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PLANNING COMMITTEE  
Council of the County of Maui  
MINUTES  
July 10, 2006  
Council Chamber

1    **CONVENE:**       1:39 p.m.

2    **PRESENT:**       Councilmember Charmaine Tavares, Chair  
3                    Councilmember Danny Mateo, Vice-Chair  
4                    Councilmember Michelle Anderson, Member  
5                    Councilmember Robert Carroll, Member  
6                    (left at 2:02 p.m.)  
                    Councilmember G. Riki Hokama, Member  
7                    Councilmember Jo Anne Johnson, Member  
8                    Councilmember Dain P. Kane, Member  
9                    Councilmember Michael J. Molina, Member

10   **EXCUSED:**       Councilmember Joseph Pontanilla, Member

11   **STAFF:**         Pauline Martins, Substitute Committee  
                    Secretary  
12                    Kim Willenbrink, Legislative Analyst  
                    David Raatz, Legislative Attorney

13                    Jock Yamaguchi, Executive Assistant to  
14                    Councilmember Kane  
                    Lynette Zakabi, Executive Assistant to  
15                    Councilmember Anderson

16   **ADMIN.:**        Brian T. Moto, Corporation Counsel,  
                    Department of the Corporation Counsel  
17                    James A. Giroux, Deputy Corporation  
                    Counsel, Department of the  
18                    Corporation Counsel  
                    Michael W. Foley, Director, Department  
19                    of Planning  
                    Joseph Alueta, Administrative Planning  
20                    Officer, Department of Planning  
                    Milton M. Arakawa, Director, Department  
21                    of Public Works and Environmental  
                    Management

22   **OTHERS:**        Frank Krau  
                    John D. Kim  
                    Madelyn D`Enbeau  
23                    Plus (11) other people

24   **PRESS:**         Akaku--Maui County Community Television,  
                    Inc.  
                    Valerie Monson, The Maui News

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1 **ITEM NO. 39: MAXIMUM BUILDING HEIGHT REQUIREMENTS**  
2 **(MAUI LANI NEW SAND HILLS--NAKOA**  
3 **DRIVE AND MAUI LANI SITE 1-D--PALAMA**  
4 **DRIVE) (C.C. 05-287)**

4 CHAIR TAVARES: (Gavel.) Good afternoon. This is  
5 the Planning Committee, will please come to  
6 order for the meeting of July 10th.

7 We have in attendance our Vice-Chair  
8 Danny Mateo and Committee Members Michelle  
9 Anderson, Robert Carroll, Council Chair G. Riki  
10 Hokama, Councilmember Johnson, Councilmember  
11 Kane, Councilmember Molina. And Councilmember  
12 Pontanilla is excused for this meeting.

13 From our Administration, we have the  
14 Planning Director, Mr. Mike Foley. We have our  
15 Corporation Counsel, Brian Moto, and Deputy  
16 Corporation Counsel James Giroux. We also have  
17 the Planning Department planner, Joe Alueta.

18 From our staff, present is our  
19 secretary, Pauline Martins; our Legislative  
20 Analyst, Kim Willenbrink; and our legal analyst,  
21 David Raatz.

22 For the record, is there anyone signed  
23 up to testify, Ms. Martins?

24 MS. MARTINS: No.

25 CHAIR TAVARES: Seeing that there is no one here to

1           testify, with no objection, we will close public  
2           testimony at this time.

3       **COUNCIL MEMBERS VOICED NO OBJECTION.**

4       CHAIR TAVARES:   Okay.   Thank you, Members.

5                   All right.   Before us today are three  
6           items.   PC-39 is the maximum building height  
7           requirements.   Maui Lani's new Sand Hills--Nakoa  
8           Drive and Maui Lani Site 1-D--Palama Drive.  
9           Also, PC-44, which is amendment to definition of  
10          height.   And our last item for today is PC-27,  
11          Country Town Zoning -- Country Town zoning, I  
12          think there's an amendment.

13                   Members, we have put PC-39 and 44 sort  
14          of together so that discussion can interchange  
15          between those two items.   At this time, I would  
16          like to ask Mr. Moto or Mr. Giroux if they have  
17          any comments regarding the documents that were  
18          presented to the County, I think it was  
19          yesterday, and what kind of bearing would that  
20          have, if any, on discussions that we are about  
21          to embark on in this Committee?

22       MR. MOTO:   Good afternoon, Madam Chair, and Members  
23                   of the Committee.   Brian Moto, Corporation  
24                   Counsel.

25                   Madam Chair, I can confirm that on

1 July 7th, 2006, Friday, our office was served  
2 with a complaint, Heu, Nacua, Medeiros, and  
3 Gallo, plaintiffs, versus Alan Arakawa, Mayor of  
4 the County of Maui, and Michael Foley, Director  
5 of the Department of Planning, and the County of  
6 Maui, defendants.

7 Accompanied by the complaint was a  
8 motion for preliminary injunction. The attorney  
9 for the plaintiffs is Lance Collins. Madelyn  
10 D'Enbeau of our office has been assigned as the  
11 Deputy to defend the case for the County of  
12 Maui.

13 The -- from what we can see from the  
14 terms of the complaint, it deals with issues and  
15 facts that are the same or similar to those that  
16 are on today's agenda. Because of this,  
17 because -- and the pending lawsuit and the fact  
18 that our office has not yet had time to file an  
19 answer yet or to discuss some preliminary  
20 matters with the attorney for the plaintiffs, I  
21 am -- I feel under some restriction to make  
22 public statements regarding the legal rights and  
23 privileges of parties involved and of any  
24 matters relating to the strategy or tactics that  
25 are of concern to the -- that are raised by the

1 lawsuit or that might be related to the lawsuit.

2 There are perhaps some generalized  
3 statements or matters I could address depending  
4 upon the kinds of questions that you had. But  
5 if there are questions that require me to give  
6 my opinions on the interpretation of certain  
7 matters or certain acts, then that I would  
8 recommend be done in Executive Session.

9 I would note that I see from your agenda  
10 that the lawsuit itself, of course, is not on  
11 today's agenda, just the matter relating to Maui  
12 Sand Hills under your Planning Committee agenda.

13 CHAIR TAVARES: Okay. Thank you, Mr. Moto.

14 Any questions for our Corporation  
15 Counsel?

16 Ms. Anderson.

17 COUNCILMEMBER ANDERSON: Thank you, Madam Chair.

18 Mr. Moto, it's my understanding that the  
19 lawsuit in question is very narrow in its scope  
20 in that it only asks the Court to determine  
21 whether or not the Mayor had authority to  
22 circumvent the County Code, in so many words.  
23 Is that correct?

24 MR. MOTO: Madam Chair, no, that's not a complete  
25 answer because it appears -- well, it does

1 require or request a declaratory ruling. I am  
2 sorry. I am looking through the complaint now.  
3 It does ask for declaratory relief regarding an  
4 action by the Mayor, and -- but it also asks for  
5 injunctive relief relating to the issuance of  
6 permits and approvals for what's referred to in  
7 the complaint as the Nakoa development and  
8 Palama development.

9 CHAIR TAVARES: Ms. Anderson.

10 COUNCILMEMBER ANDERSON: So it's asking for  
11 injunctive relief in order to stop anything  
12 until the judge can make a declaratory ruling as  
13 to whether or not the Mayor had the authority to  
14 make his decision in contradiction to the County  
15 Code?

16 MR. MOTO: Um --

17 COUNCILMEMBER ANDERSON: Mr. Moto, what I am trying  
18 to do is I am trying to get, you know, a  
19 definition -- I have read the lawsuit. It is in  
20 our binder. It's a public document. I am  
21 trying to get a clear definition from you as to  
22 what this lawsuit addresses so that we are able  
23 to discuss everything else surrounding this in  
24 open session. Because I think that this is a  
25 matter that the public in general is very

1 concerned about.

2 I cannot tell you, Madam Chair, how many  
3 phone calls and e-mails I've received from  
4 people who are terrified this is going to happen  
5 to them. And -- and -- and the Mayor has made  
6 comments, and I believe it was in one of the  
7 Maui News stories, that the decision he's made  
8 in regards to these two subdivisions will apply  
9 countywide.

10 So, the reason I am asking you these  
11 questions, Mr. Moto, is I have read the suit,  
12 and it looks to me like it's a very narrow  
13 request, doesn't have -- it is not asking about  
14 grading or anything. It is just asking whether  
15 the Mayor had the authority to make his  
16 administrative decision that these projects  
17 could be built at finished grade, no matter how  
18 high that might be.

19 So if you could speak to that and kind  
20 of clarify for us.

21 MR. MOTO: Madam Chair, I do not read the complaint  
22 to be that narrow. Literally, it asks for  
23 permanent relief, not temporary or interim,  
24 permanent injunctive relief, and as I read it,  
25 it -- the relief sought, by implication, would



1       affect people, property owners, that are not  
2       named in the lawsuit, which is one of the --  
3       which is an aspect of the complaint that is a --  
4       certainly something to be an issue.

5               In other words, the complaint, as I see  
6       it, is a complaint that would affect the rights  
7       and privileges of parties that are not here  
8       today and were for some reason left out of the  
9       lawsuit because it would -- the relief calls for  
10      an injunctive -- an injunction against the  
11      issuance of permits, presumably for all people  
12      who are seeking now permits or perhaps even have  
13      already gotten them.

14   COUNCILMEMBER ANDERSON:  So, are you saying, then,  
15      Mr. Moto -- let me address this in another way.

16               Are you saying that we can't speak to  
17      the grading permits that were issued, to the  
18      various Phase II and Phase III approvals that  
19      were issued, to the ownership of these various  
20      parcels and whether or not they received  
21      approval for ownership change from the Planning  
22      Commission?

23               There's many other issues here that are  
24      not being addressed in this lawsuit.  So I am  
25      just trying to get an idea, Madam Chair, of

1           where we can go. I think we are in a very  
2           touchy situation because we only have one  
3           Corporation Counsel, and because he's now  
4           involved in defending the Mayor in this  
5           situation, I think it raises a conflict of  
6           interest.

7                        So I am trying to get from him some  
8           definitive answer as to what the scope is of  
9           what we can discuss here in open session.  
10          Because, you know, he's -- he's -- I'm saying  
11          the scope of this lawsuit is very narrow. He is  
12          asking one question. Does the Mayor have the  
13          authority to have made these administrative  
14          decisions?

15                       And then Mr. Moto goes on and answers  
16          about how who this is going to affect and all of  
17          that. I mean, certainly any lawsuit is going to  
18          affect people but I don't think that's what we  
19          are discussing here. We are discussing the  
20          issue that brought us to this point.

21                       And so, Mr. Moto, if you -- if you could  
22          have any comment on what you think we can  
23          discuss in open session.

24   MR. MOTO: Madam Chair, well -- my comments are  
25          focused on what I think I can discuss in open

1 session. I think there are certain facts that  
2 probably could be discussed about Maui Sand  
3 Hills, those facts which are of public record,  
4 you know, whether it's a chronology of events or  
5 documents as I understand them to be.

6 What I -- what I would like to not do is  
7 have to provide any kind of legal interpretation  
8 or conclusions in open session.

9 CHAIR TAVARES: Okay. Thank you.

10 COUNCILMEMBER ANDERSON: Thank you.

11 CHAIR TAVARES: Mr. Hokama.

12 COUNCILMEMBER HOKAMA: Madam Chair, thank you.

13 My question regarding the situation that  
14 we are in as far as effective this past Friday,  
15 the 7th of July, my question to Mr. Moto as  
16 Corporation Counsel, when it states the County  
17 of Maui, I am assuming it includes the nine  
18 Council Members. Is that a correct  
19 understanding?

