

BOARD OF APPEALS  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
OCTOBER 10, 2008

A regularly advertised hearing on the appeal of **WILLIAM L. GEORGE AND GAY P. GEORGE (BOA 08-000067)** was called to order at 10:22 a.m. in the County of Hawaii, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i, with Chairman Joel Gimpel presiding.

PRESENT: Joel Gimpel  
Charlene Hart  
Peter Hendricks  
Karen Maedo  
Kim Tavares

ABSENT AND EXCUSED: David Drury

Renee Schoen, Counsel to the Board  
Alice Kawaha, Staff to the Board

William George, Appellant  
Miles Okumura, Attorney for Appellant  
Lynn Higashi, Attorney for Appellant  
Amy Self representing Planning Director

And approximately 14 people from the public in attendance.

**PETITIONER: WILLIAM L. GEORGE AND GAY P. GEORGE (BOA 08-000067) -**  
Appeal of the Planning Director's Decision to Sign the Settlement Agreement and Mutual Release dated April 10, 2008 with Derrick Liu and Sonia Liu. The matter relates to a previous appeal BOA 07-000046 relating to an operation of an "Amusement and Recreation Facility, Major Outdoor" (motorcycle and dirt bike race track) in an Agricultural District. The property consists of approximately 19.5 acres and is located on the south side of Kapuna Road, Ahualoa Homesteads, Hamakua, Hawai'i, TMK: (3) 4-6-8:24.

GIMPEL: Item 3 on the agenda, New Business, Petitioner is William George and Gay George, (BOA 08-67) and this is an appeal of the Planning Director's Decision to Sign the Settlement Agreement and Mutual Release dated April 10, 2008 with Derrick Liu and Sonia Liu. This matter relates to a previous appeal BOA 07-000046 that related to an operation of an "Amusement and Recreation Facility, Major Outdoor" (motorcycle and dirt bike race track) in an Agricultural District. The property consists of approximately 19.5 acres and is located on the south side of Kapuna Road, Ahualoa Homesteads, Hamakua, Hawai'i, TMK: (3) 4-6-8:24. Can we have the parties identify themselves and their counsel. Ms. Self, you are here.

SELF: Amy Self, Deputy Corporation Counsel, representing the Planning Director.

OKUMURA: Miles Okumura, attorney at law representing Bill George.

GIMPEL: And you are?

GEORGE: I am William George.

GIMPEL: And this young lady here?

HIGASHI: My name is Lynn Higashi; and I'm on the pleadings but Mr. Okumura will be representing Bill George.

GIMPEL: I see. Thank you. All right. I'm going to ask that each party present an opening statement. I understand according to the pleadings that the Planning Department has filed a Motion to Dismiss, and we will consider that. But I want to hear opening statements from the parties, and then we'll take it from there and see where we go.

OKUMURA: Thank you.

GIMPEL: Okay.

OKUMURA: Your honors and honorees. I believe some of you were not on the Board and I was not present either at a hearing that started I believe it was in October of 2007, so I'm going to keep this brief. But we would like to make a presentation to bring those Board Members up to speed, and that you will see in our motion there was filed a group of exhibits. And I know it's difficult for Board Members to consume and digest all these, and we will try to go through those briefly, just to highlight and explain our position.

As a general background this matter started at about 2005. At about October 2005 the dirt bike track began operation. I'm going to keep this very brief. In January letters were sent of complaint, excuse me, January of 2006. In approximately March of 2006 the Zoning Inspector Usagawa came out to inspect the property, found the dirt track complete with jumps and bumps; and thereafter the residents on the property installed gates, and he could no longer get on the property to see it further. In October of 2006 the Planning Department notified the owners of violation and ordered them to cease immediately. The operation continued. Mr. George has elaborate diaries of over hundred incidents of the violation, specific days when he happened to be home. In December of 2006 the Planning Department sent out a letter which was hand-delivered ordering him, again, the owners to cease and desist operation of the dirt bike track immediately. The operation continued. In December 28, 2006 the Planning Department sent out a letter acknowledging their statement that they were going to complete corrective action. They did not complete corrective action, the operation continued. In March 19, 2007 the Planning Department sent out a letter, hand delivered, advising them of recurring violations. The operation continued. July 2007 more neighbors complained. They received a notice of appeal, and a continuance was granted till October 12<sup>th</sup>. All this time operation continued. On October 12<sup>th</sup> the hearing concluded due to insufficient time. I do believe after reading the transcript that Corporation Counsel was pursuing the case rather aggressively to secure a ruling to hold the owners liable for the appropriate fines and to demand corrective action. There was a

