

# PLANNING COMMITTEE

Council of the County of Maui

## MINUTES

November 18, 2008

Council Chamber

**CONVENE:** 9:15 a.m.

**PRESENT:** VOTING MEMBERS:

Councilmember Gladys C. Baisa, Chair  
Councilmember Jo Anne Johnson, Vice-Chair (in 9:18 a.m.)  
Councilmember G. Riki Hokama  
Councilmember Bill Kauakea Medeiros  
Councilmember Michael J. Molina (in 9:17 a.m.)

NON-VOTING MEMBERS:

Councilmember Michelle Anderson (in 9:21 a.m.)

**STAFF:** David Raatz, Legislative Attorney  
Clarita Balala, Committee Secretary

**ADMIN.:** Jeff Hunt, Director, Department of Planning  
Joseph Alueta, Administrative Planning Officer, Department of Planning  
Madelyn S. D'Enbeau, Deputy Corporation Counsel, Department of the Corporation Counsel  
Michael Hopper, Deputy Corporation Counsel, Department of the Corporation Counsel

*Seated in the gallery:*

Milton M. Arakawa, Director, Department of Public Works  
Roy Silva, Executive Assistant, Office of the Mayor  
Brian T. Moto, Corporation Counsel, Department of the Corporation Counsel

**OTHERS:** Ron Leinweber  
Adrienne Owens  
Annette L. Heu  
Clare Apana  
Charles Jencks, Honua`ula Partners, LLC  
Joyclynn Costa  
Cheryl Cabebe  
Gwen Hiraga, Munekiyo & Hiraga, Inc.  
Blaine Kobayashi, Esq.  
(11) additional attendees

**PRESS:** *Akaku: Maui Community Television, Inc.*

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Ilima Loomis, *The Maui News*

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CHAIR BAISA: . . .(*gavel*). . . Good morning, everyone. The Planning Committee meeting of the Maui County Council will come to order. Today is November 18<sup>th</sup>, and it is now a quarter past nine. We are sorry for the delay, but we're ready to rock and roll. With a quorum present I would like to request that anyone in the audience who has a cell phone, a pager, or even Members or anyone in the chambers who needs to put that on silent mode if you could please do so at this time so that we will not be disturbed during our meeting and thank you very much for that.

I am Councilmember Gladys Baisa, and I am the Chair of this Planning Committee, and I'd like to welcome everyone this morning. And I'd especially like to introduce to everyone the voting Committee Members that are here this morning. I have Chair G. Riki Hokama—good morning, Chair—and also, Bill Kauakea Medeiros.

COUNCILMEMBER MEDEIROS: Aloha and good morning, Madam Chair.

CHAIR BAISA: Good morning, Bill. And also excused for the moment but will be joining us we have our Vice-Chair Jo Anne Johnson and Michael Molina. From the Department of Corporation Counsel this morning we have Brian Moto our Corporation Counsel, and we also have Madelyn D'Enbeau—good morning—and we have Michael Hopper. These are our Deputy Corporation Counsels that are always here with us. And from the Executive Branch we also have my participants that are with me all the time, Jeff Hunt, our Planning Director.

MR. HUNT: Good morning, Chair.

CHAIR BAISA: Good morning. And also with him is Joe Alueta, the Administrative Planning Officer for the Planning Department.

MR. ALUETA: Good morning, Madam Chair.

CHAIR BAISA: Good morning, Joe. Also, just joining us is Councilmember Mike Molina who is a voting member of the Committee.

COUNCILMEMBER MOLINA: Good morning, Madam Chair.

CHAIR BAISA: Welcome, Mike and welcome back to Maui.

COUNCILMEMBER MOLINA: Thank you. It feels good to be home.

CHAIR BAISA: Also good to go away on a little trip once in a while. Also with us this morning is our regular Committee Staff. We have David Raatz, our Legislative Attorney and Clarita Balala, our Committee Secretary.

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This morning we will be accepting public testimony starting in a few moments. Those wishing to testify should sign up with Committee Staff. Testimony will be limited to three minutes and testifiers are requested to state their name for the record and to indicate who they are representing. The Chair would also like to note the arrival of my Vice-Chair Jo Anne Johnson.

VICE-CHAIR JOHNSON: Aloha, sore back and all.

CHAIR BAISA: Well, I wondered if there might be flooding in Lahaina.

VICE-CHAIR JOHNSON: It's, it's really coming down, so I'm sure it's making its way here, but let's hope that nobody gets flooded, but the rain is a blessing this morning.

CHAIR BAISA: Yes, it's all over the island and much welcomed. We won't have to talk about a drought today which is a relief. Members, today we have one item on our agenda and that is PC-44, amendment to the definition of height. Members, before the Committee is a proposed bill transmitted by the Planning Director entitled "A BILL FOR AN ORDINANCE AMENDING SECTION 19.04.040, MAUI COUNTY CODE, PERTAINING TO GENERAL PROVISIONS AND DEFINITIONS." The bill would add a single sentence to the County Code for the following purpose: to establish "the finish grade" as the point from which structural height shall be measured within projects that have received site-plan approval in association with a Special Management Area Permit, Project District Phase II approval, or Planned Development approval. Currently, the County Code states that height shall be measured from the natural grade or the finish grade, whichever is lower.

I will ask the current Planning Director to explain the policy rationale for this bill when we get there, but before we begin our deliberations I will now accept public testimony. Without objections the Committee will now accept public testimony on PC-44. Seeing no objections, we'll proceed. We have received a number of requests to testify this morning, and we would like to thank those of you who have come to testify this morning, and we're anxious to hear your testimony. Our first testifier this morning is Ron Leinweber and he will be followed by Adrienne Owens. If you'd please come forward, sir. And if I've fractured your name, I apologize.

***...BEGIN PUBLIC TESTIMONY...***

MR. LEINWEBER: No, actually you did it just right.

CHAIR BAISA: Good morning.

MR. LEINWEBER: My name is Ron Leinweber. I'm a resident of Maui Lani, and I'm here to ask you to not approve the amendment to PC-44. I assume that one of the reasons that

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this ordinance was enacted originally was probably because they wanted to protect views, but also probably such things as drainage, air flow, and visual impacts were included in the decision to originally create this ordinance. For some reason, which is completely beyond the comprehension of the general public, the County seems to be committed to allowing Maui Lani to have a free reign to develop their, their, at their whim, break the law, be immune to enforcement of building codes, and do whatever it takes to make a profit regardless of the consequences to the adjoining public.

They, across from the new school they have put in a retaining wall and filled that in, and unless this ordinance is changed they will not be able to build homes on that property. So I assume that's one of the reasons that you're considering making this change and also the litigation going on with the local residents at this time. They take their profits, go back to Oahu, and we have to live with the consequences of the things that they've done. And I could go on and on as to why this ordinance should not be, this amendment should not be approved. What I would ask you to do is show some commitment to the residents, go out to a property on Palama Street, go out and see what it looks like to walk in their backyard, look back at this wall 15 feet high, five feet of dirt on top of that, and a six foot fence, and imagine and look at pictures of what it was like when that was a 20 foot deep gully.

Imagine what it's been like for the residents to put up with two and a half years and 5,000 truckloads of dirt being compacted on this property, the, the dirt, and the compaction, and the, the damage that's been caused. And then ask yourself one thing, if that was your property would you approve this amendment? Who's going to want to buy your home after all this is done? Those homes over there and the drainage, we've been talking about the drainage for two and a half years now, and I'm sure that you're going to see some pictures on some of the drainage problems we've had. We haven't had any big rains yet. Where all this water used to drain into, instead of a 20 foot deep gully it's now a hill.

So this is some of the reasons that I ask that you do not approve this amendment. I don't understand, again, why Maui Lani is so different than anyone else. All the other contractors and builders on Maui you make adhere to these laws, and this one time the County has chosen to go around the law and allow the developer to go ahead with the projects which in turn brought the litigation that the residents have against the County now. So, again, since this isn't in your backyard maybe you don't care, but we do. It's time to break the developer's ties and the favoritism toward them and do what is pono. Thank you.