20 MR. MOTO: Madam Chair, the -- let me first of all  
21 confirm that the complaint as written did name  
22 and did say "and the County of Maui." Normally,  
23 we -- we take that to mean the...

24 COUNCILMEMBER HOKAMA: Officers?

25 MR. MOTO: Well, the entity, the whole -- the County

1 as a municipal corporation.

2 COUNCILMEMBER HOKAMA: So are the Members, are the  
3 Members, point -- yes or no?

4 MR. MOTO: No.

5 COUNCILMEMBER HOKAMA: We are not involved in this  
6 lawsuit?

7 MR. MOTO: No.

8 COUNCILMEMBER HOKAMA: Okay. So that's -- that's  
9 very clear, Mr. Moto. Thank you very much.

10 As far as, again, just trying to  
11 reconfirm my understanding of what I have heard  
12 just shortly before by your response to  
13 Ms. Anderson, anything that is currently public  
14 record and that we are not asking you for a  
15 legal opinion on, that can be asked in an open  
16 session? That is not an issue?

17 MR. MOTO: Madam Chair, yes, I think that's generally  
18 true, and if -- if there's a question that --  
19 that's posed to me, at least, I think I cannot  
20 answer, I will let you know.

21 CHAIR TAVARES: Fair enough. Okay.

22 COUNCILMEMBER HOKAMA: Thank you, Chair.

23 CHAIR TAVARES: Thank you.

24 COUNCILMEMBER HOKAMA: I am clear on what I  
25 understand our parameters are in open session.

1 Thank you.

2 CHAIR TAVARES: Any further questions, Members?

3 Mr. Mateo.

4 VICE-CHAIR MATEO: Chairman, thank you very much.

5 So, Mr. Moto, what you are telling us at  
6 this particular point is that you are  
7 comfortable in addressing questions that we have  
8 already asked you; you are comfortable in  
9 responding to responses that we got from the  
10 respective Departments prior to the suit  
11 being -- being filed or served?

12 MR. MOTO: Generally, yes. Provided, if the  
13 questions relate to facts that are a matter of  
14 public record. You know, those I can confirm  
15 whether that's my understanding or whether I  
16 have a different understanding based upon  
17 information made available to me.

18 VICE-CHAIR MATEO: Okay. Thank you.

19 So, Madam Chairman, the intent today  
20 would be to actually review what we had already  
21 covered or -- because of the sensitivity of the  
22 document? Or I don't know -- I don't know what  
23 to ask other than issues that we have already  
24 discussed.

25 CHAIR TAVARES: I think that what we wanted to get to

1 is more the chronology, try to get an  
2 understanding of the timeline from almost day  
3 one of this project, and also at the various  
4 review plateaus, what kinds of things are  
5 reviewed before a decision is made. And those  
6 are part of the public record, and I am hoping  
7 that Mr. Foley will be able to guide us through  
8 that -- that whole scenario --

9 VICE-CHAIR MATEO: With the Chairman's...

10 CHAIR TAVARES: -- with the Project District.

11 VICE-CHAIR MATEO: The Chairman's interest was also  
12 the consideration of Executive Session?

13 CHAIR TAVARES: It's posted in case we needed to get  
14 there. But we will kind of see where we are  
15 going with it.

16 VICE-CHAIR MATEO: Thank you.

17 CHAIR TAVARES: Mr. Moto.

18 MR. MOTO: Madam Chair, to assist the Chair, perhaps,  
19 although I suppose the Planning Director and/or  
20 Public Works Director is as qualified, if not  
21 more so, than me to speak as to a chronology of  
22 actions taken and permits reviewed, etc., on my  
23 own I have attempted to learn about Maui Sand  
24 Hills, and I have created my own chronology.  
25 I -- I believe based upon the information given

1 to me that it's correct. I may be wrong in  
2 certain instances, but I think -- I think it  
3 should be fairly accurate. And I am prepared to  
4 just sort of go through it, because the things I  
5 will mention I think are a matter of pretty much  
6 public record, and I would feel comfortable in  
7 discussing those today.

8 CHAIR TAVARES: That would be perfect. Thank you.

9 MR. MOTO: Would that -- all right.

10 CHAIR TAVARES: That would save us from grinding  
11 through it ourselves.

12 MR. MOTO: Yeah, okay.

13 CHAIR TAVARES: But -- which -- we trust your  
14 evaluation.

15 COUNCILMEMBER HOKAMA: Chair Tavares.

16 CHAIR TAVARES: Yes, Mr. Hokama.

17 COUNCILMEMBER HOKAMA: It would help -- I believe it  
18 would be helpful, especially for me, if Mr. Moto  
19 is reading from something, and he has no  
20 objection to having staff provide us with  
21 copies, it might be easier for us to follow  
22 instead of all of us writing down what we  
23 believe we are hearing in his comments.

24 CHAIR TAVARES: Okay. Mr. Moto, are you able to do  
25 that?

1 MR. MOTO: Yes, I am -- if you would just give me a  
2 second, Madam Chair. I have my notes typed up,  
3 and I just want to make sure that there's  
4 nothing in there, the notes, that I would not  
5 want to be disclosed in open session. But I  
6 think -- I think we will be okay here.

7 CHAIR TAVARES: Shall we give you a few minutes,  
8 Mr. Moto?

9 MR. MOTO: Yes, thank you, Madam Chair.

10 CHAIR TAVARES: Anything further, Mr. Hokama?

11 COUNCILMEMBER HOKAMA: Chair, I would just like to  
12 pose a question, so that Mr. Moto, in the  
13 appropriate time, he can think about whether or  
14 not he wants to respond in an open session, and  
15 this would be in regards to have we had  
16 variations in other applications regarding the  
17 same grading permit and have we come to  
18 different conclusions regarding similar  
19 requests?

20 Because if we -- if it's shown that it's  
21 been very inconsistent how we have been  
22 interpreting or how a certain Department head  
23 or -- or -- or divisional head has been handing  
24 out the permits, and for this person it could go  
25 this way and for this person, they do it a



1 different way, I think it will be helpful for us  
2 to know that we have not, or have, administered  
3 this fairly and consistently.

4 CHAIR TAVARES: Okay. Thank you.

5 MR. MOTO: Madam Chair, I think...

6 COUNCILMEMBER HOKAMA: Doesn't have to be this  
7 subdivision, Mr. Moto.

8 MR. MOTO: Right, yes.

9 COUNCILMEMBER HOKAMA: Could be the one across the  
10 street, Kehalani, could be Lanai, Manele Project  
11 District.

12 MR. MOTO: Yes. Yes.

13 Madam Chair, I do have information  
14 regarding -- that I have been given regarding  
15 the treatment of other subdivisions, and I do  
16 feel that I could disclose them because the  
17 information would be public. And yes, they do  
18 show a pattern -- that's my term -- but they do  
19 show that other subdivisions, in effect, have  
20 been -- not been subject to a strict building  
21 height limitation. This is not -- in other  
22 words, Sand Hills is not at all unique.

23 CHAIR TAVARES: Okay. Mr. Hokama.

24 COUNCILMEMBER HOKAMA: I am -- I'm sorry, and if you  
25 want me to wait, I can wait. But my follow-up

1 question that needs to be asked from me is what  
2 does he mean by strict interpretation? You just  
3 told me that we have kind of strayed in our  
4 parameters, but it's within parameters, but it's  
5 been bouncing within --

6 MR. MOTO: The -- the -- Madam Chair, I think what  
7 the record will show is that there are  
8 structures, houses, that have been permitted  
9 which -- whose height would exceed the 30 --  
10 would not comply with the definition in the --  
11 in the zoning Code.

12 COUNCILMEMBER HOKAMA: But they obtained a variance  
13 from the Board of Variance and Appeals?

14 MR. MOTO: No, they -- not as I understand them, no.

15 COUNCILMEMBER HOKAMA: So we have approved structures  
16 that went beyond the limitations that the  
17 ordinance, our law allows?

18 MR. MOTO: Yes, if you measured height from the  
19 natural grade.

20 COUNCILMEMBER HOKAMA: And was that the lower grade?

21 MR. MOTO: Probably in some cases, yes.

22 I cannot, I don't have details on, you  
23 know, which house, particular houses, or how  
24 many houses or -- but I do have information  
25 about which subdivisions are probably the ones

1 in which this is the case.

2 COUNCILMEMBER HOKAMA: Thank you for your  
3 forthrightness in your response, Mr. Moto. But  
4 that does not make -- that does not make me feel  
5 any better or comfortable with the subject  
6 matter we have before the Committee this  
7 afternoon.

8 Thank you for allowing me some of my  
9 questions, Chair. My apologies for...

10 CHAIR TAVARES: Those are very pertinent, Mr. Hokama.  
11 Thank you for asking them.

12 Mr. Moto, do you need some time to  
13 review your notes?

14 MR. MOTO: Yes, I -- I just need a couple of minutes.

15 CHAIR TAVARES: Okay. Let's take a five-minute  
16 recess, Members. Recess until six minutes after  
17 2:00. (Gavel.)

18 **RECESS: 2:02 p.m.**

19 **RECONVENE: 2:14 p.m.**

20 CHAIR TAVARES: (Gavel.) Meeting please reconvene.  
21 Thank you, Members, for that short recess. And  
22 we've had the opportunity to have Mr. Moto  
23 review his -- his notes, and you have passed out  
24 to you a copy from Mr. Moto. And at this time,  
25 unless there's something else, I would like

1 Mr. Moto to just go right into this.

2 Mr. Kane.

3 COUNCILMEMBER KANE: And thank you, Madam Chair.

4 Just one question, perhaps, that I don't see on  
5 the -- the chronology list of facts that I think  
6 Member Anderson provided for us in the Nakoa  
7 Drive approvals, in the last meeting. There's  
8 one document in there that if I can ask Director  
9 Foley to give us an indication of what that's  
10 about, if I may, Madam Chair.

11 CHAIR TAVARES: Go right ahead, Mr. Kane.

12 COUNCILMEMBER KANE: Thank you for your latitude. In  
13 a packet that was passed out to us, Maui Lani  
14 new Sand Hills Nakoa Drive approvals was  
15 received from Member Anderson at the 6/19/06  
16 Planning Committee meeting.

17 About halfway in, Members -- actually,  
18 it's the fifth -- the sixth page from the end,  
19 there's a December 14th, 2004 interdepartmental  
20 transmittal that reads, "The Planning Department  
21 is rescinding our recommendation for final  
22 approval of the subject subdivision. Issues  
23 have arisen regarding the current grading and  
24 the future compliance with building height  
25 restrictions. The subdivider is required to

1 submit documentation that all of the pre" --  
2 excuse me -- "regraded lots can accommodate a  
3 dwelling or structure not exceeding 30 feet in  
4 height as measured from original or finish  
5 grade, whichever is lower." And it's signed by  
6 Director Foley, dated 12/15/04.

7 And I ask that because that document is  
8 not recognized from the submittal by Corp.  
9 Counsel that's received by us. Because they  
10 have it from August 2nd, 2004, for the grading  
11 permit, and then the next item is January 5th,  
12 Phase III approval, granting -- with a letter  
13 signed by Mike Foley.