continuance; and thereafter an appeal, excuse me, a consent decree, a compromise, a settlement agreement was agreed to by the Planning Director with the signature of the attorneys for the property owners and, of course, Corporation Counsel. However, Mr. George was not involved with that, although he was on the list of witnesses and though he was one of the major complaining witnesses. This settlement agreement is contained in your list of exhibits. If you'll turn to that wonderful bundle, it is Exhibit No. 9. I'll just summarize it. Essentially what the Planning Director stated in his written decision, in his written consent, was that the owners, excuse me, the household members on the property could ride their motorcycles and ATV's and could use the dirt track so long as it was on Saturday or a Sunday, but not on Monday, Tuesday, Wednesday, Thursday and Friday. They could do so if within 30 days they put on mufflers onto the vehicles. They could do so if they notified in writing 24 hours in advance one particular person, his name is Bill George, William George, my client here, via email. We're protesting the action of the Planning Director in signing this consent decree, the settlement agreement; and we're ready to make our case about that.

Okay, there is a motion on the docket here to dismiss based on certain legal grounds and we'll address that shortly. In our case in chief we will present evidence and we will support our claim that the Director's actions according to the rules of procedure here before this body were arbitrary and capricious at least, without founding or with disregard in fact or foundation of law; and that's what we're going to do with our evidence we have, and supported with the exhibits as well. I'm not addressing the Motion to Dismiss at this time, is that correct, Mr. Gimpel?

GIMPEL:                   That's correct. Ms. Self.

SELF:                    The Director contends that this case is not a final written decision by the Director, and so therefore it's not within the jurisdiction of this Board to make a decision on this case. That doesn't mean that the appellant is without an option. They have the option of filing a law suit in court. But the Charter is very restrictive as to the jurisdiction of this Board, and the jurisdiction is limited to hearing appeals from final decisions of the Planning Director. And then under Section 25-2-20(a) of the Hawaii County Code, that further provides that such appeals must be made from a written decision of the Planning Director. This is a settlement agreement that is being appealed or challenged before this Board. It is not a final written decision of the Planning Director. It is a contract between two parties, both of which within the contract it clearly states that both parties are the drafters. So this is not the type of appeal that is within the jurisdiction of this Board to hear. And even if it was, even if this Board does decide to go ahead and not dismiss this case and hear the case and render a decision, if that decision, let's say for instance the appellant loses this appeal, they have no ability to appeal to Circuit Court under Chapter 91, because Chapter 91 requires that you be involved. The Hawaii Supreme Court has actually said that you have, if an agency has procedures for being in a contested case, being a party in a contested case, that you have to follow those rules. And this appellant did not intervene. He had every opportunity to do so, but he never did file a petition to intervene. He was, therefore, never a party to the original appeal before you. And, therefore, there's no place to appeal after this because he was not a party to the original appeal. This is an original claim. This body does not hear original claims. It only hears appeals from final written decisions by the Planning Director. So that's the contention of the Planning Department. Thank you.

GIMPEL: Any Member of the Board have any questions of either attorney at this point? The motion has now been put before us; and would you please respond to that motion. I'd like to hear your arguments on the motion.

OKUMURA: Are you saying the Motion to Dismiss? Is that correct?

GIMPEL: Motion to Dismiss is now before us.

OKUMURA: We are in receipt of the Corporation Counsel's Motion to Dismiss. I assume that the Members of the Board have a copy?

GIMPEL: You assume correctly.