**CHAIR BAISA:** Thank you very much. Members, questions for our testifier? By the way the Chair would like to note the presence of non-voting Member of our Committee Michelle Anderson. Good morning, Ms. Anderson.

**COUNCILMEMBER ANDERSON:** Good morning. Thank you.

**CHAIR BAISA:** Did you have a question for the testifier?

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COUNCILMEMBER ANDERSON: Yeah.

CHAIR BAISA: Mr. Leinweber, if you could please hold on. Go ahead, Ms. Anderson.

COUNCILMEMBER ANDERSON: So, Mr. Leinweber, thank you for being here. You feel that this amendment would adversely impact the residents along Palama Street --

MR. LEINWEBER: I think it adversely...

COUNCILMEMBER ANDERSON: --since the damage is already done?

MR. LEINWEBER: I think it adversely affects everybody in Maui County because there are other, several other developments which have allowed excess fill to be put on the properties which also leaves the County open to more lawsuits for that. I realize that there's a lot of problems for the County because the, the, if they enforce this ordinance, there are a lot of lots that are unbuildable, which means that people can come back and sue the County for allowing those to be developed that way in the first place. But that's something that the County got started, and they're going to have to clean up the mess. And I don't think that changing the law to allow a mistake that was made on the County's part is the correct way to do it, because there's a reason this law was passed. And if we amend it, which virtually does away with this ordinance, this amendment just negates this ordinance altogether. So I feel it's detrimental to the people of Maui County to allow this amendment to take place.

COUNCILMEMBER ANDERSON: Okay. Thank you.

CHAIR BAISA: Any additional questions? If not, Mr. Leinweber, thank you very much for coming. Our next testifier is Adrienne Owens, and Ms. Owens will be followed by Annette Heu.

MS. OWENS: Good morning. My name is Adrienne Owens. I live at 366 Palama Drive. And I am totally against this ordinance passing changing it to not say original, from the original height. What we've gone through in the last two years has been unbelievable. In our homes, our homes are shaking, things are falling, cracks are appearing in the walls and the floors. Is this what you want to do to other people as well? I mean it's bad enough that we had to endure this two years of, of shaking which I practically lost my mind over, and you want to impose this on more people? I just can't believe that you would do that. Is there anybody here that cares about the people of Maui and not rich developers?

Here's a picture of what's behind my house, if I may. Can all you see this? Or you can pass it around.

CHAIR BAISA: David, if you could please circulate the picture.

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MS. OWENS: My wall ends here, that's six feet. They went up all the way to here, and then all the way up here. How can I sell my home? I used to have views of the West Maui Mountains. I can stand on my tiptoes on my roof, and I can't see anything anymore. I also have over here, there's a back door. I have no air circulating. There's no air circulating whatsoever, and since they put up this white privacy fence which, by the way, is not totally put together, when the wind blows it makes this ee, ee noise. It, it bounces all the heat back into my house. Who would want to buy my house?

CHAIR BAISA: Ma'am, if you'd like us to circulate that, if you'll give it to Mr. Raatz, he'll be happy to take care of that.

MS. OWENS: Thank you.

CHAIR BAISA: Thank you.

MS. OWENS: The other thing that's wrong with Maui Lani is that even though they had everything signed off by a company called Unemori, they did not follow any of the guidelines or, or stipulations that was set out for this, this property. I've read them. I can tell you that one of the things that you cannot have in the fill is any rocks more than three feet...

COUNCILMEMBER ANDERSON: Inches.

MS. OWENS: Three inches. Excuse me, thank you very much. Here's a picture I took. This is my hand, this is a, this is a rock. This is just one of many, and I'm sure that now that it's rained you should go up there and check it out because that's when it comes out. I can remember the day that they were skimming all the big rocks off the top, and I heard them talking saying, well, we're never going to be able to pass this unless we get rid of these things. So what they did is they skimmed off the ones that were on the top, pounded everything into the ground, and left. Well, every time it rains they come out again and this came after a rain. So if you'd like to also show this around.

Another report that was really specific kept saying all the way through it, in bold at the top of the page, this is only valid if Maui Lani uses fill from the Maui Lani area. That wasn't done. Why are we rewarding a company who has not given any thought to anything they do other than get the dirt up high and sell it for big bucks because they're going to be higher than everybody else? And one thing that I would personally like to know is when the developer gets out of this situation, if, you know, homes are put on it or whatever is going to happen, who do we go to if we have problems? Do we sue Unemori? Do we sue the County? Who are we going to sue when that wall falls down? There's no rebar, there's no concrete, and it is over 20 feet high. That's all I've got to say, thank you.

CHAIR BAISA: Thank you very much for your testimony. Members, questions for the testifier? Ms. Anderson.

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COUNCILMEMBER ANDERSON: Thank you, Chair. You said that they didn't use the sand from Maui Lani that they were supposed to for the fill.

MS. OWENS: Correct.

COUNCILMEMBER ANDERSON: What did they use?

MS. OWENS: Well, they started off with mill mud, which is not supposed to be on the bottom or anywhere for all that matters, but because it's not stable, it stays mushy. So that's, that's what the wall is sitting on.

COUNCILMEMBER ANDERSON: Okay. Thank you.

MS. OWENS: You're very welcome.

CHAIR BAISA: Any other questions for our testifier? If not, thank you very much for being here.

MS. OWENS: Thank you. I appreciate the opportunity.

CHAIR BAISA: Our next testifier is Annette Heu, and she will be followed by Clare Apana.

MS. HEU: Good morning --

CHAIR BAISA: Good morning.

MS. HEU: --everybody, my name is Annette Heu, and I speak for myself. The amendment before us today is presented as saying, and I will read it so you can hear it. This is a bill to establish the finish grade as a point from which structural height shall be measured within projects that have received site-plan approval in association with a Special Management Area Permit, Project District Phase II approval, or Planned Development approval. I read it so you can hear it, and I brought those pictures so you can see it.

And if you take a look at those pictures, you will see what our backyard started with, and you will see what we ended up with today. So all of this, this whole process is about doing this again because this is going to happen again. And we live on Maui, and we will continue to live on Maui, and our children will live here, and I'm not leaving that for my kids going out saying this is okay, because it's not okay. And I going back to this because my emotion is starting to take over me. Before considering this action or any other, think of the consequences for people like us. This neighborhood of Palama Drive, this is what Special Management Permits got us. This is what it got us. Legislative action such as these will allow certain developers the ability to do all sorts of manipulation to the natural lay of the land.

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If you act on this amendment today, you will be approving, you will be saying it's okay because this is your chance. It's your chance to say it's not okay. We not going do this to Maui. Our Planning Department takes the stand that the definition they attempt to provide will resolve a difficult situation. For who? For who? Not for us. Not for my kids. Not for my grandparents. Take a good look at these photos. This amendment doesn't resolve this situation for Maui. It's just another proof that this is not about us, we the people of Maui County. This is about the Maui County Development Plan and the ability to acquire certain privileges, plain and simple.

I'm sure the voting Members of this Planning Committee as well as Mr. Hunt would find this amendment to be a real problem if they or their parents, grandparents, children lived on Palama Drive. Don't use Corp. Counsel as an excuse when you vote today. Provide the vote you spoke about when you asked the people of Maui County to vote for you because you care. When the water comes will any of you face the financial repercussions? What good is affordable housing if other people will suffer for it? Do you really think lawsuits are the answer? Personally, I can tell you it's not. Our former Mayor abused his power by approving this illegal action, maneuvering through loopholes.

CHAIR BAISA: Ms. Heu, could you please wrap it up?

MS. HEU: I will.

CHAIR BAISA: I'm sorry.