14 So this is something that's in between  
15 that that talks about a rescinding of final  
16 approval for the subject subdivision, and I am  
17 curious to know where that document is in this  
18 discussion.

19 MR. FOLEY: Madam Chair, one clarification that I  
20 wanted to make is that this -- this is a  
21 recommendation, not a rescindant, because the --  
22 the subdivisions are not approved by the  
23 Planning Department, they are approved by the  
24 Public Works Director.

25 So even though I submitted this letter

1 changing my recommendation, I am not sure it had  
2 any impact on the approval.

3 COUNCILMEMBER KANE: Okay. Then my second question  
4 would be the very next item that was provided to  
5 us by Member Anderson. It's dated  
6 February 15th, 2005, signed by Director Foley.  
7 It's the DSA -- it is a form, the revised final  
8 plat review. And then, "For Planning, submit  
9 your comments by 2/18/05. Final approval of the  
10 subdivision is," and then there, there's an X of  
11 "recommended" by Director Foley.

12 So between -- between December 15th of  
13 2004 and February 15th of 2005, what occurred,  
14 Director Foley, that changed your mind from a  
15 recommendation of rescinding your recommendation  
16 to a recommendation for final subdivision  
17 approval?

18 MR. FOLEY: Mr. Kane, I would direct your attention  
19 to the note below there, that Lots 83, 84, 85,  
20 86, 88, and 89 have been revised. I don't have  
21 a recollection specifically of what occurred  
22 between those two documents, but this implies  
23 that possibly the plans were changed for six  
24 lots, and those may have been the lots that were  
25 in question in my December 14th memo.

1 COUNCILMEMBER KANE: So, final question, Madam Chair.

2 CHAIR TAVARES: All right.

3 COUNCILMEMBER KANE: Thank you. So would there be  
4 any other type of documentation that could help  
5 us understand your thought process, Director  
6 Foley?

7 And all it is is I am just looking for  
8 something that would help this body understand  
9 how you arrived at the recommendation to rescind  
10 on December 15, and then within that two-month  
11 period, there was a change that would validate  
12 that perhaps that December 15th was related to  
13 those six lots, and now that because the six  
14 lots have been revised, perhaps a formal  
15 submittal by the applicant, that would -- that  
16 would give you cause to -- to reverse your  
17 recommendation? Is there anything that's  
18 available in your Department or to this  
19 Committee that would help us understand what  
20 took place?

21 MR. FOLEY: The -- a few pages later, there's a memo  
22 from -- from the Mayor to me dated  
23 December 22nd, referring to revisions or  
24 improved -- substantial improvements. I don't  
25 see anything else in this packet that is dated

1 in between those dates. So I -- I don't know  
2 from the packet that I have in front of me  
3 what -- what if anything was submitted that  
4 was -- that -- that changed my recommendation.

5 COUNCILMEMBER KANE: Madam Chair.

6 CHAIR TAVARES: Go ahead.

7 COUNCILMEMBER KANE: I guess I am trying to find out  
8 if there's -- if there's a point in time in the  
9 chronology where our process kicks in, where if  
10 there's a call made by a Director, and there's a  
11 dispute of that call, in other words, an  
12 applicant does not agree with that call, that  
13 the process would provide that -- that applicant  
14 to go before, in this case, perhaps the BVA, the  
15 Board of Variances and Appeal, to resolve that  
16 conflict or resolve that disagreement, if you  
17 will.

18 And then if they rule against the  
19 applicant, then the next step seems to me a  
20 judicial review, would go to a court to have  
21 them do their final thing there.

22 And so I am trying to see if there's a  
23 point at which the applicant faced a situation  
24 where we have this grading issue that's before  
25 us, and -- and there's, I guess, there's a



1 signal of that, based on Mr. Foley signed  
2 interdepartmental transmittal of 12/15, that  
3 between then and February, there seems like that  
4 may be a point in time where that process should  
5 have kicked in to where the applicant go to the  
6 BVA and make a request there.

7 And I don't know if that's what it is.  
8 That's what I am trying to find out, if in fact  
9 that's the process, or -- we will get to that  
10 when we get to that, and I will leave it at  
11 that.

12 CHAIR TAVARES: All right.

13 COUNCILMEMBER KANE: Thank you.

14 CHAIR TAVARES: Mr. Hokama.

15 COUNCILMEMBER HOKAMA: Thank you, Madam Chair.

16 I just want to ask these questions, and  
17 again, Mr. Moto, you need to make a  
18 determination whether you want to respond in  
19 open session or not.

20 But in my understanding of the Project  
21 District ordinance, and since this Sand Hills  
22 Nakoa Drive, as well as Site 1-D, Palama Drive  
23 is part of a project district, under B, Phase II  
24 approval, under B1, letter -- small letter a, it  
25 states that what would be submitted to the

1 Director -- and again in this subject, the  
2 Director is always the Planning Director -- the  
3 Planning Director will send to the Planning  
4 Commission proposals for drainage, street,  
5 parking, utilities, grading, landscaping,  
6 architectural design concepts and guidelines,  
7 building elevations, building sections,  
8 construction phasing, open spaces, land uses,  
9 and signage.

10 And also in the same area, under d,  
11 small letter d, that it would need to also  
12 include potential environmental, socioeconomic,  
13 and aesthetic impacts, aesthetic impacts.

14 So I'm assuming that obviously it was  
15 through the review, Mr. Foley or his appropriate  
16 staff, had some concerns that felt it was  
17 responsible to have him provide a recommendation  
18 of rescinding the earlier comment. And yet it  
19 was still yet approved, as we understand it, by  
20 the Mayor.

21 Do you have any comments on that,  
22 Mr. Moto?

23 MR. MOTO: Right. The cite -- the section quoted by  
24 the Member, Madam Chair, is from Section  
25 19.45.050 of the Maui County Code, which

1 discusses the processing procedure for a Project  
2 District. And Phase II approval does have a  
3 number of items listed under it. Phase II  
4 approval is to include matters relating to  
5 drainage, streets, parking, etc., and -- and  
6 building elevations, and design concepts.

7 Phase II approval was granted on  
8 September 18, 1990, for the Maui Lani project  
9 district. So Mr. Foley would not have been  
10 involved at that time with the Phase II process.

11 COUNCILMEMBER HOKAMA: But was the Department fully  
12 in receipt of information under these areas that  
13 was forwarded to the Planning Commission for the  
14 Planning Commission to make a proper Phase II  
15 approval?

16 MR. MOTO: Well, that's something I can't answer.

17 That would require going back into the files and  
18 seeing what was reviewed by the Planning  
19 Commission in 1990.

20 COUNCILMEMBER HOKAMA: Well, let me ask you this  
21 question, then. Since under Director Foley's  
22 tenure, Phase III approval was granted, okay.

23 MR. MOTO: Yes.

24 COUNCILMEMBER HOKAMA: And if you look at Phase III,  
25 it states, the Director, and again in this

1 chapter the Director is Mr. Foley or the  
2 Planning Director -- excuse me, it's not Mr. --  
3 it is the Planning Director, that shall approve  
4 the final site plan; is that correct? Because  
5 nowhere else in this chapter does anything state  
6 about Public Works Director.

7 MR. MOTO: That's correct. The Director there is the  
8 Planning Director.

9 COUNCILMEMBER HOKAMA: So his response to Mr. Kane's  
10 earlier question wouldn't be accurate, then, for  
11 Phase III approval.

12 MR. FOLEY: I was referring to the subdivision  
13 approval.

14 COUNCILMEMBER HOKAMA: Okay. My -- my correction.  
15 Thank you for that correction, then.

16 Then on the last one, the Planning  
17 Director makes Phase III approval.

18 MR. MOTO: Yes, Madam Chair, I think I can state very  
19 clearly that Phase III approval is -- is the  
20 responsibility and power vested by the ordinance  
21 in the Planning Director.

22 COUNCILMEMBER HOKAMA: Okay. So if reading the  
23 December 22nd, 2005 letter from Mayor Arakawa to  
24 Mr. Foley, Director of Planning, in his second  
25 paragraph that states, "The zoning definition of

1 building height in Title 19 would limit building  
2 heights to ten feet or lower on certain lots  
3 making some of those lots undevelopable," to  
4 result this conflict he made an administrative  
5 decision.

6 But you would think that it's a  
7 substantive change enough that somebody  
8 obviously didn't want to go back to Phase II  
9 process again because that's what the chapter  
10 says regarding Project District processing.  
11 Under 19.45.060, proposed substantial revisions  
12 of the preliminary and final site plan shall be  
13 subject to Phase III -- Phase II approval  
14 procedures.

15 So somebody didn't want to go back to  
16 Phase II because that would have been the  
17 appropriate procedure, as it's written in the  
18 ordinance.

19 So can you tell me why something that  
20 would limit ten feet or lower -- and again,  
21 that's the developer's problem, not the County's  
22 problem. They do the design. They do the  
23 engineering. They do the grading.

24 Why didn't we hold them to go back to  
25 Phase II, then, to do that revision, substantial

1 revision, to allow buildings to be higher than  
2 ten feet? If that is the issue as we read in  
3 the December 22nd, letter?

4 MR. MOTO: I am not sure that's a question I can  
5 answer. The -- the Mayor does not -- is not  
6 vested by the ordinance with the power and  
7 responsibility to do Phase III approvals. That  
8 is only done by the Planning Director.

9 COUNCILMEMBER HOKAMA: But if I am reading the  
10 December 22nd, 2005 letter correctly,  
11 Mr. Moto -- and I may be wrong, if it's just  
12 what I am reading in my public school education  
13 that I take pride in -- that it is not Mr. Foley  
14 that made the Phase III approval; it is the  
15 Mayor.

16 MR. MOTO: Well, as noted on the chronology that I  
17 have, Mr. Foley did sign a January 5, 2005  
18 letter that granted the Phase III approval for  
19 Lot 1-D, and by a letter dated March 12, 2004,  
20 granted Phase III approval for the Sand Hills  
21 108-lot subdivision.

22 COUNCILMEMBER HOKAMA: Well, on January 5th, 2005,  
23 what was approved is what was changed, right?  
24 And it is because of this building height  
25 problem; isn't that accurate?

1           And instead of asking for a return to  
2           Phase II, to do the appropriate adjustments in  
3           the plans, maybe because it was taking too much  
4           time, where lots were being sold already, or  
5           commitments that we are not aware of was made,  
6           that now we have this 2005, December 22nd,  
7           letter?

8   MR. MOTO:   What I can note at this time as a factual  
9           matter is that the Planning Director did  
10          approve -- if you're -- if I can -- I can  
11          confirm that's my understanding on January 5,  
12          2005, the Planning Director did grant Phase III  
13          approval for Lot 1-D, which is the 51-lot  
14          subdivision portion.

15                 And that under subsection C of Section  
16          19.45.050, C2 says the Director shall approve  
17          the final site plan if it conforms in all  
18          substantive respects to the approved preliminary  
19          site plan.

20   COUNCILMEMBER HOKAMA:   I can read that just as good  
21          as you can, Mr. Moto.   My question is something  
22          changed in between that approval and the need  
23          for the Mayor to make his administrative  
24          decision.   And the County didn't change, so  
25          obviously someplace else changed.   And if it was

1 the developer's problem that they screwed up,  
2 miscalculating their elevations because of their  
3 grading plan and that they couldn't build any  
4 building over ten feet, I would have thought  
5 that the responsible thing would have informed  
6 them that that is what you submitted, that's  
7 what we approved. You want changes, you are  
8 going to do Phase II again and resubmit  
9 appropriate, corrected engineering, grading,  
10 filling, compaction plans.