OKUMURA: Okay. The Corporation Counsel makes great hay out of the Charter's wording that says this body shall have jurisdiction over final decisions of the Planning Director. They then go on to use the word "only" repeatedly in their pleadings. However, that word is not listed in the Charter. It does not say only. And I'll direct the Board's attention to perhaps a section of the Rules of Procedure governing this Board, specifically Section 8-1. The 8-1 you probably don't have it in front of you, although it was provided to me by the Board. The scope of appeals, this governs the general procedure, and I'm editing it to save some time, from the decisions of the Director relating to the Zoning Code and in other cases where there is no direct appeal to court provided for by the Code and to appeals from the actions of the Chief Engineer. It does not say only final decisions. It says in cases, excuse me, relating to appeals from the decisions of the Director, not final decisions. In other cases where there is no direct appeal to court there is no direct appeal to the Court for the actions of the Planning Director, except going through the Board of Appeals. There are Supreme Court of Hawaii cases that cite that. You cannot go to make an appeal without a record. There can be no record unless there's a hearing. One might say we almost had a hearing but there was not a complete hearing of the total amount of evidence, and certainly not the evidence that we're ready to present today.

Secondly, in the Section 8-2, Standing to Appeal, this tells you who can come before the Board. And it says here a person aggrieved by the decision of the Director in the administration or application of the Zoning Code, not just the actions or the final decisions of the Director in hearings. Again, I'll repeat it, a person aggrieved by the decision of the Director in the administration or application of the Zoning, or in other cases where there's no direct appeal to court provided for by statute. Again, we cannot go directly to Court without a record. There has to be a record made on this particular dispute, whether you consider it a dispute over the land use or the dispute over the action of the Planning Director in terms of his procedures.

Addressing the Corporation Counsel's motion, they list several examples of cases in other jurisdictions where the failure to appear at a hearing precludes a party's standing in court. These are all cases in other jurisdictions, with the exception of one which I will address later. They do not have to do with the standing of the citizen at the administrative level before the Board of Appeals. It has to do with their standing in Court. We're not in Court yet. None of these jurisdictions have the rules of procedure and the County Charter that we have; and, again, I'll refer you back to the rules of procedures that I quoted that you have, Section 8-1 regarding scope in terms of what are your areas of jurisdiction, including the so-called other cases in which there is no direct appeal, or when a person is aggrieved by the Director's action in administering or applying the Zoning Code.

The Board needs to be involved in the actions of the Planning Director. This is the venue where citizens come to protest such actions. Last, the last proceeding that we held here, related to the issues at hand, was not a complete Board of Appeals hearing. Counsel fails to cite a case from Hawaii called Life of the Land versus the Land Use Commission, State of Hawaii, where the Court specifically stated, again, although this is not relevant to this case here, the Court specifically stated, just appearing as a witness is sufficient to be considered participation in a hearing.

Going a little backwards in this motion, I'd like to take note that Corporation Counsel has not filed a responsive pleading to our motion; and in responding to my opening discussion Corporation Counsel made no mention of any issues of fact, law, or evidence regarding our motion in chief, rather addressing the procedural aspect of whether we have standing or, I guess it's just standing, not jurisdiction. This motion was filed in May, in May of this year. It has been five months since our motion was filed. When that motion was opened up I'm sure the first thing they thought about was standing or jurisdiction. We received this motion seven days ago which gives us seven days to respond, according to the Rules of Procedure. So we have seven days to respond. They had five months to file this motion based on threshold considerations in practice of litigation. And I would like the Board to deny this motion at least on the grounds of untimeliness and unfairness.

I will now present a Memorandum in Opposition to this motion which was served today. I think the Board deserves some time to go through this, our response. Chairman, would you like a few minutes or shall I just read through it? How would you like to -?

GIMPEL: I think we'll take a ten-minute recess at this point to allow the Board to review your Memorandum in Opposition to the Motion to Dismiss; and then we will reconvene. It is now 18 minutes, according to my watch, to 11. So we'll reconvene at around two or three minutes to 11. Thank you.

OKUMURA: Mr. Chairman, can I state for the record that I have personally served Members of the Board as well as Corporation Counsel, with original going to the clerk.

GIMPEL: We'll acknowledge that we have all received it now and that all the parties have received your Opposition to the Planning Director's Motion to Dismiss. Thank you. We're in recess now.

RECESSED The Chair called a short recess at this time, 10:41 a.m.

RECONVENED The meeting reconvened at 10:58 a.m.

GIMPEL: Everybody has completed reviewing the Motion so we're back in session. I understand Charlene that you have a motion that you wish to make.

HART: Yes, Mr. Chair. I'd like to request to, put a motion in to go into Executive Session with our attorney to ask her a couple of questions.

GIMPEL: All right. Do I have a second?

TAVARES: Second.

