we didn't have enough notice or whatever, we'd like to have – defer the motion at this time.

Chairman Endo: Okay, well– Go ahead.

Mr. Giroux: Just for clarity, the only thing on the agenda is for us to adopt the order that was already the decision. So there's no additional findings that you have to make, or any additional orders or motions, unless there's discussion about the actual document that you wanna make changes to.

Chairman Endo: I guess the only other question also is that I see Item B. It says, "Request by the Planning Department to BVA to determine amount of daily fines." That's not correct, then, at this point? That's not a request being made.

Ms. Johnston: No. No, I don't know. I don't know. I guess Trisha prepared the agenda and I wouldn't have worded it exactly like that. It's just that again, it's the Director's position to make that determination subject to the review by the Board.

Chairman Endo: Because I think, if my memory serves me correctly, at that meeting where we made the decision, we did put some things on the record as to our general thoughts as an appropriate amount of fines that would be – not – would then not be subject to – not subject to, would be reasonable in our minds.

Ms. Johnston: Yes. And certainly, the Director will have these comments in front of him. And he can weigh those in making a final determination, take that into consideration. But again, I think that the final determination is his based – and then on what he sees. We still don't know if the violations have been corrected, whether the clock is still running on the NOV since we weren't able to inspect. So I think my question was – that I asked, it said, the Director could issue – I had asked Mr. Giroux specifically whether this Body has the power to impose the fines. And his conclusion was, it was the Director's judicial decision which would be appealable.

Ms. Yokoyama: For the record, can the mailings be mailed to the Pulehu address?

Ms. Johnston: Yes, we certainly will. Certainly. I just found out yesterday afternoon, so certainly. And also, you're free to – you won't have an attorney, but you're free to call me and talk to me, and I would encourage that because I would really like to see this case settled rather than have to keep proceeding . . . (inaudible) . . .

Chairman Endo: Just procedurally, I know normally we would just finalize the findings and sign them. Was there anything special that we added last time that said that we were gonna give opportunities for objections or any kind of further arguments? Does anybody recall? Okay. So in

that case, we're not really doing anything today, then, really. We're just – it's more of just a status update at this point by the parties. So, Ms. Yokoyama, there's not really anything to really defer, unless if you want to come back. If you have something, then you can always make a request to be put back on the agenda, though, yeah? Members have any questions? Bill?

Mr. Kamai: I have a question for anybody from the Counsel or the County. The last time we voted on this case, there was a question about what equipment constituted construction equipment versus something you could utilize on the farm. And I think that was a point of discussion that we couldn't decide on. I think it was brought up and mentioned. Was that addressed by the County?

Ms. Johnston: That was part of the discussion after you voted to deny the appeal and to adopt the proposed findings of fact and conclusions of law the County gave. That was an issue that came up. And that's what was the idea behind our trying to set this onsite visit so the County Inspectors could go through and say, that won't work, that won't work, that's okay, that's not okay. And then based on that if there was a disagreement, we could come back and take that up. But as far as the status, the vote was to accept the findings of fact, and conclusions of law, and then try to work out before an actual fine was assessed. And that was – we're still willing to do that.

Mr. Kamai: That's what my issue was that there was nothing written down prior to anybody setting foot on the property. That absolutely, this particular vehicle, this particular truck, crane, forklift, backhoe, something, prior to walking on the property otherwise, it turns into one, I don't know, pick and choose at the time, what you think it is. So I'd hope that the County would have something in writing prior to even going on the property because that can apply, that list that you come up with, can apply to anything and anybody instead of being arbitrary, walking on the property and saying, oh, this one, yes, and that one, no. That's my issue.

Chairman Endo: You mean they should have a list like all bulldozers or all loaders should be removed?

Mr. Kamai: Absolutely. Have something prior to – that you can apply Countywide.

Mr. Santiago: I agree. Subjectivity can enter into the decision-making process onsite. I would have to take issue with that too.

Mr. Kamai: Thank you.

Chairman Endo: I guess the problem is that sometimes you could use construction equipment for certain parts of their farming. So it goes both ways, yeah?

Mr. Kamai: Thank you again.