11 MR. MOTO: Madam Chair, at this point I think -- I  
12 think I have to reference the list of facts as I  
13 understand them to be on the summary that was  
14 distributed. May I do so?

15 CHAIR TAVARES: Yes, Mr. Moto, why don't you go  
16 through that, and then we can get the questions  
17 afterwards.

18 MR. MOTO: Yeah, the reason is because -- and by the  
19 way, this -- this was disseminated, but it was  
20 not intended for -- I didn't intend that it  
21 would be for distribution, and so that's why it  
22 is in the format it's in. It's fairly  
23 informally written.

24 And by the way, these facts are the ones  
25 which happen to be written, typed up for this --



1       this -- for my use. They are not necessarily  
2       the complete realm of facts that one could have  
3       on the subject of grading or filling or Sand  
4       Hills. This particular recitation deals  
5       primarily with Sand Hills, but there are other  
6       facts that are probably germane to the topic  
7       about grading and heights in general.

8               And there is a redaction here because  
9       there was a fact -- there was a statement in  
10       there that the fact, which I cannot -- I have  
11       not been able to confirm yet. But relating to  
12       Sand Hills, as noted, Phase I and Phase II were  
13       approved in 1990. In -- and some of these facts  
14       you may already have in your possession.

15               In December 15th, 2003, the developer  
16       completed a grading plan for Sand Hills. And  
17       in -- three months later, in March of 2004,  
18       Phase III approval was granted.

19               The Phase III plan that was granted at  
20       that time included the grading plan dated  
21       December 15th, 2003. So it basically  
22       incorporated that.

23               Following the Phase III plan approval,  
24       on August 2, 2004, grading permit for the mass  
25       grading of Maui Lani Sand Hills -- there's a

1 mistake there. It says "Maui Land"; it should  
2 say Maui Lani Sand Hills. Involving  
3 222,000 cubic yards of fill, and 285,000 cubic  
4 yards of excavation was issued.

5 Now, within that permit, there is a  
6 paragraph 10 that has that clause in it relating  
7 to -- which advises the applicant that there are  
8 zoning restrictions of building heights which  
9 are measured from the top of the structure to  
10 the natural or finish grade, whichever is lower,  
11 and then it goes on.

12 My understanding is that based upon --  
13 although this is not written in this summary, my  
14 understanding is that after the issuance of the  
15 grading permit in August 2004, in fact grading  
16 did start and filling did start.

17 I am also informed -- and again, this is  
18 another fact that's not included in this written  
19 recitation -- that lots in the subdivision were  
20 marketed and then -- it was being promoted and  
21 sold by a local real estate agent.

22 So those events took place, in my  
23 understanding, between August of 2004 and  
24 Phase III approval in January 2005.

25 COUNCILMEMBER HOKAMA: So, Mr. Moto, what happened

1           between January 5th, 2005, and October 11th,  
2           since October 11th, 2005, an additional  
3           Phase III approval was granted for revised  
4           plans? What drove for that revision? What was  
5           the driving factors for that revision?

6                       Was it because of the grading and the  
7           height of the grading that now you needed angles  
8           and slopes?

9   MR. MOTO: No. No, actually, that probably -- that  
10           question probably should be directed -- probably  
11           best answered by a planner.

12                      I do know that two lots, 33 and 34, were  
13           the subject of some revision relating to a  
14           retaining wall. Beyond that, I really can't --  
15           can't say very much. I don't -- I just don't  
16           know the details.

17   COUNCILMEMBER HOKAMA: Well, we heard about impacts  
18           from impacted residents on -- regarding this  
19           subdivision and how it's made a definite impact  
20           on part of their existing property, property  
21           lines, and so I just need to know, was this  
22           driven by the earlier Phase III approval for  
23           grading?

24   MR. MOTO: I -- was it driven? I am not sure I can  
25           answer that.

1 COUNCILMEMBER HOKAMA: You know, retaining walls mean  
2 exactly that. You and I know that, Mr. Moto.  
3 It's to stop something from going somewhere.  
4 So, obviously, something was happening.

5 MR. MOTO: Yeah, I can't speak to it.

6 COUNCILMEMBER HOKAMA: Thank you very much, Mr. Moto,  
7 for your responses.

8 Madam Chair, I am happy to relinquish  
9 the floor.

10 CHAIR TAVARES: Thank you.

11 Ms. Anderson, followed by Ms. Johnson.

12 COUNCILMEMBER ANDERSON: Thank you, Madam Chair.

13 Based on what I have heard -- and Madam  
14 Chair, myself and my staff have thoroughly  
15 researched this, and having been an executive  
16 assistant to Councilmember Nishiki, I have spent  
17 probably in the last seven years a good 100  
18 hours reviewing subdivision files.

19 So I just want to lay that out because I  
20 think I have a clear understanding of the  
21 process and that's why I am particularly  
22 disturbed by how both of these developments have  
23 proceeded.

24 I would like to draw Members' attention  
25 to -- and all of this gets back to the Phase II

1 approval. Because Phase II approval, Members,  
2 if you will note in the Maui Lani Project  
3 District approvals, that's the overall Project  
4 District approval packet, which gives you the  
5 actual processing regulations first, which  
6 Member Hokama was just citing, and then it gives  
7 you the breakdown for Maui Lani, their actual  
8 ordinance, Phase I approval, and then right  
9 behind that is Phase II.

10 And Phase II approval, Madam Chair,  
11 according to the ordinance, requires that  
12 grading plans be included. And that a  
13 preliminary site plan shall conform to the  
14 Project District ordinance and shall include the  
15 following.

16 Now, that means the site plan includes  
17 these things: Drainage, proposals for drainage,  
18 streets, parking, utilities, on and on. Okay.

19 Now, if you look at the attachments,  
20 Members, to that Phase II approval, besides the  
21 conditions, all these conditions that are  
22 attached to Phase II approval, many of them  
23 reference exhibit letters, exhibit letters that  
24 are attached. And, actually, Phase I approval  
25 cited a actual land use map that was dated for

1 acceptance as September 10th. This is an  
2 amendment that actually Councilmember Velma  
3 Santos put in when they came in for some  
4 amendment.

5 And if you note that the conceptual land  
6 use plan attached to Phase II, the one that is  
7 the most extensive is Exhibit Number 4. And  
8 Exhibit 4, Members, if you will look in the  
9 right-hand upper portion of the map, you will  
10 see the golf course. And around the golf  
11 course, before you see house lots, you are going  
12 to see -- it looks like sloping, indications of  
13 sloping. These are not house lots. This is  
14 spacing between the golf course and these house  
15 lots.

16 And I am sorry the map is so small. But  
17 to me, that indicates that there was no  
18 intention to build houses right up against the  
19 golf course, to fill in the gulch. That looks  
20 like the gulch all the way around the golf  
21 course to me.

22 Now, Phase II approval, Members, if you  
23 will note, it's for the whole 1,000 acres. It's  
24 for 1,012 acres at that time. So any changes to  
25 these maps should require an amendment to

1 Phase II, as delineated in the ordinance. But  
2 instead of any kind of Phase II adjustment to  
3 the site map, site plan map, they instead just  
4 went ahead for a Phase II -- Phase III approval.

5 And I would like you to note that  
6 Phase III -- did I say Phase II? I meant to say  
7 Phase III. They went right to Phase III  
8 approval.

9 And -- and I want you to see that in the  
10 ordinance, again, back to the first page, on the  
11 second page, phase -- under C, Phase II approval  
12 shall be processed as follows: After Phase II  
13 approval, the applicant shall submit a final  
14 site plan for the project district development  
15 to the Planning Director. The Director shall  
16 approve the final site plan if it conforms in  
17 all substantive respects to the approved  
18 preliminary site plan.

19 Now, you will note that Mr. Foley's  
20 Phase III approval makes no mention of a site  
21 plan. And I am going to read it for the record.

22 "We have reviewed the proposed 108-lot  
23 subdivision and find that the subdivision  
24 complies with the standards of development for  
25 the Maui Lani Project District."

1           That's not a question in the Phase III  
2 approval. The subdivision is located within the  
3 SF-5 single-family subdivision, sub --  
4 subdistrict, minimum lot 5,000 square feet, and  
5 meets the unit density of six units per acre.  
6 "You are hereby granted project district  
7 Phase III approval." No mention of a site plan  
8 that he's reviewed and approved.

9           So to me, this Phase III approval is  
10 null and void because it does not meet the  
11 requirements of the County Code. Where is the  
12 site plan? And if they wanted to change the  
13 site plan, they should have gone back for  
14 Phase II approval, taken it to the Planning  
15 Commission. Then there would have been public  
16 review. We could have seen what their plans  
17 were.

18           So there's nothing in Phase II approval  
19 that gives them the permission to build at a  
20 building height, you know -- that gives them  
21 permission to build at any ol' building height  
22 and fill at any ol' level.

23           I have thoroughly examined this. If  
24 anybody can come up with anything otherwise, I  
25 would be glad to see it. But there is nothing



1 in this Phase II approval that gives them  
2 specific permission to build at that height on  
3 that fill.

4 So I think that, you know, if you look  
5 at this really thoroughly, you will find that  
6 there's lot of things they didn't do according  
7 to Phase II requirements. And they -- you know,  
8 the whole idea with a Project District -- and I  
9 might add, Members, that it was only last term  
10 that this Planning Department tried to convince  
11 us to do away with the site plan when they came  
12 forward for an additional 59 acres and a  
13 reconfiguration for the Maui Lani Elementary  
14 School, and it was all in a big, big rush, that  
15 we had to get this approved immediately because  
16 they wanted to start construction. And I went  
17 back and looked at that also, and we were  
18 promised we would have a school in Maui Lani by  
19 December '05, finished, complete. That's what  
20 they promised us. And they wanted us to do away  
21 with the site plan because it was too  
22 constrictive.

23 Well, Councilmember Nishiki, who was the  
24 Land Use Chair at that time, he saw the fallacy  
25 in that, and he refused to do it. Yet the

1 Planning Department sold this, big time, to the  
2 Planning Commission in direct contradiction to  
3 the ordinance.

4 So, if they didn't go back and -- you  
5 know, every single one of these subsequent  
6 subdivisions within Maui Lani that do not  
7 comport specifically to the site plan attached  
8 to Phase II, by law, should have come back and  
9 gotten an amendment to Phase II. And, you know,  
10 you can look at the site plan, and it doesn't  
11 look anything like Maui Lani right now. There's  
12 all kinds of difference -- differences that have  
13 not been forwarded.

14 So I don't know -- I don't know that  
15 they can rely on the fact that Maui Lani got  
16 their zoning approvals in 1990, and it was only  
17 a few months later that we put in the -- we  
18 adopted the building height restriction.  
19 Furthermore, they didn't even get a grading plan  
20 until 2003. They didn't even subdivide this  
21 property until 1995. It was barren property.  
22 It was not even subdivided.

23 So the whole idea with Project District,  
24 and you know, maybe we do need to make a few  
25 changes in this, but I think the Councils before

1 us recognize that when you are giving somebody  
2 entitlements for a piece of land this large that  
3 is looking at a 20- to 25-year build-out, you  
4 want to have some control on what is going to  
5 happen over that 20 and 25 years. That's why  
6 you need to come back and have some regulatory  
7 body review the changes.