GIMPEL: All right. How long do you anticipate we'll need, if you know?

HART: Five minutes.

GIMPEL: Five minutes. All right, we'll be in executive session for five minutes. All in favor aye?

MEMBERS: Aye.

GIMPEL: Okay, five minutes. Thank you. I have to ask everybody to leave now. We're going to be in executive session to discuss with our attorney some legal issues surrounding this appeal. Thank you.

EXECUTIVE SESSION The Board at this time, 10:59 a.m., went into executive session. The Board came out of executive session at 11:13 a.m. by a motion made by Ms. Tavares, seconded by Ms. Hart, and unanimously carried by a voice vote.

GIMPEL: The meeting will now reconvene. And we're going to take the motion to dismiss under advisement and hear the evidence to be presented by the plaintiff, and then any rebuttal by the defendant. So would you please introduce your first witness and whatever you have to say. Go ahead.

OKUMURA: Mr. Chairman, can I make just a brief introductory statement?

GIMPEL: Yes. And before you do, I'm a little bit lax here, I'd like to see if there are any objections to admitting into evidence the exhibits that have been submitted in this case. Are there any objections by either party? Ms. Self?

SELF: I have no objections.

GIMPEL: No objections. And counsel, I forgot your name. I'm sorry.

OKUMURA: Miles Okumura.

GIMPEL: Okumura. Mr. Okumura, are there any objections to admitting your exhibits into evidence?

OKUMURA: No.

GIMPEL: I didn't think so. Thank you. All right. They'll all be admitted. Thank you. Now you may proceed, Mr. Okumura.

OKUMURA: Okay. Relevant to that, I just want to make sure that Exhibit 15 is also included. There was a large packet and then a later addition of 15 which is a letter, a package of letters and documents and diaries. It looks like this and, Exhibit 15, and it contains a diary or a log of events, and also a disk, a DVD disk, which we -.

GIMPEL: Yeah, yeah, that is included in the packet that I received some time ago in mail.

OKUMURA: Okay, 15. No. 15, right?

GIMPEL: Yes, it is.

OKUMURA: Okay, okay, not that all of this would be presented word for word. Just as a matter of introduction, in summary, this is an appeal from the application, from the administration, from the behavior, from the conduct of the Planning Director. The protest of the Corporation Counsel is that our client has no standing. We will present evidence to support that he has standing. We'll present evidence to bear our burden of proof, which is by the preponderance of evidence that the Director was acting arbitrary or capricious without reason, without justification, law. I'll say it again later but I'll say it first now, the burden of proof is based on evidence which will convince you by the preponderance of evidence more likely true than not that that is what happened, evidence on the record.

Okay, the first witness will be Mr. Bill George; and he has a short presentation, it will be run via this projector and the sound system. May I proceed, Mr. Chairman?

GIMPEL: Yes, you may. And we should swear Mr. George in if he's going to give testimony. Mr. George, would you please give your name, please.

GEORGE: Yes. My name is William George; and I live at 46-3895 Kapuna Road; and it's a Post Office, Honokaa.

GIMPEL: Thank you. And do you swear to tell the truth, the whole truth and nothing but the truth?

GEORGE: I do.

GIMPEL: Thank you. You may proceed now.

OKUMURA: Mr. George, would you state briefly your background or your personal history that pertains especially to not only your position as a resident neighbor adjacent to this noise but as well as some of the evidence and facts you're going to place into the record.

GEORGE: Yes, sir. I retired from Aloha Airlines as a Captain and a Flight Instructor prior to moving to Ahualoa. I'm retired. We moved to Ahualoa in 1995, September; and I retired in February of 1996. In the process of my employment with Aloha Airlines in Flight Operations I was concerned with issues similar to this which are noise issues. As you know there are noise abatement policies in almost all the major airports in the United States and certainly here in Hawaii in Hilo. All our inter-island airports have microphone monitors. And what we had to do was develop procedures that wouldn't compromise safety but would not create undue noise to the people on the ground, and that required a lot of effort. And if we were not successful, I'll give you an example. Orange County Airport, John Wayne Airport, in

California, some of you perhaps have flown out of there, there are noise monitors all around that field. And they monitor the noise and they know which flights and which airline and what time of day; and if you bust one of those, if you set one of those off, and we have, it's a \$5,000 fine. You can't even, there's no appeal, there's nothing. You just get a bill from the FAA for \$5,000. So I do have some experience in mitigating extreme noise. Should I start my little presentation?