Chairman Endo: They could say, oh, no, I use this loader to do this for farming, then maybe they would convince the Inspector to not have to remove it. So I don't know what—

Mr. Shimabuku: Mr. Chair?

Chairman Endo: Yeah?

Mr. Shimabuku: Based on all the evidence that we saw with pictures of equipment on the property, I, too, have the same feelings with Mr. Santiago and Mr. Kamai. Like who is to say what you can and cannot use on a job or a farm? So I would have the same feelings that they do in this matter. And I guess it would just lead to stalling or not coming to a conclusion on this matter.

Mr. Kamai: And it's at the time that the applicant will have a chance to know what exact equipment has to leave. And I think the Director, when leveling fines, would appreciate that too. That you'd know exactly, this gotta go, it didn't go; therefore, the fine will remain.

Mr. Tanner: Mr. Chair, I have one comment to the Nishidas, if I could?

Chairman Endo: Sure.

Mr. Tanner: It would appear to me that the County is working really hard and diligently to try to resolve this, and they wanna see this resolved to everybody's satisfaction, and especially, to yours. You're no longer represented by counsel, and I think the County's Counsel has made an offer to assist you. And I would highly recommend you take her up on that offer and utilize her.

Ms. Yokoyama: But see, the thing is when all of this investigation was going on, we were building the house. So for Ron to even question what we were doing with the equipment, we were constructing the house.

Mr. Tanner: No, I understand that. And I'm just recommending that you work with the County's Counsel to try to resolve this as quickly as possible and to everybody's satisfaction. I think the Counsel clearly wants to see this resolved.

Ms. Yokoyama: Because to us, we feel like we were invaded by him harassing us because we did have the building permit and we were ongoing construction of the house, and it's still ongoing, as well as the farm. So it's like saying you're putting in your landscape, and they're gonna say, oh, why do you guys have dirt there? Well, how you gonna do it if you don't have the dirt?

Mr. Tanner: No, I understand that.

Ms. Yokoyama: So for him to even pick on us, and he's not even clear what the violation is that he has to come out there to find what could be a violation, that's wrong.

Mr. Tanner: Yeah, I'm just suggesting you work with the Counsel, the County's Counsel, to resolve this as she's offered to assist.

Mr. Tanaka: I have a question. May I? You set up a date with the Nishidas and your Inspectors and went up there, but the inspection never took place. Could you fill us in why?

Ms. Johnston: Yes, we were told by Mr. Takeyesu, who was there, was still representing them, that Ron Sandate, the Inspector on the case, would not be permitted to go onto the property, period.

Mr. Tanaka: Okay, so it's personal. I understand that. Can this meeting take place with a different Inspector?

Ms. Johnston: No. Jay can speak to that. It's not – the public doesn't get to choose their Inspector. I mean, that's the Inspector that's assigned to this area. To take an Inspector from another section and bring him up here, then everybody's gonna want the Inspector of their choice to come. There were four of us there. There was absolutely no reason for us not to be allowed.

I just wanna say this that – the similar things you may or may not recall. Before the notice of violation was ever issued, the Nishidas contacted the Mayor's Office, and at the time, Roy Silva from the Mayor's Office went to the property to meet with them. And Inspector Sandate was with them for the very reason that we're talking about to go on, clarify this, this, this. They called the police on him and wouldn't let him on the property. So that's the status on that.

As far as their representation today, all they're doing is building their house, I urge you to go back through and look at the findings of fact, and conclusions of law that you voted to adopt. There were clearly testimony by Mrs. Yokoyama. In fact, they were using the property as a baseyard at one point in time. So they've been using it for many, many years. We're just trying to bring a conclusion to it. I respect – I second, Mr. Tanner, on your recommendation that they try to talk to me. I'm perfectly willing to sit down, meet with them, and try to work this out.

Mr. Nishida: You know on the County Code and the State Code, there's no definition about baseyard. So I wanna know what is a baseyard?

Chairman Endo: Okay, well, I guess at this point, we should – we're sort of trying, to a certain extent, we're re-talking about the case when we've already decided already. So at this point, we don't actually have any action to take although we are just trying to help the parties come to a resolution. And I think if the County can change its rules at one point because there seems to be some kind of personal animosity, to have another Inspector go in this special situation as a gesture to just try and get it resolved one last time, I would urge the County to consider it, personally.