8 And if they had done that for either one  
9 of these, then maybe these people would have  
10 been aware and the Planning Commission certainly  
11 would have asked them about what kind of fill  
12 and grading they planned to do for these two  
13 subdivisions. But that was never done.

14 So I just want to put that clearly on  
15 the record that without having amended Phase II,  
16 I think that their Phase III is invalid.

17 I mean, the fact that they didn't even  
18 attach a site plan, which is required in the  
19 Code -- no wonder everything is vague. The  
20 other -- the other requirement, Members, if you  
21 would like to look at the conditions of approval  
22 for Phase II, they are required to go to the  
23 Planning Commission and ask their permission if  
24 they can transfer ownership of any part of this  
25 subdivision. And as far as I know, that has not

1           been done either.

2                   I know that we got a response from the  
3           Planning Director saying that Maui Lani is  
4           the -- the owner. Their records show that Maui  
5           Lani is the owner of -- sorry, Members, I have  
6           lost that -- is the current owner. Their  
7           records show that.

8                   But all these approvals for Maui Sand  
9           Hills and Site 1-D, they are to an entirely  
10          different entity, VP and DK, LLC. Who is that?  
11          Besides Valentine Peroff, who is that? Doesn't  
12          seem to be Maui Lani. If it's Maui Lani  
13          Partners, why wasn't their name on the permits?

14                   And -- the subject Phase II Project  
15          District approval shall not be transferred  
16          without prior written approval of the Planning  
17          Commission. So, again, that's an irregularity.

18                   And I wanted to address Councilmember  
19          Kane's questions about Mr. Foley's recession --  
20          COUNCILMEMBER JOHNSON: Rescission.

21          COUNCILMEMBER ANDERSON: Thank you, rescission of his  
22          recommendation for approval of the subdivision,  
23          and then his subsequent approval citing various  
24          lots had been revised.

25                   I have the maps right here. I have

1 looked at those lots. Those lots have nothing  
2 to do with Nakoa Street or Palama Street. They  
3 are lots that abut a brand-new cul-de-sac within  
4 the property. Has nothing to do with what's  
5 going on here with the issue with -- with what  
6 we are addressing.

7 So I -- I think that we need to -- well,  
8 I am going to say what I -- I am going to  
9 reserve what I think we need to do until later,  
10 until we get more facts on the record.

11 If -- you know, I would like to address  
12 one thing, Madam Chair, another issue here, and  
13 that is the grading. And I hope I don't catch  
14 you off guard, Mr. Foley, but I am going to  
15 quote something that was in an article on Maui  
16 Lani, and the reporter, because she couldn't get  
17 any comments from anybody, including Mr. Foley,  
18 who had deferred all questions to the Mayor,  
19 apparently she went back to the Planning  
20 Commission records and found discussions in  
21 those minutes regarding this new proposal that  
22 the Planning Department's bringing forward about  
23 amending our height restriction.

24 And in that, Planning Director Mike  
25 Foley declined to comment for this story,

1 referring all questions to Arakawa, but he shed  
2 some light on the situation at Nakoa Drive  
3 during the Maui Lani -- sorry -- Maui Planning  
4 Commission meeting a year ago. Quote, "Some of  
5 these projects have been around for a long time,  
6 but one of the controversial areas is in Sand  
7 Hills that borders Nakoa Drive, a portion of  
8 Maui Lani where the new project has been graded  
9 to the extent where the new houses are blocking  
10 the views from existing houses."

11 Foley said according to the meeting  
12 transcript, quote, "The fill is 15 to 20 feet on  
13 some of these lots and it was approved, but it  
14 was approved with inadequate review by the  
15 County staff, by the Commission, and by the  
16 Council, and now we are seeing the unfortunate  
17 impacts of this -- of these approvals."

18 Well, I don't know about inadequate  
19 review by the County staff and by the  
20 Commission, but the Council never had an  
21 opportunity to review anything having to do with  
22 fill or height on this project.

23 He goes on to say that he hoped the new  
24 language in this proposed new definition would  
25 be approved and that the Planning Department

1 would be able to, quote, "prepare some standards  
2 with Public Works regarding grading so that we  
3 have some criteria to look at that doesn't exist  
4 now."

5 You know, I've got to take offense at  
6 that, Madam Chair, because you sat on this  
7 Council, and you might be the only one who sat  
8 on this Council in 1998 when we passed the new  
9 grading ordinance. And I worked extensively on  
10 that grading ordinance with you, and with  
11 Councilmember Nishiki, and we have some very  
12 strict criteria in our grading ordinance. As a  
13 matter of fact, our grading ordinance is -- is a  
14 landmark ordinance for this State. There's no  
15 other County in the State, including the City  
16 and County of Honolulu, that has the kind of  
17 grading restrictions that we have in our grading  
18 ordinance.

19 And so I would like to point out just a  
20 couple of items within this that I think are  
21 very relevant, and I see we have Mr. Arakawa  
22 here from Public Works. It would be very  
23 interesting to see what he has to say about  
24 this.

25 I also heard the Mayor -- I don't know

1 if this was something one of the members in  
2 Nakoa Drive told me, or -- because they have had  
3 many meetings with him, and they've related what  
4 he said to them. And one of things that he said  
5 was that you can put -- there's no restriction  
6 on what you can put in fill. You can put  
7 anything. You can fill it with anything. You  
8 could use abandoned vehicles if you want.

9 In our grading ordinance, Section  
10 20.08.220, fill materials, the fill materials  
11 may consist of rock, gravel, sand or soil, or a  
12 mixture thereof, but shall not contain any  
13 debris or organic matter.

14 Now, the reason I bring that up is  
15 because, first of all, when -- when you are  
16 going to put in fill -- and there are  
17 restrictions on how much fill you can put in,  
18 Madam Chair -- there are requirements, if a fill  
19 is going to be so many feet tall, you have to --  
20 you have to put in cuts in the fill, in the  
21 slope. And it's perfectly prescribed in our  
22 County Code as to what those cuts must be.

23 And I might, just to cut to the chase a  
24 moment for you, Members, I -- I have updated the  
25 information that I have given to you since then,



1 and eventually, we will get them to you, updated  
2 the files as of, you know, a week ago. So  
3 everything that's been put into these  
4 subdivision files that were there when we were  
5 looking in the files, I have up-to-date records  
6 of.

7 And one of them is in order to get final  
8 approval of their construction plans for Sand  
9 Hills -- mind you, Sand Hills already has their  
10 final approval. But their final approval is  
11 based on a \$7 million bond, and a subdivision  
12 agreement that the contractor will fulfill all  
13 the requirements on the construction plans. I  
14 have not seen a signed copy of the construction  
15 plans.

16 But in that check off list for Sand  
17 Hills, Nakoia Drive, it says that all the slopes  
18 must be stabilized, and that there's an argument  
19 going on between their engineer and the County  
20 as to how much cut they have to put in these  
21 slopes to stabilize them, number one.

22 And the reason I bring this up, because  
23 when -- when you are going to put this much fill  
24 in, the grading ordinance also requires  
25 compaction tests from a soil engineer. And --

1 and so that you know that what you are filling  
2 is going to have the correct compaction so that  
3 when a house gets built on it, ten years down  
4 the road, there isn't going to be subsidence and  
5 having a shifting of the house or any of the  
6 neighboring property.

7 The soils engineer report for Palama  
8 drive, and that's the drive that's got all the  
9 mill mud from Paia used as fill, that engineer's  
10 report, Madam Chairman, specifies sand, and Maui  
11 Lani sand. And if you can't use Maui Lani sand,  
12 use a sand of better -- of the same or better  
13 quality.

14 And then it goes on to say that -- at  
15 the end of the report, there's always the  
16 disclaimer by an engineer. And this engineer  
17 says if you don't follow the recommendations in  
18 this report, all of our recommendations are null  
19 and void. But yet, they used mill mud, which is  
20 sure to contain organic matter, and the reason  
21 you don't put organic matter in fill is because  
22 over time, it deteriorates. It puts holes in  
23 the compaction, and you lose -- you lose your --  
24 your firm foundation.

25 Now, there are fill around Nakoa Street,

1 around the bottom, also at Palama Drive, where  
2 they are going to have 10- to 20-foot retaining  
3 walls. And these retaining walls are going to  
4 be holding this fill back from the adjoining  
5 properties. So you better be sure that you have  
6 accurate compaction and that you have a solid  
7 foundation for these retaining walls, and not a  
8 foundation that's floating on fill.

9 The other thing I wanted to bring to  
10 Members' attention regarding the grading  
11 ordinance, I would be interested to know if they  
12 are going to get a certification -- this is also  
13 required in the -- in the grading ordinance --  
14 for Palama Drive, a certification from the  
15 engineer that the work was done in conformity  
16 with the approved plans. I would like to see  
17 how they can do that since the -- the soils  
18 report was for sand, not for mill mud.

19 There's also strict provisions in the  
20 grading ordinance that no person, firm or  
21 corporation, either directly or indirectly shall  
22 so construct or maintain drainageways on, over,  
23 through or across any lands owned, leased or  
24 controlled by such person as to block a  
25 drainageway on such lands or divert storm

1 surface -- surface storm water in such a manner  
2 as to cause such storm water to flow on, into,  
3 or over any public highways of the County other  
4 than through natural channels.

5 I am sorry. Well, that's relevant. But  
6 the more relevant part is that any person  
7 performing or causing to be performed any  
8 excavation or fill shall at his own expense  
9 provide the necessary means to prevent the  
10 movement of earth of the adjoining properties to  
11 protect the improvements thereon and to maintain  
12 the existing natural grade of the adjoining  
13 properties. Any person depositing or causing --  
14 or causing to be -- oh, sorry.

15 No person, either directly or  
16 indirectly, shall block a drainageway without  
17 the prior approval of the Department of Public  
18 Works and Waste Management of the County. Any  
19 person depositing or causing -- causing to be  
20 deposited any silt, refuse, paper, trash, glass,  
21 nails, bottles, wire, grass clippings, brush,  
22 concrete, earthen fill, garbage containers or  
23 other similar debris in any drainageways,  
24 ditches, water courses, drainage facilities, and  
25 public roadways shall remove such silt or other

1 debris.

2 Now, it seems to me that the  
3 drainageways that have provided runoff, received  
4 the runoff for these older subdivisions have now  
5 been filled. And that seems to be in  
6 contradiction to the Code -- to the grading  
7 ordinance.

8 I do know that on Nakoa Drive, there is  
9 one drainage sump in somebody's backyard, and  
10 that drainage sump is filled with mud right now.  
11 The pump doesn't work. So God forbid that we  
12 have a heavy downpour right now because where is  
13 the water going to go now that the drainageway  
14 or the gulch is totally filled with soil and  
15 sand?

16 There's no relief for these people. And  
17 they live in fear. I mean, I can drag up some  
18 photographs that we have got from 1975, '78,  
19 when their homes were totally flooded because of  
20 an irrigation main broke.

21 But the point is, Members, these people  
22 are right now, I think, under threat of -- of  
23 safety and harm to their property and to their  
24 personal well being. I mean, we don't -- we  
25 don't have any alternative right now to take

1 care of that drainage.

2 And I'd like to bring up also, when I am  
3 speaking with drainage, Madam Chair, is that  
4 there are letters from this developer stating  
5 that -- and I have it here, and I am sorry. I  
6 am just trying to get this all out so I can give  
7 other people a chance to speak, and I will  
8 provide that for the Members.