MS. HEU: I will.

CHAIR BAISA: Thank you.

MS. HEU: Please don't allow this situation to continue by providing special legislative actions to certain developers. Have them work with the lay of the land. As an area currently seeking approval has been molded and manipulated, you allow sand mining, and then you call it grading. You call it a special use. Well, your special use is allowing pre-contact burials to be disinterred. Special Use Permit. I'm done.

CHAIR BAISA: Hang on a second. Members, any questions for our testifier? If not, thank you very much.

MS. HEU: Thank you. Thank you, really.

CHAIR BAISA: Our next testifier is Clare Apana and Ms. Apana will be followed by Charlie Jencks.

MS. APANA: Good morning. Sorry. I have written testimony from a neighbor on Nakoa Drive. . . .*(knocks cover off of mic)*. . . I'm sorry.

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CHAIR BAISA: Now you got our attention. If you could start, please. Thank you.

MS. APANA: Honorable Chair ...*(laughter)*... Gladys Baisa, and Members of the Maui County Planning Committee, and Ms. Anderson, I am testifying in opposition to PC-44. Every day I pass Nako Drive where Sand Hills Estates rose up high enough out of the trough of a sand dune to build their new houses in the view plane of the older neighborhood. I consider myself lucky to live one block up on Halenani Drive in Sand Hills where each home has a unique place on the hill in the sand dune. My neighborhood was built with the lay of the land. Each neighbor has a house forward, back, up, down. We went with the land, and it is a beautiful neighborhood. I have a little bit of a view and if my neighbor directly down the hill from me decided to fill his yard 15 feet, and then build a 30 foot high house I'd be looking at his back door, and my view would be gone.

When I read this proposed ordinance to amend the height I was filled with questions. I'm still filled with questions. I hope you can answer these. 1) Who does this amendment benefit? 2) Are there any specific projects in existence or in the future who will benefit from this, this amendment? If passed, I'm assuming this will be retroactive to take care of the projects that have gone wrong. And I wonder if this is the way to solve the outcome for these problems. My mom said, you take your lumps. You do it, you take your lumps, and I think that's what should happen here. Would this justify making these changes? What is the criteria to establish finish grade? Can you fill 100 feet, and then say, I'm finished, now let's put my house on top? Does that allow, is that allowed? How much can the original grade be changed with a Phase I permit or a Special Use Permit to arrive at finish grade? In this ordinance, can you limit the amount of change to the original grade that is allowed by this ordinance? I think that's probably where the Planning Department should have brought forth legislation. How much can you change that grade?

I am really afraid of something that I heard when I was testifying for the VMX. Mr. Hirano said, there is a possibility, this is on August 12<sup>th</sup> of this year. I, there's a possibility of a legislative solution to look at the heights or to clarify the determination of heights. And that was months ago. I looked to see if the ordinance was changing, something was happening. Is this it? Why are we being told that this is it? And how come the Planning Department's bringing this forth?

Okay. I, I really believe in this process. I believe that you want to hear what we have to say, and I don't think this is at all clear about the implications and what is going on here. When you can, if you can come back and tell us what are the parameters, what are the criteria, what are we really looking at in an open manner, and then let us have a chance to say something. I feel like we're, we've got the wool over our faces somehow. This, this is not clear, this is not well written. I know you got a legal staff. I mean there are so many loose ends here, and I really worry because I live in Sand Hills. There is an empty lot in Maui Lani right, Project District right below us. Now can they fill it all the way up, and then build on top of it, and ruin the whole look of our old neighborhood? And it's

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our old neighborhoods that have been suffering with the change in the way that the grade is made, the lay of the land.

CHAIR BAISA: Ms. Apana, could you please wrap it up?

MS. APANA: Yes, I can. Thank you. So I would ask for a chance to be able to testify again when it's cleared up and this is, the issues are really clear, and what we're voting on, and what we're talking about is clear. Thank you very, very much.

CHAIR BAISA: Thank you. Members, questions for our testifier? If not, Ms. Apana, thank you for coming.

MS. APANA: I have also pictures.

CHAIR BAISA: If you'd leave those with Staff, they'll circulate them.

MS. APANA: Okay. These are pictures. . .

CHAIR BAISA: Ah. . .

MS. APANA: Oh, can I just tell them because I've. . .

CHAIR BAISA: Very quickly, please.

MS. APANA: These are pictures of the current VMX project, and we're looking at another wall like Palama.

CHAIR BAISA: Thank you very much. Any questions? None.

COUNCILMEMBER ANDERSON: Just one quick question.

CHAIR BAISA: Yes, Ms. Anderson.

COUNCILMEMBER ANDERSON: Where is this VMX project?

MS. APANA: On Waiale in the, within the Maui Lani Project District.

COUNCILMEMBER ANDERSON: Okay. Thank you.

CHAIR BAISA: Members, any more? If not, thank you again.

MS. APANA: Thank you.

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CHAIR BAISA: Our next testifier and the last person who has signed up to speak this morning to testify is Mr. Charles Jencks. If there is anyone else in the gallery who would like to testify, this is your last invitation. All right, Mr. Jencks.

MR. JENCKS: Good morning, Madam Chair and Members of the Committee.

CHAIR BAISA: Good morning.

MR. JENCKS: My name is Charlie Jencks. I'm the owner's representative for Honua'ula Partners, LLC. I'm here today to testify in favor of this, this modifications of the definition of building height for a couple of reasons. When I was the Director of Public Works, the current definition of building height was, was adopted, and it actually worked fairly well for a number of years. But I, but I will tell you that when we got into larger projects, like a project district where a planned development or a project in the SMA district it was, there were always discussion about how you would define building height because typically you would have fill activity or cut activity.

I think this modification does a good thing in that it provides for more public scrutiny and review of the establishment of finish grade through the project district process, or the planned development, or SMA because you end up with a public hearing in front of the Planning Commission. The Planning Department can provide some analysis on a site plan, on the grading plan which they require, and then the public has a chance, a more formalized opportunity to comment and review those plans, and, and to comment on the relationship between the new project and existing property. So in that sense I, I would say that this is a good modification. I would support it. The project supports it.

Project districts, many of them, I know speaking for Honua'ula, we have specific conditions in the zoning that relate to the modification of the land form and require us to minimize that, if at all possible. This amendment actually helps everyone understand clearly what the assumptions will be going in, and it also helps everyone understand inside the project and outside the project how the project will relate to adjacent properties. So we would support this. It provides for greater public scrutiny and, and, review. I'll entertain any questions.

CHAIR BAISA: Members, questions for our testifier? Ms. Anderson.

COUNCILMEMBER ANDERSON: Mr. Jencks, you say that this amendment provides for greater public scrutiny because it would be reviewed by the Planning Commission, but really what it does is it changes the definition of height from measuring at natural or finish grade, whichever is lower, to measuring it at finish grade.

So if those of you in the building community were following the current definition for building height, there would be no need for public scrutiny because you would have to adhere . . . *(change tape, start 1B)*. . . to building heights at natural or finished grade, which would mean you would be limited by the amount of fill you could put in in order

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to meet your building height requirement. So I don't see how this is an improvement just because it gets scrutiny by the Planning Commission. Basically, what it says is that you can use finish grade to determine height if the Planning Commission allows you to do that. Now, they're not an elected body like this Council is who sets public policy, and the current building height restrictions are set by this body and have been in place for many years as a County policy. So why do you think that this is a better way? Just so that you can have the flexibility to put in fill at your discretion?

MR. JENCKS: No, I think, I think I was pretty clear. The reason why we would support this is that when we come in with a grading plan for a Phase II approval for our project, for Honua'ula, we have to represent to the Department of Planning exactly what we're going to do with grades keeping in mind I have a condition. In the zoning it says I have to minimize the land form wherever possible. So for my project, number one, I have to minimize the land alteration on the project. I have to come in and submit to the Department of Planning a detailed grading program. They will then evaluate that in relationship to Maui Meadows, for example, and decide your finish grade is really too high or your finish grade looks like it's okay. It's not going to affect these views. There will be more dialogue.