Mr. Shimabuku: Mr. Chair, I have a question. With the evidence that's been provided through the hearing, the Inspectors know what kinda machine that is possibly in violation. Is it necessary to go again and see what – to pinpoint what has to be removed based on the notice of violation? If there is a notice of violation, he should know what equipment shouldn't be there. And it wasn't presented with the notice of violation that certain equipment doesn't belong.

Chairman Endo: So you're saying they don't need an inspection or they don't need an Inspector?

Mr. Shimabuku: Because of these issues of what's going on, do we have to have an inspection? Can it be based on what the evidence that was provided, the pictures that was shown, trucks, cranes, or whatever it may be?

Ms. Johnston: May I say something? There needs to be – anytime there's a violation, and there's a date to cure the violation, there's gotta be a followup inspection to ascertain whether the violation's been removed. So if nothing else, I guess what I'm suggesting at this point is we set a date to go and see if the violation is cured. And if it's not, then they can say, well, this is still in violation. And it's not just a matter of equipment. It was also the matter of the place was being used for running the business of the construction company with workers coming and going. There were two parts of the notice of violation, not just the equipment. And that was admitted by Ms.



Yokoyama that it's--

Ms. Yokoyama: No, we didn't admit it was a place of business. It was a place where they picked up materials.

Ms. Johnston: Okay. That's a baseyard.

Ms. Yokoyama: No, that's not a baseyard.

Chairman Endo: Okay, well, that's okay. Let's not -- there's no reason to argue that since the case has already been decided, yeah? The parties can appeal. Of course, you realize that. You're allowed under law -- well, you have 30 days from the thing is signed.

Ms. Yokoyama: Yeah, because ours doesn't have a signature.

Chairman Endo: Yeah, so your time hasn't started yet. So once it's signed and delivered, you'll have 30 days to appeal to the circuit court.

Mr. Tanaka: I'd like to make a suggestion. Like what Ray was saying about -- well, it's been brought up by numerous Members about creating a list. I agree. A site inspection onsite, walking on the property, may not be necessary. We have tons of photos and evidence that showed certain things. My suggestion would be that a list would be created as part of what needs to be removed in order to conform, and as well as our minutes from that meeting where we discussed, as a Board, possibilities on fines. Then the Director can make his decision, his determination, and if necessary, it could be appealed and come back to us. That would be my suggestion.

Chairman Endo: Mr. Shinmoto?

Mr. Aaron Shinmoto: Is it proper for me to comment?

Chairman Endo: Sure.

Mr. Shinmoto: I think the site inspection is to their advantage. If you ask us to make a list, I'm gonna make a list: backhoe and everything else. If we're on the site and they show us the backhoe is being -- their construction -- no, the backhoe is being used to dig a septic system, we might not put it on the list. Otherwise, we'll put everything on the list that we think is construction-related. So I think it's to their benefit that we go onsite. And we will not remove Mr. Sandate. We will send another Inspector. Mr. Sandate will be at the inspection. He's the Inspector who saw the thing. He issued the violation. I don't think it's appropriate for him not to be there. If the Board wants us to make a list, we'll make a list without the inspection.

Chairman Endo: Well, I guess the other thing would be to the homeowner's advantage also because otherwise, if there's no inspection, everything -- you don't have full clarity, then you might get another violation later on because it wasn't done exactly the way the Inspectors feel what needs to be taken off. So by having an inspection, you do get it at least a little clearer. So I can understand that.

Mr. Shimabuku: Well, Mr. Chair, if there is an inspection, I can see it where you're gonna have a list of items, but who is to say these items are not belonging on the property? Who says that you cannot use one backhoe for farming? Who is to say you cannot use a crane for farming? That's my concern. You going get one list, but we going come back to the same conclusion where, okay, why is this on the list? And it can pertain to all my equipment, you know. Every equipment is not made for only one purpose, in my view. You know, in today's technology, you use different things for different objects, not necessarily traditionally, what you used it before.