9 But there is a letter from the developer  
10 to the Public Works Department stating regarding  
11 our discussions, we would like the County to  
12 work with us in developing and taking over our  
13 drainage.

14 I guess I need to find it, because it's  
15 very specific as to what they want the County to  
16 do. And the County -- they wanted the County to  
17 partner with them on their drainage project.

18 And the County wrote back and said that  
19 they would do that, but they have to wait until  
20 the Fiscal Year '05 budget is passed because  
21 they are asking for funding from the Council for  
22 their share of this drainage project.

23 And we all know that Palama Street has  
24 had drainage problems. Or -- yes, it's Nakoa  
25 Street that's had the drainage problems, but you

1 know what, this is \$500,000 for Palama Street  
2 drainage.

3 So, and I did inquire why -- why are we  
4 putting in all this mill mud if they are going  
5 to then dig it all up and put drainage in? And  
6 what is going to happen in the meantime?

7 The Engineering Division told me that  
8 they will probably have the plans for Palama  
9 Street drainage done by the end of August. They  
10 don't even have the plans done yet. So I don't  
11 know. When is 18 months from July '06? I guess  
12 they got time.

13 CHAIR TAVARES: December '07.

14 COUNCILMEMBER ANDERSON: Right.

15 January 9, 2006. This is for Sand  
16 Hills. This is a Development Services  
17 Administration final inspection checklist for  
18 the required improvements. No. 1, all graded  
19 slopes shall be stabilized, and they have asked  
20 them to cut -- cut the slope.

21 And the response from the developer is  
22 pretty amazing. In other words, we don't care  
23 what you say. We think it is going to work, so  
24 we are going to do it our way.

25 Grading shall be corrected -- this is,

1           again, the inspection checklist. Grading shall  
2           be corrected to comply with Sections 20.08.210,  
3           cut or fill slopes distance from property line  
4           of the Maui County Code. Also some slopes  
5           appear to be steeper than 2:1. Verify that  
6           constructed slopes are in accordance with the  
7           approved construction plans.

8                        You know, when you are doing fill, and  
9           you are creating slopes of 10 to 20 feet, the  
10          grading ordinance actually has distances from  
11          the property line. If you are going to have  
12          a -- a fill that is more than 10 to 15 feet in  
13          height, you have to have a distance of five feet  
14          from the neighbor's property line from the  
15          bottom of that fill.

16                      And I don't know, some of these pictures  
17          I have seen, they have got -- they have got  
18          their dust fences in the -- in the -- in their  
19          neighboring yards, with the -- with the support  
20          staff, you know, dug into somebody's front yard.

21                      I mean, to me, the County has just  
22          turned a blind eye to this, and I think we have  
23          got a lot more problems than just whether or not  
24          the Mayor had administrative -- had a right to  
25          basically circumvent the County Code. I don't



1 think the Executive Branch, anybody in the  
2 Executive Branch has a right to do that. That's  
3 the prerogative of this Legislative Branch of  
4 government, and that's done through an  
5 amendment, not through an administrative  
6 decision.

7 So I think we have got some big problems  
8 with this, Madam Chair, and I think -- I see it  
9 as systemic. I don't think that this is just  
10 this one project. I think the reason this  
11 project came forward is because the people were  
12 persistent enough. You will see that they have  
13 written letters to the Administration, they have  
14 called, they have gone everywhere from State to  
15 County, over, for over a year, and gotten no  
16 response from anyone. And it wasn't until they  
17 got ahold of Ms. Val Monson from The Maui News  
18 that this issue even came to light.

19 So I -- I have a real hard -- hard time  
20 accepting what's happened here because to me,  
21 either, you know, you follow -- follow what's in  
22 the County Code or you don't do it. And if you  
23 are a developer, and you make assumptions  
24 without reading what's in the County Code, then  
25 you know what, you made a bad business decision,

1 and why should everybody else pay for your bad  
2 business decision.

3 I would hope that maybe this Council  
4 would look at special counsel, Madam Chair, or  
5 at least an audit of what's going on because I  
6 have the feeling this is the tip of the iceberg.

7 And I will mention that I have had phone  
8 calls from people -- and you know, this is so  
9 sad. Nobody wants to say who they are. Nobody  
10 wants to come forward because they are afraid of  
11 retribution. And these are professionals in the  
12 field, professionals that deal with development  
13 and subdivisions in this County, from  
14 engineers -- I am not even going to say who they  
15 are because I don't want to jeopardize their  
16 ability to get anything further through this  
17 County in a timely way.

18 But I will tell you, I have had phone  
19 calls for the last eight months from  
20 professionals in the field who are complaining  
21 about the policy changes that are going on in  
22 Public Works. Hey, we always did it this way.  
23 Now they are saying we got to do it that way.  
24 What's up with that? You know, where is --  
25 where is the rule change?

1           You know, County Administration needs to  
2           start respecting our law, if we are expecting  
3           everybody else to respect it. They got to start  
4           respecting it and follow what's in the Code.  
5           And if you don't like it, bring -- bring forward  
6           an amendment and let us discuss it, but don't  
7           just internally change the policy. That's  
8           illegal, Madam Chair. And they seem to do it as  
9           a course of action.

10           So, I have a whole lot more to say on  
11           this, but I think I have taken up more than  
12           enough time, and I will yield to other Members.  
13           Thank you.

14 CHAIR TAVARES: Thank you, Ms. Anderson.

15           Ms. Johnson.

16 COUNCILMEMBER JOHNSON: That was a lot to absorb, but  
17           I am hoping that the Members, as well as staff,  
18           you know, can really take to heart the things  
19           that have been said because I think that where  
20           obviously the concerns were when I read the  
21           letter, you know, that Mayor Arakawa sent, his  
22           obvious motivation, or at least it seems to me,  
23           was that look, we don't want to get sued. And  
24           that is what has been reported in the paper.

25           But when you as a developer come

1 forward, and you do not follow the law, and  
2 you -- you know the law as well as anybody else,  
3 just because somebody misses something, somebody  
4 doesn't call you on it, doesn't absolve you of  
5 having to follow the law once it's pointed out  
6 to you. So I know that we will go forward.

7 But one of the questions, Madam Chair,  
8 that I had, and because I am not as well-versed  
9 in procedure as Ms. Anderson is, there was a  
10 letter in -- I guess it's this whole file, from  
11 October 18th, 2003 that's attached to Maui Lani  
12 with the Nakoa Drive approvals, and it's from  
13 Development Services Administration. But at the  
14 very tail end, I always find this interesting,  
15 and I don't know if everything was submitted in  
16 accordance with this, but it states right at the  
17 end, "Within one year from the date of  
18 preliminary approval of the subdivision, a final  
19 plat must be filed and the construction plans  
20 must be submitted unless an extension time is  
21 granted." And it goes on to say the procedure  
22 for filing a time extension.

23 But you -- if you don't follow this  
24 procedure, it says time extension requests which  
25 are not in compliance with all of these

1 requirements will result in a subdivision being  
2 deemed null and void.

3 My question I guess would be when the  
4 plans were submitted, were they submitted, were  
5 they submitted on a timely basis, if there was a  
6 time extension required, or if their plans that  
7 were submitted deviated from what is currently  
8 before us, then does this sentence or this last  
9 page on 7 of 7, on October 18th, 2003, which was  
10 very clearly stated from Gil Coloma-Agaran, if  
11 they were not in compliance, is the subdivision  
12 null and void?

13 And I gather -- I have no way of knowing  
14 that because I wouldn't begin to know where to  
15 look for all of the plans and to know whether  
16 all of the plans were actually completed. So I  
17 don't expect an answer now, but at some point in  
18 time, I would just like someone, if everything  
19 was done appropriately, to just reassure me and  
20 the other Members that everything was done in  
21 accordance with the law.

22 Because this again I look at as a  
23 fallback position for the County rather than  
24 finding ourselves in a position where we are  
25 being litigated against because somebody didn't

1 do something properly. If this onus was on the  
2 developer, and they failed to follow that, then  
3 I would also ask for that verification one way  
4 or the other. Thank you.

5 CHAIR TAVARES: Okay. Thank you.

6 You know, Members, the -- we have been  
7 going for a little bit here, so I think it's  
8 time for us to take -- to take a little break,  
9 so we will have a recess for ten minutes, if you  
10 will report back at -- at 3:20, please.

11 COUNCILMEMBER KANE: Twenty-five?

12 CHAIR TAVARES: Twenty-five. I am sorry, 3:25. Ten  
13 minutes. I can't add, right? 3:25. Recess.  
14 (Gavel.)

15 **RECESS: 3:17 p.m.**

16 **RECONVENE: 3:32 p.m.**

17 CHAIR TAVARES: (Gavel.) Will the meeting please  
18 reconvene.

19 Members, before I give my recommendation  
20 on what we should do with these two issues, it  
21 is my intention to defer on the last item. I  
22 know we have a long week ahead of us and a long  
23 day and night. There's a site visit for Public  
24 Works over at the R and T park this evening, and  
25 we have some heavy meetings tomorrow for sure,

1 and into the evening also there.

2 So I don't want us to be tired when we  
3 discuss my favorite topic, Country and Business  
4 Town Zoning. I want to us devote our alert  
5 attention to this most wonderful ordinance  
6 that's before us.

7 Please note that this is returning from  
8 the Planning Commissions with their  
9 recommendations and we will discuss it at our  
10 next meeting.

11 At this time, as Ms. Anderson has asked  
12 to make a few more comments, short ones,  
13 hopefully, just to get some stuff, some other  
14 things on the record, and then I will give my  
15 recommendations.

16 COUNCILMEMBER HOKAMA: Madam Chair.

17 CHAIR TAVARES: Mr. Hokama.

18 COUNCILMEMBER HOKAMA: If Ms. Anderson would  
19 consider, I have a couple of questions, if she's  
20 just going to provide some -- some comments that  
21 she feels is appropriate for this item.

22 CHAIR TAVARES: Okay.

23 COUNCILMEMBER HOKAMA: I would just ask if she had  
24 questions also, then I am happy to, you know,  
25 support your recognition of her for the floor;

1 if not, I have just a few questions that I would  
2 like to ask before, if it's just a comment  
3 period that you were looking for.

4 CHAIR TAVARES: Ms. Anderson, did you have questions,  
5 or would you yield the floor to Mr. Hokama for  
6 his questions?

7 COUNCILMEMBER ANDERSON: I would be happy to yield  
8 the floor.

9 I did have questions for Director  
10 Arakawa, too, but I was going to try to  
11 short-circuit everything by just making some  
12 comments.

13 CHAIR TAVARES: Okay.

14 COUNCILMEMBER ANDERSON: But I am happy to yield.

15 CHAIR TAVARES: Okay. Thank you, Ms. Anderson.

16 Mr. Hokama.

17 COUNCILMEMBER HOKAMA: Thank you, Madam Chair.

18 And I am just curious because we as a  
19 Committee have heard comments about types of  
20 fill, such as fill coming from agricultural  
21 areas that may or may not have components that  
22 might not be suitable. And I just ask if that  
23 is also part of the Sand Hills Nakoa Drive  
24 issue, and I bring that up because in my reading  
25 of the final grading report by Fewell



1 Geotechnical Engineering, which is dated  
2 December 20, 2005, it is only about testing from  
3 material on site, and excavated on site, which  
4 is on our -- what they have through their  
5 licensed engineer, Timothy Cavanaugh, is just  
6 tan, the color tan, sand. And the compaction  
7 test, moisture test, that was done.