In that sense, that's why we, there's more dialogue, more review. When Mr. Hunt presents the Phase II to the Planning Commission, they'll review that in detail. So there's more discussion relative to the land form. That's why I think this, this goes a step farther.

COUNCILMEMBER ANDERSON: Yeah, well, the grading ordinance already requires that and if those parameters had been followed for Maui Lani, the people on Palama Drive wouldn't be facing the problems, the lifetime problems that they've got in front of them right now. Thank you, Madam Chair.

CHAIR BAISA: Thank you, Ms. Anderson. Members, any additional questions for our testifier? If not, Mr. Jencks, thank you for being here. We have one last person signed up to testify this morning and that's Joyclynn Costa. Ms. Costa. If there's anyone else, would you please come forward and sign up? Good morning.

MS. COSTA: Good morning. My name is Joyclynn Costa, and I thank you for this opportunity to speak. I don't live in Kahului. I'm blessed to live out in Haiku where it's still country for however much longer it's going to be. But I know Annette Heu, and I've been on her street, and I've seen the devastation there. I've seen the emotional stress and devastation as well for the human factor. But I think what this is all about is accountability, total accountability. You're here deciding for someone's well being and ordinances are put in place for a reason.

Now, Mr. Jencks came up here, and he was very eloquent in what he said, but the fact of the matter is once it gets to Planning the developers do have wiggle room now 'cause you've already set certain language that they can say, well, we, we met the criteria so we really can move forward. And they can put on a little bit more recommendations, but

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pretty much they then push everything through. I've sat in several different meetings with this project, Maui Lani, and when it comes to our, our burials, well, we didn't find it in our inventory so it's going to be called an inadvertence so we can move it or just leave it, build a road over it.

What happens here will determine what happens down the road. Down the road doesn't determine what end result is. And so, when the end result happens, like it's already done, maybe you guys should all get in your car and go drive down there today, like this minute, and go see exactly what is happening down at that wall. Or is it something everybody wants to put a blind eye to? Let's not go look. We kind of know, but let's not go look. So what do they do, they bring you pictures. That's the best they can do. They can't pick that wall up and bring it here in front of your Chambers.

Accountability, people. When does it end the anguish of the people and when does accountability begin? Why do they need to go through lawsuits? Why should you all be indemnified? You have choices. You made those choices. You chose to make these important choices. Be accountable for your choices, all of you. Thank you.

CHAIR BAISA: Thank you, Ms. Castro[sic]. Members, questions for Ms. Castro [sic].

MS. COSTA: Ms. Costa.

CHAIR BAISA: I'm sorry, Costa. Sorry. I was hoping you were Castro, that makes you a relative. Maybe that's why ...(laughter)... maybe that's what came to mind. Any questions for our testifier? If not, that's it. Is there anyone else out there who'd like to testify? Would you come forward please? People in the gallery, if you'd like to testify, please feel free to do so. That's what this process is all about. Ma'am, what we'll have you do is testify, and you can sign your paperwork after you testify.

MS. CABEBE: I wasn't sure...

CHAIR BAISA: If you could raise the mic, please, a little bit? We go from very tall to not so tall.

MS. CABEBE: I wasn't sure I was going to be able to make it today. I was supposed to work, but I was able to get off. And this is a really emotional time for me because, first of all, we have a lot in Sand Hills Estate, and we bought this in 2005, and my husband and I had planned to either build or...

CHAIR BAISA: Ma'am, would you state your name for the record please?

MS. CABEBE: Oh, I'm sorry.

CHAIR BAISA: I'm sorry.

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MS. CABEBE: I'm Cheryl Cabebe.

CHAIR BAISA: Thank you.

MS. CABEBE: And we purchased this lot in 2005, like I said, and I know there was, the first lawsuit came through, and they were stopped, they stopped, like, the permits and everything, and we were leery of, like, what was going to be happening. And the idea of having 38 feet of fill right now is kind of scary, and we have not been able to sell our lot. The people that we have disclosed information to in regards to this they've, like, gone away because it's..., I'm trying to get my thoughts together. It's, it's just caused serious financial difficulties with us. We are in this lot for \$167,000. I just want to know where our protection is if they deem this property unbuildable. I mean as far as, you know, us being able to sell it or to, to try to build on it? I mean where, where will we be standing in this? I'm, I'm, I'm very concerned.

I mean we're, we're almost ready right now to go into foreclosure with this lot, and we won't be able to refinance our home that we're living in. We have another house in Maui Lani, and it's, it's going to really affect our credit, and we can't keep on making payments, and we have not been able to sell this lot. And I think it's from all the negative publicity and, you know, just having all this being allowed to go on, and it seems like there's no end to it. And I'm sorry I'm not composed. I'm not really...

CHAIR BAISA: Its okay, ma'am, don't apologize. It's fine.

MS. CABEBE: Basically I, I think I've said everything I needed to say.

CHAIR BAISA: Thank you very much. Members, any question for the...

MS. CABEBE: I'm sorry, I have one more thing.

CHAIR BAISA: Sure. Sure.

MS. CABEBE: In 2007, I had a prospective buyer that told me that I had a hole on our lot. And when I went, I wish I had the pictures. I had them blown up, and I showed Madelyn D'Enbeau, and she is familiar with this, but half of the side of our hill went down onto the golf course. The developer never called us. They had engineers go and fix it. It took them three months to do this, and then during that time we were not able to even show the lot because it was just this huge mass of sand that came down the hill onto the golf course. It looked like a sand dune. And that also affected us being able to sell the lot. So, I mean, it's affecting everybody, you know. It's, it's not a good thing. This, these fills are wrong. Thank you.

CHAIR BAISA: Thank you for coming. Hang on please. First, ma'am, if you could hold on we have a question for you, and before you leave the floor if you could please fill out a little form here so we have your information. Okay, Ms. Anderson.

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COUNCILMEMBER ANDERSON: Thank you, Madam Chair. So, Ms. Cabebe, are you saying that the fill that was put onto your property fell down?

MS. CABEBE: The side, it's called like the buffer area, but it came down...yes, it came down the hill, and it, it happened because of a broken irrigation line from the developer. They never called us and even told us it was there. And the person that was looking at it could have fallen in the hole. I mean he could have been hurt seriously. And they were aware of it, and they never even called me.

COUNCILMEMBER ANDERSON: So basically the fill wasn't stable that was on your lot?

MS. CABEBE: No. No.

COUNCILMEMBER ANDERSON: Okay. Thank you.

CHAIR BAISA: Thank you. You can complete your form. Thank you very much. Members, any other questions? Is there anyone else in the audience who would like to testify this morning? Seeing none, Members, without objections the Chair would like to close public testimony for this morning.

COUNCILMEMBER MEDEIROS: No objections.

**...END OF PUBLIC TESTIMONY...**

CHAIR BAISA: Thank you very much. We will close public testimony.

**ITEM NO. 44    DEFINITION OF HEIGHT (C.C. No. 06-104)**

CHAIR BAISA: Members, today we have one item on our agenda, and we will ask now if our Planning Director, Mr. Hunt, would provide an overview of PC-44. Mr. Hunt.

MR. HUNT: Thank you, Chair. I think it's important to give a little background on how we got here.

CHAIR BAISA: That might be very helpful.

MR. HUNT: The bill that's before you was originally transmitted back in March of 2006 under the previous Administration and the catalyst for that bill, as I understand it, was to address the Maui Lani situation along Palama Drive.