GIMPEL:                   Go ahead.

GEORGE:                   Thank you, sir. I'll try to go through this rapidly. I don't want to take a lot of time from the Board. But some of this material I think is quite relevant. You already know about this. This is three years in the making. The operation started in October 2005, so this is anniversary of the dirt track operation and, also, the anniversary of my 72<sup>nd</sup> birthday.

If you're not familiar with Ahualoa, and some folks if you don't live around that area or not, it's just up from Honokaa. I don't have a pointer but you can see Honokaa town, the ocean up in the north there. And it's up country from Honokaa at an elevation of around 2000 feet. And these are some pictures just taken from our property and around the area. It's a gorgeous spot. We work hard to care for the aina and we keep the place clean and beautiful. More shots from around our place.

Now these are videos of the normal sounds, and I hope we got the volume up. We can hear this. It's actually quiet. You can hear the birds. I don't need to run this very long. And that's our garden and then there's, this is our yard looking out. And this is actually looking in the direction of the dirt track. The dirt track is two lots past the earthquake damaged Portuguese oven.

Then October of 2005 it changed (noise emanating from the dirt bike track played). And from there, that's where we ride and train our horses, and you can see that over there. Oh, this is not particularly a good shot. But the dirt track, here's our lot, here's the lot that's between us that's not owned by us, of course, and this is the dirt track. There's the dirt track operator's house. And it runs, it used to run all the way to the road, but they quit using the part you can see from the road. So they use an area right up in here, all the way around there. And I believe judging from the satellite pictures there has got to be 2 plus acres in size, maybe close to 3. But I can't really tell. You can see it a little bit in here from the road. It's not quite clear with the projector but it runs back up from here all the way up around here; and our horse training area would be up there. This is rather hard to see but there's our house, there's the dirt track which encompasses that area there. And it's about, closest point from there to our house is 643 feet, and then the far side is maybe 1000 feet. And this is an expanded view of the Ahualoa area; and now you can see the George's up in the upper center to the right. And some of the people that have written letters and provided testimony for you are all the way down in this area down here. Mr. Johnsen who is in the room at the present time is down at the bottom. He is .81 miles from the noise source.

Why do this type of noise travel such great distances? Well the local acoustics are very good, for one thing. But there's characteristics (played video emanating sound of motorcycles). Now responsible riders, we have one in the room which will be a witness, acknowledged that this is a major problem, and they try to get members of rider organizations to understand how bad it can be. This quote is from Jimmy Lewis. He's the editor of "Dirt Rider" magazine; and he says, well, you can read it, "The psychology of sound opens up a whole new and interesting area that

very few have explored. Plain and simple, loud noises aggravate humans. Whether it's 110 decibels of rock concert or exhaust noise from your own bike, it triggers the 'startle' mechanism in your brain." And as far as the National Park Service is concerned, this fellow who's Dale Bosworth says: "Noise alone is a huge issue. Noisy machines can drive threatened, endangered and sensitive species from habitat they need to survive. Noise can pit users against each other or user against homeowners; it may be the biggest single source of social conflict when it comes to outdoor recreation."

So I think we need to look at two types of riding, and we're going to get a little more amplification on this. There is exploration, trail riding, people go out to get close to nature, utility riding like riding your ATV around your ranch or farm or working livestock. And then they're sport racing which is motocross competition. And the two flavors of ATV's and dirt bikes, that's an important distinction. The utility is used for, as we said, tending livestock, transportation, fairly quiet intermittent use. They go somewhere, they do their job, they put their tools on, they come back. Sport/racing, they're powerful, they're loud, and for recreational use only, and they're continuous use for extended periods and they need prepared tracks. There's the utility and here's sport. They don't even look alike.

And, also, you have to look at, that's not part of this particular issue, but you do have to look at it in the long term: Public versus private track. Dirt rider safety, experience and training, no control. Vehicle compliance, they have noise regulations, no control. Safety equipment, no control. And they have a poor record of fatalities and injuries. (Noise emanating from the dirt bike track and video of rider getting into an accident being played.)

SELF:                   Objection.

GIMPEL:                We have an objection.