8 So I am just asking if the issue  
9 regarding the other types of fill material is  
10 also pertinent with the Sand Hills Nakoa Drive  
11 issue also.

12 And I don't know if we need Mr. Arakawa,  
13 our Director of Public Works to answer that, or  
14 if Mr. Moto has knowledge of that.

15 COUNCILMEMBER ANDERSON: I could answer.

16 MR. MOTO: Madam Chair, I have no information on the  
17 matter raised.

18 CHAIR TAVARES: Okay. You can answer it when we get  
19 to you.

20 COUNCILMEMBER ANDERSON: Thank you, Madam Chair.

21 No, the Nakoa Drive --

22 CHAIR TAVARES: Ms. Anderson, when we get to you.

23 COUNCILMEMBER ANDERSON: Oh, I am sorry.

24 CHAIR TAVARES: Let him go with his next questions,  
25 first.

1 COUNCILMEMBER HOKAMA: Thinking.

2 CHAIR TAVARES: Thank you. Sorry about that.

3 COUNCILMEMBER HOKAMA: And again, Madam Chair, thank  
4 you.

5 If not, then I would ask maybe upon  
6 deferral, maybe a consideration that you, as our  
7 Chair, would consider sending to Mr. Arakawa,  
8 Director Arakawa, that question.

9 Because also in this final grading  
10 report that I have in my hand that was part of  
11 the I believe the submittal from the Department  
12 in response to your letter, Madam Chair, from  
13 the Committee, on page 2, it says, in summary,  
14 our observations and testing indicate that the  
15 grading for the Sand Hills Estates has been  
16 completed in general accordance with the  
17 December 22, 2003 construction plans by Warren  
18 S. Unemori Engineering, Inc., last revised on  
19 February 1st, 2005.

20 So, what was that revision on  
21 February 1st, 2005? And is that part of the  
22 additional or has anything to do with the  
23 October 11, 2005, Phase III approval for revised  
24 plans? I am just asking the question. I am  
25 trying to connect the dots so that I can

1           hopefully come to the best and correct decision  
2           when we come upon that point in the process,  
3           Madam Chair.

4 CHAIR TAVARES:   Yes.

5 COUNCILMEMBER HOKAMA:   So I just bring it up because  
6           this is what has been submitted to the Committee  
7           as official documents.   Thank you.

8 CHAIR TAVARES:   Thank you.   We will -- we will follow  
9           up with those questions, Mr. Hokama.

10                        Okay.   Ms. Anderson.

11 COUNCILMEMBER ANDERSON:   Thank you, Madam Chair.

12                        In response to Mr. Hokama's question  
13           about Nakoa Drive near Sand Hills, I think I can  
14           confidently answer that question because I have  
15           reviewed all the documents, and because Nakoa  
16           Drive, they did use fill, so the soil engineer's  
17           report is appropriate.

18                        My question is the Palama Drive one  
19           because that soil engineer report also said to  
20           use sand, and they didn't.   They used mill mud,  
21           so...

22 CHAIR TAVARES:   Would you like us to pose that  
23           question?

24 COUNCILMEMBER ANDERSON:   Which one?

25 CHAIR TAVARES:   About the discrepancy between the

1 sand fill as described in the soils report and  
2 the mud?

3 COUNCILMEMBER ANDERSON: I think the appropriate  
4 question would be how can you approve the final  
5 grading report for the Lot 1-D -- they've  
6 changed the names on these so many times, I am  
7 not sure. I think Lot 1-D is now called The  
8 Fairways. But I don't know how they are going  
9 to approve the grading report when they didn't  
10 use the fill that was prescribed in the soil  
11 engineer's report.

12 And as I said, he made a disclaimer in  
13 the report that all the recommendations in this  
14 report, including the required compaction test,  
15 or compaction rate, will be null and void if you  
16 change any of the recommendations in this  
17 report. And the recommendation was to use sand.  
18 All the calculations were based on sand.  
19 There's nothing in that report that has anything  
20 to do with soil such as the soil that they used.

21 And I know that -- I have been in touch  
22 with the State Department of Health regarding  
23 the testing for this mill mud. And  
24 unfortunately, the testing that they did was at  
25 the mill, not exactly at the mill, but they take

1 the mill mud from the mill and they put it in  
2 a -- stack it in a pile, I guess. And that's  
3 where they have taken the test.

4 And the people who live on Palama Drive,  
5 they want the testing to be done at the site so  
6 that they know exactly, you know, the content of  
7 the soil at the site because you can't be sure  
8 that what they tested at the mill is the same  
9 soil that they took to the site.

10 And I have done some research on this.  
11 There are -- there are agricultural sites where  
12 testing has been done where the arsenic levels  
13 are beyond any acceptable level. And then just  
14 a little ways over, you can test it again, and  
15 it meets the standard.

16 So I think it's a real dangerous thing  
17 to -- to take a -- to take a soil sample from  
18 where the mill mud came from rather than taking  
19 a soil sample at the actual site that it ended  
20 up at because that's the soil these people have  
21 been breathing and they want to know what's in  
22 it. So hopefully, that will happen.

23 I did want to point out just a couple  
24 more things. And you know, in lieu of the time  
25 constraint we have here, rather than ask

1 questions, I am just going to pose these  
2 comments, Madam Chair, because I think it's very  
3 relevant to what we are dealing with.

4 And that is, you know, that's beyond  
5 what's happened with this height thing. It's  
6 how did all this happen in the first place? I  
7 mean, since when do we go around filling up our  
8 natural drainageways so people can build on  
9 them? I mean, it says right here in our -- in  
10 our grading ordinance that -- for drainage,  
11 18.20.130, drainage systems in all subdivisions  
12 shall be planned, designed, and constructed in  
13 accordance with standards of the Department of  
14 Public Works or consistent with generally  
15 accepted engineering practices, certified by an  
16 engineer so as to meet the following: No. 1,  
17 protect and preserve existing natural  
18 drainageways to the extent feasible.

19 I would like to know what -- you know,  
20 what motivated the County to accept their  
21 drainage plan which requires natural  
22 drainageways to be filled?

23 I would also like to point out, Members,  
24 you know, it's very clear that Title 19 is under  
25 the purview of the Director of Public -- of

1 Planning, and that the height restriction is  
2 under that chapter. But I would also like to  
3 read into the record for everyone's information,  
4 when the building height restriction was  
5 adopted, Madam Chair, it was adopted by  
6 ordinance, 19.04, and that ordinance also -- it  
7 was a comprehensive zoning ordinance. And  
8 included in that was we delineated the various  
9 park districts, from PK-1 to PK-4. But it -- it  
10 amended various definitions within -- within the  
11 title, one being the height restriction.

12 And along with that, which I think is  
13 very important that we put on the record and we  
14 are all cognizant of it, especially those people  
15 who are reviewing these projects, it says under  
16 compliance, 19.04.020, buildings and  
17 subdivisions, no building or structure shall be  
18 erected, structurally enlarged, or maintained  
19 unless it complies with the requirements of the  
20 Building Code. No land shall be subdivided  
21 unless the subdivision complies with the  
22 provisions of this title.

23 Now, Mr. Foley attempted to do that on  
24 several occasions for both of these  
25 subdivisions. There were conditions on the

1 preliminary subdivision approval for I think it  
2 was Sand Hills, or rather Palama Drive  
3 subdivision. In their preliminary approval, it  
4 says, right there, the same condition -- well,  
5 the same condition that was delineated in the  
6 rescission he gave, the reason he gave a  
7 rescission to the Sand Hills subdivision.

8 And I might add, Members, that those  
9 warnings about whatever fill you put in, just  
10 remember the -- the measurement of your building  
11 height will be from existing or finish grade,  
12 whichever is lower. That is also on every  
13 single grading permit that's been issued for  
14 both of these projects. So it's not like nobody  
15 was forewarned.

16 Also in Title 19.04, under  
17 interpretation and scope, and I think this is  
18 very important. In the interpretation and  
19 application of the same -- and remember, this is  
20 the ordinance that adopted the height  
21 restriction -- provisions of this article shall  
22 be held to have been enacted for the purpose of  
23 promoting the safety, health, convenience, and  
24 general welfare of the community. It is not  
25 intended by this article to interfere with or



1       abrogate or annul any easements, covenants, or  
2       other agreements between parties, provided,  
3       however, that where this article imposes a  
4       greater restriction upon the use of buildings or  
5       premises or upon height of buildings or requires  
6       larger open spaces than are imposed or required  
7       by other ordinances, rules, regulations, or  
8       easements, covenants or agreements, the  
9       provision of this article shall govern.

10               I think that's pretty darn clear.

11               I would like to also point out that in  
12       reviewing the files, I found that they had  
13       received letters of complaint from other people  
14       in April of '05 objecting to the final approval  
15       of the subdivision due to failure to follow  
16       procedures as required by law and that doing so  
17       would harm the parties as prospective buyers.

18               Now, this is in writing. Prospective  
19       buyers have signed contracts for the purchase of  
20       and have put substantial moneys towards the  
21       purchase of same, which moneys have been in the  
22       possession of an escrow account opened for the  
23       ultimate benefit of the developers and owners.

24               Now, these people were concerned about a  
25       different issue. They were concerned about the

1 fact that there were several iwi found and that  
2 they were being re-interred on this site. And  
3 they -- I mean, they actually in their letter  
4 delineate the lots that they have put in escrow  
5 for their purchase. And that these lots were  
6 going to have bones re-interred on them, and  
7 they were upset about it.

8 But the reason I am bringing that up is  
9 because they are telling us in April '05 that  
10 they have already signed contracts for the  
11 purchase of and have put substantial money  
12 towards the purchase of same, which moneys have  
13 been in the possession of an escrow account.

14 This was in April. So, I don't know, I  
15 haven't contacted these people. I don't know  
16 how much prior to that they opened up these  
17 escrow accounts.

18 But final subdivision approval for the  
19 Sand Hills Estates was not granted until  
20 June 13, '05. And within our subdivision  
21 ordinance, again, Section 18.12.080, which is  
22 action, which is basically what has to happen on  
23 the Director's part to submit -- well, actually,  
24 to consent to final approval, on the final plat.  
25 Section E, underneath that section, says land

1 shall not be offered for sale, lease, or rent in  
2 any subdivision nor options or agreements for  
3 the purchase, sale, leasing or rental of land  
4 made until approval for recordation of the final  
5 plat is granted by the Director.

6 So these people have obviously entered  
7 into agreement of sale prior to the final  
8 recordation of this plat. Again, in  
9 contradiction to the County Code.

10 Now, everything in the Code is done for  
11 a reason, Madam Chair. You know, whatever  
12 happens in this lawsuit, and whatever damages  
13 may be suffered by people who have already  
14 bought lots, they would have been protected from  
15 that if, you know, the Code had been followed.  
16 I have a real hard time with that one.

17 And then one other thing I did want to  
18 mention, and I am very appreciative of the time.  
19 There's also, within Title 18, Section .20.240.  
20 Now, remember, Title 18 is under the authority  
21 of the Director of Public Works. And there's a  
22 check and balance here between Title 19 and  
23 Title 18, back and forth, a check and balance  
24 that says, you know -- well, I am going to read  
25 to you what it says. But both the Planning

1 Director and the Public Works Director have to  
2 verify that this subdivision is going to be in  
3 compliance with Title 19 and the provisions of  
4 Title 19.