Maui Lani received a Phase II Project District approval back in 1990, and subsequent to that in 1991, the County revised the height ordinance to read as it is now. In 2004, Maui

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Lani received a Phase III approval. Soon after that, individual building permits were applied for, but our Zoning and Enforcement Division determined that they couldn't approve those building permits because they exceeded the height limit per the 1991 revision to the height ordinance. Mayor Arakawa then overruled the Zoning and Enforcement Division and directed ZAED to approve these permits based on a determination that the Phase II approval for Maui Lani had occurred prior to the height ordinance. And as I understand it, lawsuits then were filed and that's really why we're here today. And the Corporation Counsel can speak to the lawsuits much better than me.

In reviewing the bill that's before you, again, it was transmitted a long time ago. I, I picked it up and, and started discussing it with staff including Public Works, and it became apparent that the Maui Lani situation is not the only situation out there. There's a number of other projects that have been approved with mass grading that effectively render the building lots unbuildable. And based on that we're suggesting additional revisions to the bill, and we can go over that shortly.

As, as revised, the bill would allow for mass grading for projects that require public hearings, and we're going to suggest we follow that suit that if there's public hearings involved, then mass grading should be allowed or could be allowed given the scrutiny of the public hearing, giving the notification of public hearings involved, then there would be an opportunity to prevent situations like along Palama Drive in the future.

In researching this issue, I drove down Palama Drive and, and the road that's next to it. And I got to admit I was shocked. I have complete sympathy for the people who have come before you today and have expressed their outrage at that situation. But we didn't create this situation. We're here to try and find a solution. I, I've tried to avoid this situation like the plague, frankly, but at this point we don't have any choice. The Planning Department has been pulled in, because the bill before you would amend the height ordinance, the definition of height, which is found under Title 19, which the Planning Department administers.

So, again, we're here to find a solution, to clean up a mess that we didn't create. Nobody in this room created it really, but we're between the rock and the hard place. You got impacts to the residents near Palama Drive, legitimate impacts, heart-wrenching stories. If you drive down there and take a look at it, it's hard to understand. At the same time, we've had owners of lots that have been approved that they can't build on, because the grading is so high it doesn't allow them to build on it. We've also got situations where mass grading is an accepted process in more urban dense developments. It's more economically feasible. You've heard the developers talk about that. So, again, it's not an easy situation. It seems like the Planning Department is being vilified again because we're trying to clean up a mess that the previous Administration left for us. Now, having said all that and gotten that off my chest we're here to try and help you guys come, come to a solution. We're here to help. Thank you.

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CHAIR BAISA: Thank you very much, Director Hunt. Members, questions for Director Hunt?  
Member Molina.

COUNCILMEMBER MOLINA: Thank you, Madam Chair. Not, not so much a question for the  
Planning Director, but more of a procedural question here today --

CHAIR BAISA: Yes.

COUNCILMEMBER MOLINA: --because of what's listed on our agenda, because we're  
talking about a bill, and we've heard testimony relating to a specific project. I want to  
make sure that we proceed in the appropriate manner so we're not caught with any  
Sunshine Law issues. And there's also, you know, and I appreciate the, the Planning  
Director adding a little bit more clarity as to why we're here. So, and I, I make, it also  
mentions on the agenda that there's a, there's the option for executive session as well  
because we have a lawsuit on the County regarding a specific project.

So I just want to make sure that our Q & A for the Department and our other resource  
personnel is appropriate, so we don't get caught in any type of, you know, situation that  
may not be the intention here today. So I need your guidance, Madam Chair or  
Corporation Counsel, so we can proceed in the appropriate fashion.

CHAIR BAISA: Thank you very much. It's the Chair's intent that we will allow questions to  
the Planning Department, and then we will ask the Department of Corp. Counsel for  
comments. Now, if Corp. Counsel recommends an executive meeting then, of course, the  
Chair will entertain a motion to do that to handle anything that needs to be handled in that  
manner. I have also, being that we have several attorneys available today, I have asked  
them, including Mr. Moto, that if there is any point in the discussion where we need legal  
advice that they will notify Chair, and we'll proceed carefully. Thank you.

COUNCILMEMBER MOLINA: Okay. Thank you. And, again, I just bring that up because  
there's no mention of any specific project on the agenda.

CHAIR BAISA: That's . . .

COUNCILMEMBER MOLINA: So I want to make sure we're okay with the Sunshine Law.  
Thank you.

CHAIR BAISA: Thank you, Mr., Member Molina. Member Johnson.

VICE-CHAIR JOHNSON: Yes, and this is a general question not specific to Maui Lani or any  
particular development, but with the ordinance that we have on the books, as it is now, I  
take a look around the island. I, I know we've had Maui Meadows, we've had, just take a  
drive down the area here, Mr. Carr's project, and some of the other projects and that's  
under the existing ordinance which says it shall be from natural grade; is that correct?

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CHAIR BAISA: Mr. Hunt.

MR. HUNT: The building ordinance or the ordinance that regulates height isn't tied to the grading ordinance. So people can come in and get fill and get a grading permit, and it can result in so much fill that then you can't put a house on top or a very small house on top of it. So that's, that's one of the issues that we're dealing with.

VICE-CHAIR JOHNSON: Well, how does this ordinance help prevent things like the great wall of Kahana or the great wall of Honoapiilani Highway where it totally obliterates views? It's obscene, you know, that this ever happened, but I want to know how is this going to make it better? How will it make it better for the people who we want to try and help? As Mr. Jencks is saying, oh, well, it will open the public process, but you know as well as I do how many times...these people are working. What if they miss a hearing? What if they miss a notice in the paper, and then they're faced with, you know, more, more problems? Just explain to me how this is going to make me feel good, that I'm doing a good job for the people of Maui?

MR. HUNT: The, the intent would be that through the public hearing process there'd be a lot of eyes and opportunities. I agree with you just because you notice the neighbors they may not be aware of it, but the applicant would come before the Planning Commission. There would be, the Planning Commission would have an opportunity to discuss them. I, we, internally we've talked as a Department. We kind of have a checklist of issues that we address on every staff report that goes to the Planning Commission and, and perhaps mass grading would be added to that so that it just becomes part of the routine, part of our, our normal discussion. Just like traffic. You, you wouldn't even think of taking a major project to the Planning Commission without discussing traffic, and I think we need to add mass grading to that, to that discussion.

And so, it's not a catchall. The alternative, again, for you folks is, is you could not allow mass grading, but then you have, you've got, first of all, you've got the pre-existing conditions out there that we need to deal with one way or another, and then we need to determine, as a policy, what are we going to do going into the future. Are we going to allow mass grading or not? And you've heard the development community say that there's arguments in favor of it. Personally and professionally, I'm not a big fan of mass grading, but I think in some instances it does make sense in tighter urban densities where instead of just carving out individual building lots when the building lots are right next to each other, why don't you just do the whole thing.

VICE-CHAIR JOHNSON: Given what you've said would, you know, situations like we see that, you know, are highly visible in really beautiful view plane areas, not all of them in special management areas, but how do you believe that this ordinance will facilitate sensitive development, sensitive to the neighboring properties instead of people having to look at a fence or a giant wall, having no air circulation? What specifically is within this bill or I guess would you even suggest to change or modify the bill to expand into areas so that this wouldn't happen?

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MR. HUNT: And I don't think the bill does address that. All the bill is saying is that, how, how we measure heights. So buildings could be built on top of mass grading. Now, we could come back later with a bill addressing grading permits and, and that's part of the research that I've done in talking to planners and the Public Work's folks. Is, you know, perhaps we need to address the grading issue on the, on this whole subject.

VICE-CHAIR JOHNSON: Yeah, and, and, Madam Chair, I think that that is the crux of the problem. And what you begin with, and your sensitivity to the surrounding areas to me is a big problem. I even look at areas like Launiupoko where now on the top of these hills you have people flattening, you know, the top of a hill and bringing in massive fill. And it just, I don't know, it's a problem for me both on mass grading, but also site specific where you're looking at a particular area that just is destroying our environment.