Chairman Endo: Yeah, that's the difficulty of this whole case. That's the defense of the homeowners, basically. That was what Mr. Takeyesu was arguing the whole time, but I think the majority basically felt that as a totality, looking at all the photos and hearing all the evidence, it just didn't sound – it just did not appear that it was all for farming or home construction. So that's why they upheld the NOV.

Mr. Shimabuku: Well, that's why going back in my recollection of this hearing, you know, at one point, I did make a motion to stop the proceedings on this case because of wrongful violation, but nobody did a second, and it carried on to where we are today.

Ms. Johnston: Can I make a brief response? Part of the problem in this is the agricultural activity that was being engaged in, and Mr. Takeyesu brought a whole bunch of pictures showing areas were planted, were all on the part of the property that were not accessible by the Inspector being off the property. It's behind. If you noticed, the pictures that were taken by the Inspectors were those basically they could see from the road which were on one corner, but the agricultural activity, according to testimony, is going on behind the house, but there's no way to see it unless you can get around behind there. And the Inspector was never able. So I think that would be one of the things that a site inspection would help clarify. I mean, if you're growing things and we can't see them, you know–

Mr. Shimabuku: But then there were pictures of the back of the house that was taken from the neighbors that didn't show any equipment on the back side.

Ms. Johnston: The problem there is there's a gulch. And they see straight across, but not a lot of things going down in the gulch.

Mr. Shimabuku: Yeah, but then the pictures that they had, you can see the house. And I guess the vegetation that they had–

Chairman Endo: Alright. At this point, because we're about to lose a lot of our Members anyway, and actually, it's a difficult situation, but we're not actually taking any action today anyway, so the parties, for whatever it's worth, got to hear some comments, but we're just gonna move on to finish up our meeting.

### **C. APPROVAL OF THE JANUARY 27, 2011 MEETING MINUTES**

Chairman Endo: So moving on to Item C, everybody should have the January 27, 2011 meeting minutes. If there are no corrections or anything–

Mr. Kamai: Move to approve, Mr. Chair.

Mr. Tanner: Second.

Chairman Endo: Moved and seconded to approve the meeting minutes of January 27. Any discussion? Hearing none, all those in favor, please say aye. Opposed, please say no.

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

**VOTED: To approve the January 27, 2011 meeting minutes.**

**(Assenting: W. Kamai, R. Tanner, S. Castro, R. Shimabuku,  
B. Santiago, B. Vadla. K. Tanaka)**

**(Excused: R. Phillips)**

Chairman Endo: **The meeting minutes of January 27 are approved.**

#### **D. DIRECTOR'S REPORT**

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

Chairman Endo: Trisha, is there a status report on BVA contested cases?

Ms. Kapua`ala: Two contested cases are scheduled as of now by Judge McConnell. Other than that, there are two that the Director either reversed the decision, so that case is now thrown out, or is going to reverse the decision, so it's just paperwork from here. So you just have two contested cases with Judge McConnell which are already scheduled.

Chairman Endo: Okay.

##### **2. March 10, 2011 Meeting on Lanai**

Chairman Endo: And we have a March 10 meeting on Lanai. Is that correct?

Ms. Kapua`ala: Yes.

Chairman Endo: Are we flying or riding the boat?

Mr. Shinmoto: Riding the ferry.

Chairman Endo: I think I'm busy that day. No, I'm just joking.

#### **E. NEXT MEETING DATE: February 24, 2011**

Chairman Endo: Okay. The next meeting is February 24, 2011. Is there any other business of the Board? Hearing none, this meeting is adjourned.

#### **F. ADJOURNMENT**

There being no further business to come before the Board, the meeting adjourned at 3:28 p.m.

Respectfully submitted by,



TREMAINE K. BALBERDI  
Secretary to Boards and Commissions II

**RECORD OF ATTENDANCE**

**Members Present:**

Randall Endo, Chairman  
Kevin Tanaka, Vice-Chairman  
William Kamai  
Ray Shimabuku  
Bart Santiago, Jr.  
Steven Castro, Sr.  
Rick Tanner  
Bernice Vadla

**Members Excused:**

Rachel Ball Phillips

**Others:**

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