5 18.20.240, and again, this is referring  
6 to the Director of Public Works. The Director  
7 shall disapprove a preliminary plat or a  
8 subdivision map where the subdivider has failed  
9 to comply with the provisions of Title 19.

10 So I think there's plenty of  
11 responsibility to go around for how all this has  
12 come down, and I am very anxious to see what  
13 your recommendation will be, Madam Chair. Thank  
14 you for the time.

15 CHAIR TAVARES: Thank you. Any further comments,  
16 Members? If not, my recommendation on these two  
17 items, 39 and 44, are both to defer, with no  
18 objection.

19 **COUNCIL MEMBERS VOICED NO OBJECTION.**

20 CHAIR TAVARES: Your Chair will send additional  
21 questions as was brought up in today's meeting  
22 to the appropriate Departments, and I will also  
23 be conferring with our Council Chair as to what  
24 our next steps might be.

25 What I would like you, Members, if -- if

1       you so desire, is to look at the areas that have  
2       come up for discussion pertaining to the  
3       legislation that we have on the books. You  
4       know, this Committee is supposed to be looking  
5       at policy making through legislation. If  
6       there's something wrong with our current  
7       legislation on the books, and we are seeing  
8       evidence of that through discussions or actions,  
9       then if there's a way to tighten up the  
10      legislation, then I would ask that Members  
11      either propose something, not, you know,  
12      thoroughly, but at least the idea of where you  
13      think we need to either tighten up or change  
14      existing legislation so that in the future, we  
15      can avoid these types of situations.

16                So I will leave that open. I will send  
17      a memo out to all the Members if you would be  
18      willing to bring forward some of your ideas  
19      regarding how we might change in 19 and 18,  
20      Chapter 19 and Chapter 18, which has been  
21      referred to throughout this discussion.

22                The specific issue of these two areas  
23      in our Central Maui area I think are going to be  
24      addressed through a different venue at this  
25      point, and we will continue to look at what our

1 options are as a Council with regard to what has  
2 happened to produce the situation that exists  
3 today, so for that, those things, those reasons.

4 Mr. Kane.

5 COUNCILMEMBER KANE: Yeah, Madam Chair, if you can  
6 help me understand or provide clarity, are you  
7 saying this in the context of what we are  
8 dealing with today?

9 And the reason I ask that is because,  
10 and it's with respect to your comments, and with  
11 all due respect to the comments, if -- if in the  
12 end that we find that there is a lack of  
13 application to the law, then I guess my question  
14 would become why would we change the law when  
15 it's not the law that may be the problem, it's  
16 the application of the law that's the problem?

17 CHAIR TAVARES: I understand your question.

18 COUNCILMEMBER KANE: So I just pose that because of  
19 your statements, and again, with all due respect  
20 to the statements, and I respect them, but I  
21 would see that applied to when we recognize or  
22 identify and through analysis come to a  
23 conclusion that there's a problem with the law.

24 CHAIR TAVARES: I didn't want...

25 COUNCILMEMBER KANE: In this case, I think we

1 starting -- we are seeing something else emerge,  
2 and so I would only caution us to not move to  
3 change a law that seems to be -- may not be the  
4 problem. And so I just -- I state that, Madam  
5 Chair.

6 CHAIR TAVARES: Yes. And that's exactly what I was  
7 getting to when I said I will be conferring,  
8 future, to find out what our next move would be.

9 COUNCILMEMBER KANE: Uh-huh, thank you.

10 CHAIR TAVARES: But in relationship to the law, if  
11 there are areas that you feel should be  
12 tightened up, we can do that.

13 If perhaps -- if we want to change the  
14 Project District processing law so that  
15 something will require Council approval, for  
16 example, that may be an area where we can  
17 provide the check and balance between what goes  
18 on in the Departments and what goes on according  
19 to the law.

20 I think that it is woefully inadequate  
21 of our system when something gets this far  
22 before it is brought before the body. And if  
23 there are people out there listening or watching  
24 this, if there is something happening in your  
25 area that you feel is not right, you need to

1           come forward as soon as it is not right.

2                   Now, I notice that this was referred to  
3           us in April, Mr. Mateo, April of '05, April of  
4           last year, and because we were still embroiled  
5           in some other things, we didn't really get to it  
6           until just now, and it really was a coincidence  
7           when I scheduled this because I scheduled it  
8           before I knew the newspaper article was coming  
9           out.

10                   But I think that the public also must  
11           stay on us as far as we need to address this, we  
12           need to address this, because this is something  
13           that's rolling. And I don't know what authority  
14           we have as Council Members or as a Committee  
15           Member, and a Councilmember, to stop what is  
16           going on now. That has to be done through  
17           another process, which I believe has started.

18                   But we need to, you know, be mindful  
19           that if we don't hear about it or we don't know  
20           about it as Council Members, we can't do much  
21           about it. So I encourage the people out there  
22           in the public to please let us know how urgent  
23           things are.

24                   And I thank you, Mr. Mateo, for bringing  
25           it forward, and I really do apologize for not



1 getting to it before now because it is so  
2 critical.

3 VICE-CHAIR MATEO: Thank you.

4 CHAIR TAVARES: Mr. Mateo.

5 VICE-CHAIR MATEO: Chairman, thank you very much, and  
6 I really appreciate you moving this forward, you  
7 know, when we did.

8 I think what we have learned through  
9 this particular process was the lack of the  
10 public's appeal processes. I think we have  
11 learned through this particular exercise that  
12 this community tried and tried and tried. They  
13 went to the Departments; they didn't get the  
14 response they thought they needed. They went to  
15 Administration; they didn't get it there. Then  
16 they came to the Council.

17 I think, if anything, you know, we  
18 should ensure that the public's process, the  
19 public's right to appeal is always existent in  
20 the ordinances that we do because we will end up  
21 right here again. Because they really had no  
22 forum to actually voice their concerns without  
23 having to go through litigation. And that's --  
24 that's a travesty when that happens with our  
25 residents. Kind of like depriving them of their

1 full right because the quality of their life was  
2 disturbed because of business.

3 So I think, if anything, that's a lesson  
4 we learned, and I think the inclusion of the  
5 appeals process is one that we really have to  
6 weigh heavily into.

7 Thank you, Chairman.

8 CHAIR TAVARES: Thank you. Your comments are right  
9 on point, Mr. Mateo. Thank you.

10 Any further comments before we adjourn?

11 Ms. Anderson.

12 COUNCILMEMBER ANDERSON: Yeah, I would like to make a  
13 closing comment, Madam Chair.

14 You know, the reason we codify the rules  
15 and regulations on how a subdivision is supposed  
16 to happen is so that there's -- there is a sense  
17 of equality for the surrounding neighborhood,  
18 that -- I mean, anywhere you look through it, in  
19 fact, there's a provision in the Code right now  
20 that if the Public Works Director felt that  
21 the -- and, as a matter of fact, Members,  
22 there's two violations that have already been  
23 issued on the new Sand Hills development, and it  
24 was issued because they didn't put in their dust  
25 fences. They were putting -- bringing fill in

1 way before they put in any dust fences.

2 And you know, there's Best Management  
3 Practices that they have to follow. And it  
4 wasn't until they are cited and violated -- I  
5 mean, violated -- and they were fined that they  
6 went in and put in their dust fences, you know.

7 So, all of the provisions that are in  
8 our County Code are there to protect the  
9 public's -- general welfare of the public. And  
10 you know, that's what government is all about.  
11 We are supposed to be here to protect the little  
12 guy from the big guy. The big guy's got all the  
13 money and all the clout, and the little guy,  
14 he's lucky he can pay his mortgage.

15 So the reason we have our Code, you  
16 know, besides safety and welfare of future  
17 homeowners is the safety and welfare of the  
18 surrounding neighborhood, who is going to be  
19 impacted no matter how you say it. They are  
20 going to be impacted. The idea is to diminish  
21 the adverse impact that they are going to have  
22 to suffer.

23 And as I said, there's a provision in  
24 the Code right now that if the Director wanted  
25 to, he could issue a stop work order. He could

1 say, you know what, you are putting in mud, and  
2 your -- your engineer's soil report said you  
3 were going to use sand, so I am going to issue a  
4 stop work order until we get this worked out.

5 I could show you pictures, Members, of  
6 the mud and the dirt and the cracks in their  
7 foundations. One member, on Nakoa Street, had a  
8 whole bunch of sand dumped on his shed and part  
9 of his car. Pet cemeteries were dug up. Little  
10 old ladies were out there crying because their  
11 pets had been dug up. Not to mention  
12 waterlines.

13 Now, I would say this is an adverse  
14 impact. And this County should be responsible  
15 and go out and take control of that site. But  
16 oh, no, everything is speeding right along.

17 So, you know, I am very disappointed,  
18 Madam Chair. I think our role as government is  
19 to protect the little guy from the big guy, not  
20 to facilitate their slaughter. So, I am  
21 disappointed in the Departments whose -- whose  
22 responsibility is to protect the general public  
23 here, and they have got the authority to do it,  
24 and they are doing nothing.

25 So I hope that the next time we meet on

1           this, we can take some action, Madam Chair.

2           Thank you.

3 CHAIR TAVARES: Thank you for your comments.

4           Any further comments, Members?

5           If -- Mr. Kane.

6 COUNCILMEMBER KANE: Very brief, Chair.

7           I would only say that our Code is not  
8           only to protect the little guy, it is to have a  
9           fair and consistent application that is meant to  
10          protect everybody, even the big guy, because the  
11          big guy can get screwed too. Because they have  
12          money, and because they have clout, we can screw  
13          them too, because we can extort them as an  
14          example. So those laws are meant for everybody  
15          to be treated fairly and consistently. So I'd  
16          just like to throw that in before we close for  
17          today.

18 CHAIR TAVARES: Thank you, Mr. Chairman --

19          Mr. Chairman -- Mr. Kane.

20                  Members, my recommendation is that we  
21          defer PC-39, PC-44 and PC-27, with no  
22          objections.

23

24 **ITEM NO. 44: AMENDMENT TO DEFINITION OF HEIGHT**  
25 **(C.C. 06-104)**

1 **ITEM NO. 27: COUNTRY TOWN ZONING (C.C. 04-12)**

2

3 **COUNCIL MEMBERS VOICED NO OBJECTIONS.**

4

5 **ACTION: DEFER pending further**  
6 **discussion.**

7

8 CHAIR TAVARES: Any announcements, Members? I  
9 already did the announcement for the site visit,  
10 so we will have fun out there. Should be a full  
11 moon.

12 Mr. Molina.

13 COUNCILMEMBER MOLINA: Madam Chair, just a reminder  
14 tomorrow. Members, get a good night's rest, we  
15 are going to have a long evening, Committee of  
16 the Whole meeting 6:30 tomorrow, regarding the  
17 Super Ferry issue.

18 CHAIR TAVARES: Okay. Thank you. All right. If  
19 not, Members, and staff, Department,  
20 Administration, Corp. Counsel, thank you very  
21 much for attending today's meeting. This  
22 meeting is adjourned. (Gavel.)

23 **ADJOURN: 4:03 p.m.**

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## C E R T I F I C A T E

I, CHARI L. POSSELL, Certified Shorthand Reporter, State of Hawaii, do hereby certify that the proceedings were taken down by me in machine shorthand and were thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

I further certify that I am not attorney for any of the parties hereto, nor in any way concerned with the cause.

DATED this 19th day of July, 2006.

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CHARI L. POSSELL, CSR NO. 414