So I think, for me anyway, Madam Chair, the bill does not, it doesn't go far enough because it doesn't address some of the core issues that are being raised by the community. And unless I see those protections in a specific piece of legislation I, I don't feel comfortable moving forward with this. Thank you.

CHAIR BAISA: Thank you, Member Johnson. Member Hokama.

COUNCILMEMBER HOKAMA: Thank you. At this time, you just wish us to present questions to the Planning Department?

CHAIR BAISA: Yes, please.

COUNCILMEMBER HOKAMA: Okay. Thank you. Obviously, from the parameters of the proposed ordinance, Mr. Director, this, this is very limited. 'Cause these are for, as I understand it, projects that have received Phase II approvals on the Project Districts or Planned Unit Developments that has a Special Management Area Permit. So it's a limited, it's only for certain properties or projects currently in that status, Mr. Director?

MR. HUNT: Correct. The, the intent is those projects all go through a public hearing process.

COUNCILMEMBER HOKAMA: Including Phase III? Does Phase III require a public hearing? No, right?

MR. HUNT: The Phase II does.

COUNCILMEMBER HOKAMA: But isn't this about all, all that have passed Phase II approvals, already have received Phase II approval? So they're just the remaining third step for planned unit and project districts are just an administrative approval which is basically you, the Director of the Department?

MR. ALUETA: If I may, Madam Chair, respond?

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CHAIR BAISA: Yes, please, Mr. Alueta.

MR. ALUETA: The way the initial bill that you have, at least the 2006 version that's in your binder, it would only cover, again, the, specifically to project districts Phase II approvals Planned Unit Development's Phase II approval and Special Management Area major permits all of which require public hearing and all of which have site plan as well as grade, final grade, finish grading and elevation review under the current procedures. How it works going backwards I'm not, I'm not sure, but for projects that currently come in during an SMA major or doing a step two approval, that's when you get your review of individual lots, and you get a more definitive grade, grading plan.

During, as you know, during Phase I or step one approval which is done by the Council, you have very preliminary plans and just. . .

COUNCILMEMBER HOKAMA: I just need to know what phase of the process is this directed for? Anything that has passed Phase II approval regarding project districts and planned unit developments? Is that, is that what the proposed ordinance? If it's not clear, I think we need to have it clarified, Chair.

CHAIR BAISA: Yes, thank you, Mr. Hokama. Planning Director, comment?

MR. HUNT: Could you repeat the question? I'm sorry I was...

COUNCILMEMBER HOKAMA: These are for projects that have already received Phase II approval as it regards to project districts and planned unit developments as well as projects that have already received site plan approval in SMA areas or regarding an SMA permit. These are the only projects that are being impacted by this proposal; is that correct?

MR. HUNT: Correct.

COUNCILMEMBER HOKAMA: So it's just for a limited, limited projects?

MR. HUNT: Correct. We are proposing, we've worked with Corporation Counsel on some further revisions to the 2006 ordinance, draft ordinance that's before you. So we would, if we get further down the road, we would discuss those with you.

COUNCILMEMBER HOKAMA: I, I bring, I bring this, for me a technical point and if memory serves me right, you know, regarding Lanai we're the templates. Project District I and II is Lanai, Koele and Manele, 1985. And if you look at those project districts and to those that have come after I would say Lanai did a good job. It's much more detailed. There's some flexibility, but not a whole lot that the consequent project districts have been able to receive. And so, for me I, I have a dilemma because for Lanai we have, again, many

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factors that are currently going on, but in, in general our community has supported the conditions, the parameters, the guidelines, and the standards that fit for Lanai.

My concern now with the projects that are basically, because of what's happening on Maui, and, again, on Lanai, you know, take this into account. We are developing in areas that had no other developments. Okay. So we're not going against an existing subdivision. We're not going against an infill type of project where there's a remaining lot and everything else has been developed. But with project districts that are adjacent to existing subdivisions, and, and we'll use Maui Lani and Sand Hill as the example, because of these issues that have been lingering I guess since 1991, since this current version of height, and it's interesting we had two definitions in the past; right, height and building height. There's obviously reasons why the County used two definitions, height and building height, and we may need to maybe reconsider those with this proposal or expand the proposal.

But my point is what has or why hasn't your Department, because of some of these issues regarding height definition, try and propose administrative rules that would require anyone to at least be able to present to you site plans in an earlier part of the process so that you can maybe have a better sense of height or whatever it be? Or maybe we need to structure Phase I approval more stricter and say we need to have specific parameters and this is all you've got regarding height. If you're next to an existing subdivision, you cannot create a, a fill that creates a slope of a certain degree. You know, maybe we can use the definition of what puts it into a conservation district. What is that 30 degree slope, 45 degree slope? Was that ever an option for the departments to try and use administrative rule procedure to create additional reviews in advance of having us to deal with this type of situation?

MR. HUNT: I, I think we could explore adopting administrative rules. Maybe that's part of the solution along with examining the grading ordinance. But the issue before you today is to try and craft some kind of measurement of height for certain situations, and we're trying to limit it to just projects that are going through a public review process.

COUNCILMEMBER HOKAMA: Well, as I read the minutes, and you know, actually I need to review it, the document, . . .(*change tape, start 2A*). . . but I think the Department at one time mentioned that this current definition allows areas to be developed that are less desirable if it didn't have the ability of mass grading and this type of height definition. Would you agree with that?

MR. HUNT: Desirable seems a qualitative adjective.

COUNCILMEMBER HOKAMA: But that's the term used in the minutes. I'm using what's in the minutes.

MR. HUNT: Again, professionally, I'm not a fan of mass grading. I, I think the better approach is to develop land in accord, develop projects in accordance with the land. In certain

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dense projects where the building sites are so close to each other that the undisturbed land in between would be a very small strip I can, I can then see, okay, it makes sense to just mass grade the whole project. So these types of projects would, in all likelihood, fall under one of these categories that the bill is addressing, either a project district, or planned development, or an SMA.

COUNCILMEMBER HOKAMA: You know, I don't know if it's just me, but I've noticed since we made the charter revision, and we transferred LUCA from Public Works to Planning, and we called it from LUCA, Land Use and Codes Administration to Development, we seem to have more problems than we, I can recall in the past. And maybe it's just the sign of a maturing community and the differences in development techniques, but gosh, I don't recall the County going through all these kind of problems in the past, yeah, Chair.

CHAIR BAISA: Well, like you say we are a maturing community.

COUNCILMEMBER HOKAMA: And we should be doing it better.

CHAIR BAISA: It doesn't necessarily, older doesn't mean better all the time. ...*(laughter)*... Members...

COUNCILMEMBER HOKAMA: One, one, one related question, please.

CHAIR BAISA: Sure.

COUNCILMEMBER HOKAMA: Would you know, Mr. Director, if your Department or Public Works in, in the review of this type of permits regarding fill and grading take into account adjacent property impacts prior to the approval or if, or is just the focus very technical and only site related? Are you able to share some comment on, on that question please?

MR. HUNT: The, the grading permits themselves are administered by Public Works, and I, I don't like to speak for other departments, but I have talked to them, and their approach is from an engineering perspective. As long as it meets health and safety they don't have any criteria on which to deny it. That's what their existing laws are. The Planning Department gets into more aesthetics and impacts to surrounding neighborhoods. And so, I think the burden would generally fall within the Planning Department to analyze impacts to the adjacent properties, and that's why we're suggesting that through this public hearing process that would be one of our topics on every, every discussion of these projects. What are the impacts to the neighbors? Is there, is there grading that's going to impact the neighbors?

COUNCILMEMBER HOKAMA: Should it also be part of the proposed ordinance that these are the impacts that need to be considered within the hearing process or prior approval process?

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MR. HUNT: Well, I, I, I think the whole issue of grading is worthy of a comprehensive review from the County. Because of some pending lawsuits I'm not sure we have that, that luxury at this moment. Don't get me wrong. I, I think we should look at grading.

COUNCILMEMBER HOKAMA: And, and one follow-up just so that, on, on this part of the grading and, and regarding to the height, Mr. Director, you know, the Code uses the term finish grade or natural grade. You know, I have my concerns and issues with, that we continue to use the term natural grade. Natural grade, what? Back in the 1700's when Kamehameha, natural grade as of 1959 at Statehood? Natural grade of when or what? You know, that's something we need to maybe provide more better clarity, or existing grade prior to actual new disturbal [*sic*] of the ground. You know, you got to submit a brand new topo and this is what is existing. Would it allow the departments and anyone else to provide comment as of the, regarding to the existing grade prior to the approval of permits.

MR. HUNT: That is, that is an issue that we discussed when I was researching this bill in the last couple months and as the gentleman from Public Works I was discussing it with, how do you measure natural grade out in the Maui Lani area where there, there's sand dunes that move with the wind over time? Issues like that. It's not an, it's not an easy situation.

I think what we're, what we're trying to do is, is say we've got, we've got an immediate issue here. You got a team of lawyers in front of you, that should tell you something. That we're trying to address a short-term issue that we need to address to some extent. I agree that we need to look at the height ordinance better, and look at grading, and look at the public hearing process on how it, how it impacts the neighbors so that we don't repeat a situation that is affecting the people who live along or near Palama Drive. That shouldn't happen again.

COUNCILMEMBER HOKAMA: So in your estimation, with that statement you just made, you truly believe that this proposed bill for an ordinance amendment would take care of that?

MR. HUNT: I think it's a step in the right direction. And, again, we've worked with Corp. Counsel, and if we continue on these discussions we'll hand out some further revisions, and in the long-term we can look at impacting or revising the grading ordinance. We can look at how we address these issues during the public review. But I think this is, this is a good first step.

COUNCILMEMBER HOKAMA: Conceptually, I don't disagree with you, Mr. Director, that we need to do steps or, or things that are planned out that make sense in a comprehensive manner. So stating that, does it make sense for us to ask the departments, including yours, why don't you give us a comprehensive proposal? So if we need to consider the grading portion as it relates to height, if we need to consider the fill portion as regards to height, or that we're going to continue to allow project districts and planning developments to utilize mass grading, maybe we need to tighten up the parameters and take away flexibility, certain flexibility. If that is the better planning approach for this

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County to move forward and improve what we expect from development, is it not something better that you give us the big picture and how each of the steps or components make, make it work instead of just doing one, and then next time I may have another community upset, because they circumvented it another way through the field permit or the grading permit, but we took care of height? You know, you still going to come before another Council Committee.

MR. HUNT: I agree with you that generally speaking a more comprehensive package of bills is a better approach. I guess given the immediate situation perhaps, again, as I said earlier we may not have that luxury. I would, I would suggest you talk to your Corporation Counsel.

COUNCILMEMBER HOKAMA: Okay. At the appropriate time, Chair. Thank you.

CHAIR BAISA: Members, that's exactly where the Chair is going. I would now like to ask Corporation Counsel to make their presentation.

COUNCILMEMBER ANDERSON: Madam Chair, could I please question the Planning Director?

CHAIR BAISA: Okay.

COUNCILMEMBER ANDERSON: That's why I'm here. I'm a Member too. Director Hunt, you said that you want the, that this bill is to help clean up a mess. You know, I don't see that at all. I think, I think it just complicates the mess and actually perpetuates the mess because, and I was, you know, I was very involved in developing the Soil and Erosion Control Ordinance, and so I'm very familiar with it. And I'm also very familiar with what happened at Maui Lani. And, you know, part of your historic presentation left out the fact that in order to do a mass grading, well, to do any grading beyond a certain small amount you have to get a grading permit. And the grading permit gets sent to the Planning Department for their review.

And the Planning Director at the time of this project in question actually told, in his review comments, told the developer that if he planned to put in, any amount of fill that he planned to put in would have to be deducted from his height of, of the structures he's going to build, because he would have to comply with the height restriction which causes buildings to be measured from--I'll wait until Joe's done so you can give me your attention--which requires that the height of the buildings be measured from existing or finish grade, whichever is lower. The developer didn't like that determination by the Planning Director and so he went to the Mayor who overrode and made an administrative decision which a judge found he hadn't the authority to do.

So by liberalizing the height definition you're only going to be causing more problems for more people. What the real problem is, is that people within the County are not following the County Code. Now, when you want to do a mass grading you have to do a

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soils, a soil engineer's report and that report is reviewed by Public Works. And, you know, if the Mayor had not overridden the decision of the Planning Director, Public Works could have told this guy that you can't put this amount of fill specifically in a natural drainage way.

CHAIR BAISA: Ms. Anderson...

COUNCILMEMBER ANDERSON: All right. I want to talk about the project. I'll talk about the legislation in general. The, the idea of a public hearing, first of all, I would like to see language in that requires more than a public hearing, but requires notification of surrounding homeowners, just like you do for an SMA permit, a mailed-out notice. You know, it's not enough to just put a notice in the paper. How are you going to know, you know? An SMA or a Phase II Project District hearing notice isn't going to tell people that there is going to be a request for excessive fill.

And, you know, measuring from natural grade is not all that difficult because when you, when you get a grading permit you have to submit a topographical map that shows the elevations every five feet. And so, the map is there to show you the natural grade so that when they come in and they do their grading, the folks in Public Works have something to measure by. To say, okay, well, now you've put, you know, 20 feet of fill here, five feet of fill here, depending on the original topography.

The Soil Ordinance is Chapter 20.08, and I just, you know, I don't think that you can be requesting a change in height definition, which is basically what you're doing here, without looking at the implications in the Soil Ordinance, because you're going to have to amend that too. Right now, there is no requirement for a public hearing for a mass grading of a project. And I would like to note, Members, that mass grading of a project, those of you who were around at the time and remember all the runoff into Maalaea Harbor, that was due to mass grading in violation of an SMA Permit condition that said you can only mass grade at certain times of the year when there isn't rain. They ignored that and ended up with fines from the State Department of Land and Natural Resources for damage done to the harbor and to boats in the harbor.

I would like to read, for the record, Chapter 20.08.100, in the grading ordinance. If the Director finds that the work as proposed by the applicant is likely to endanger any property or public way, he shall deny the grubbing or grading permit. Factors to be considered in determining probability of hazardous conditions shall include, but not be limited to, possible saturation of the ground by rains, earth movements, surface water runoff, subsurface conditions such as stratification of faulty *[sic]*--of faulty, this is misprinted, of faulty, of faulty, I'm going to read what it says--such as the stratification of faulting of rock, nature, and type of soil or rock. Failure of the Director to observe or recognize hazardous conditions or his failure to deny the grubbing or grading permit shall not relieve the owner or his agent from being responsible nor cause the County, or its officers or agents to be held responsible for the conditions or damages resulting therefrom.

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Then it says in 20.08.130, A grading permit shall not be issued for any cut, fill, or stockpiling involving quantities more than 500 cubic yards or for excavations or fills over 15 feet in vertical height, or for work being done in increments of 500 cubic yards or less that is part of a larger development unless the permittee shall first file a bond for the benefit of the County; provided, that if the proposed grading is to be performed under an approved subdivision plan and a subdivision bond has been filed, then the Director shall not require a bond for grading or stockpiling. I'm not going to read the rest of it. He can also deposit cash.

But what I'm saying here is that there's already protections in the Code. We have a very strong Soil and Erosion Control Ordinance that this body in its Public Works Committee spent months on. And, and this was adopted in 1998. And the problem is, is that people are not following the parameters in this Code, and then they come in and say, well, please give us break because we've got too much fill here, and we can't, we can't, we can't meet the height restrictions that are in place right now. And so, what are we going to do? We're going to bend over backwards and give them carte blanche and just say, well, you know, go ahead and, and get your approval from the Planning Commission in contradiction to the policy of this body and this County.

So those of you that have put in too much fill in order to get view planes for your, your buyers at the detriment of the existing community should just go in with your backhoes and take your fill back down to an acceptable level and the problem would be solved.

CHAIR BAISA: Thank you very much, Ms. Anderson. Members, it's time for our morning break. We will take our break and when we return we will be hearing from Corp. Counsel. The meeting is in recess until ten minutes to eleven. . . .(gavel). . .

**RECESS: 10:35 a.m.**

**RECONVENE: 10:54 a.m.**

CHAIR BAISA: . . .(gavel). . . The meeting of the Planning Committee will come back to order. And the Chair will call on Corporation Counsel, Deputy Corporation Counsel Ms. Madelyn D'Enbeau to begin. Ms. D'Enbeau.

MS. D'ENBEAU: Thank you very much, Madam Chair, Members of the Committee. I wanted to explain to you briefly the state of the litigation that you've heard referenced by the public testifiers. There was a previous litigation brought by the Heu family and several others about the situation on Palama Street. That was settled a couple of years ago. And there's, then a second litigation was filed which the judge ended up dividing it into two lawsuits and this, and I hope this isn't too confusing, but the initial lawsuit was about damage to, alleged damage to the property owners in the Palama Street area, and I think some of the people live in Maui Lani, Mr. Leinweber and others, that arose from, they alleged arose from dust, and compaction, and various parts of the, of the subdivision

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process in their neighborhood. The judge eventually divided the lawsuit into two parts and one part does not involve the County. The part where the community members are seeking recovery for the damages that they've, that they alleged to have suffered from the dust, the compaction, the trucks going by, I think one of the testifiers mentioned 500 truckloads or something to that effect, but that, that damage is being addressed in a separate lawsuit. The County is not a party to that lawsuit. So that's on, as far as I know that is ongoing and that's kind of a separate issue.

The County is a party to a lawsuit where the, the plaintiffs have asked the judge to enjoin the County from issuing any building permits that would result in a violation of the height ordinance as presently written, which as you know, the height is to be measured from the finish grade or the natural grade, whichever is lower. And that request is, is pending in Judge August's courtroom as we speak.

So just for your understanding there's a previous litigation that was settled, and, and there's the two ongoing litigations, one of which does not involve the County and that's for the damages from the dust, and the cracking, and the various things that people are alleging happened to their houses because of the construction process. And then the other litigation, the one that involves the County has the request by the plaintiffs to have the County enjoined from issuing any building permits in Maui Lani. It's, it's for the Maui Lani Project District. So it's the entire Maui Lani Project District. I believe there are about 1,200 lots there, but there isn't any request for an injunction beyond the Maui Lani Project District at this time.

And I do have other things that I think would be helpful to discuss, but they should be discussed in executive session given the ongoing litigation.

**CHAIR BAISA:** Thank you very much, Ms. D'Enbeau. Any additional comments from Corporation Counsel? Mr. Hopper, anything?

**MR. HOPPER:** There was a version that the Planning Director and the Department worked on as far as some amendments to the current version, because the current bill, it's been a while since it was transmitted. And in addition, there's probably a variety of options you have as far as this bill, how it would apply, who it would it apply to, and you've got some options there. Mr. Raatz has copies of perhaps some proposed amendments we could look at, at the bill. He could distribute that at this time. That may be, at your discretion, something you would want to consider. The documents are also available to members of the public.

**CHAIR BAISA:** Thank you very much. Any additional comments from Corp. Counsel? If not, Members, we have a recommendation from Corp. Counsel that we might want to go into an executive meeting. The Chair would entertain a motion to convene an executive meeting pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, to consult with legal counsel on questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County Council and the Committee.

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VICE-CHAIR JOHNSON: So moved.

COUNCILMEMBER MOLINA: Second.

CHAIR BAISA: Thank you very much. We have a motion and a second to go into executive session. Any discussion? Member Johnson.

VICE-CHAIR JOHNSON: And the purpose for going into executive session would be to discuss issues that we can't discuss due to ongoing litigation; is that correct?

MS. D'ENBEAU: That's correct.

VICE-CHAIR JOHNSON: Thank you.

CHAIR BAISA: Ms. Anderson.

COUNCILMEMBER ANDERSON: Madam Chair, I just want to clarify that we will not be discussing the amendments that are being proposed in executive session; is that correct?

CHAIR BAISA: That's correct.

COUNCILMEMBER ANDERSON: Thank you.

CHAIR BAISA: Any additional discussion? If not, all those in favor of the motion please say aye.

COUNCIL MEMBERS: Aye.

CHAIR BAISA: Opposed, no? Motion carries with six, well, I'm sorry, five ayes. Ms. Anderson is not a voting Member of the Committee.

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**VOTE:       AYES:   Councilmembers Hokama, Medeiros, and Molina, and Vice-Chair Johnson, and Chair Baisa.**

**NOES:       None.**

**ABSTAIN:   None.**

**ABSENT:    None.**

**EXC.:       None.**

**MOTION CARRIED.**

**ACTION:     APPROVE EXECUTIVE SESSION.**

CHAIR BAISA: The open portion of this meeting will be in recess to allow for the convening of an executive meeting. . . .*(gavel)*. . .

**RECESS:       11:00 a.m.**

***(THE PLANNING COMMITTEE ENTERED INTO EXECUTIVE SESSION AT 11:05 A.M. AND ENDED AT 12:18 P.M.)***

**RECONVENE:   12:20 p.m.**

CHAIR BAISA: . . .*(gavel)*. . . The Planning Committee will come back to order. Members, due to the obvious time constraints of the morning and the fact that all of the Members are expected to be at another meeting in about an hour or less, it is obvious we don't have enough time to discuss and make a decision today on this matter. However, the Chair would like to circulate the proposed amendment to the proposed ordinance from the Planning Department for further discussion and I will defer this matter. Any objections?

**COUNCIL MEMBERS VOICED NO OBJECTIONS.**

**ACTION:     DEFER PENDING FURTHER DISCUSSION.**

CHAIR BAISA: The meeting is adjourned. Thank you everyone. . . .*(gavel)*. . .

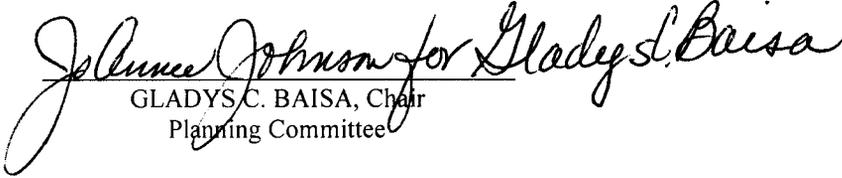
**ADJOURN:    12:21 p.m.**

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APPROVED:

  
GLADYS C. BAISA, Chair  
Planning Committee

pc:min:081118

Transcribed by: Jessica Cahill

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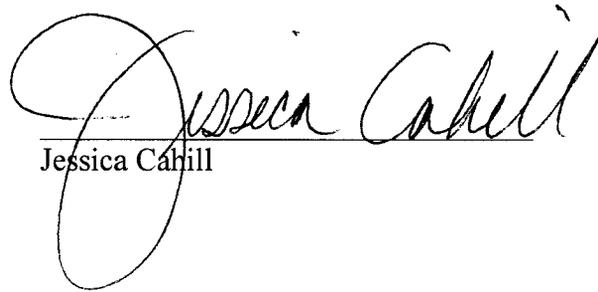
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CERTIFICATE

I, Jessica Cahill, hereby certify that the foregoing represents to the best of my ability, a true and correct transcript of the proceedings. I further certify that I am not in any way concerned with the cause.

DATED this 4<sup>th</sup> day of December, 2008, in Wailuku, Hawaii

  
\_\_\_\_\_  
Jessica Cahill