SELF:                   Their relevancy? Is this actually happening on the property that they are complaining about?

GIMPEL:                I was going to ask the same question. Is that the property that you were complaining about?

GEORGE:               No, that's an exam -.

GIMPEL:                Then that's irrelevant to this.

GEORGE:               Okay.

GIMPEL:                Thank you.

OKUMURA:            May I respond, Mr. Chairman?

GIMPEL:                Yes.

OKUMURA: This evidence is relevant to the facts that we're going to submit that has to do with the levels of sound of the operation of bikes, the equipment that's used, and so forth.

GIMPEL: Yeah, I understand that but, I mean, we've heard the levels of sound that Mr. George is complaining about earlier in this video. And I think that putting levels of sound where the bikes are operated legally and where the microphones are apparently much closer to the bikes than Mr. George's property, I think, is irrelevant in this case. So we'll have to skip this part. I'm afraid that this is not relevant to this matter.

GEORGE: Okay, well, what may be relevant is that we did support a County Council resolution to create tracks in which riders can enjoy their sport safely and responsibly. So I'd like to make it clear that we are not a bunch of anti-bike people. I've owned motorcycles myself and enjoy it very much. But this is relevant. The track takes away our family activity. I think our granddaughter that's still in the back there, that's one of them, but school's out so they're here. But this is the thing, these are the things that we do that we cannot do. So, I mean, in your deliberation I would hope that this is an either/or, Gay and my granddaughter. Looking at the human impact of noise, this is going to end up probably as some sort of a, as a County ordinance some time. But these are real effects. This is not, I didn't make this up.

Psychological Effects, including aggression and rage, the hair will stand up on the back of your neck if you come to our property. I will guarantee you that. And there's also some technical information. This study done by the Canadian OSHA shows that characteristics of sound determine the severity of the response. Without going into detail which we won't hear, the sounds of a dirt track are very high in annoyance factor. And if you like we can go back into exactly why.

Now here are important things, I think our counsel has already talked about this, these are the dates, these are the times that the operation keeps continuing. Now we had our public hearing with a comment phase. Powerpoint, we did that. Comments of the track by some of the people that are here and numerous letters that were against the track were acknowledged by the Board Chairman which at that time was Mr. Cook. The hearing was continued after I was called as a witness by Mr. Brillhante, the Corporation Counsel. And we never got to state our case. It was continued to April 11<sup>th</sup>. On April 10<sup>th</sup> they signed a settlement; and the agreement contains provisions that are impossible to verify their compliance. We can go into that. We cannot identify the family members unless we trespass the property and maybe get a DNA swab and go up there. I have no idea how we do that. It stifled the residents who are here today, some of them, who were prepared to submit sworn testimony and evidence.

So why the Director erred and the agreement should be nullified: The neighbors were denied the opportunity to be heard. Second, impossible to verify, identity of riders, muffler equipment. The sound is the same so we must assume that they haven't put any mufflers on those. The elements of agreement have been violated, and we have that documented. It has occurred eight times on weekdays. The machine noise is the same as it was. And they did ride fifteen days out of this without the required email notification. Request an email notification, because was that so that the neighbors could leave town and wouldn't be bothered with it? I don't understand that provision. And fourth it permits activity already declared illegal. And if you look at the letter that Mr. Yuen wrote to the owner of the violation letters, I think it's dated December 28<sup>th</sup>, it tells

them that it's an illegal track but that he has told the people that have illegal tracks that they could ride under certain family conditions. And, fifth, the law clearly refers, at least in my amateur viewing of it, it's to the activity, not the identity. And if you look at the C17 example, I was heavily involved in that operation to try to get them to not make these overflights. I spent a lot of time on it. And, for example, wouldn't it be okay if we let the C17 do overflights if crew is related? It doesn't, it doesn't seem to make any sense to me. And you have to understand also that the C17 will give you loud noise for about a minute, and more people are affected across the path. This provides the same level of the noise for five hours, but fewer people are exposed. The Director failed to consider the environmental effects of continued operation. Seventh, there is a contradictory letter, "We recently sent the following information to a property owner operating an illegal motorcycle and dirt bike track...not listed as a permitted use," by the law. "Thus" should be thus, "it is a prohibited use. In the agricultural district, if property is used intermittently for dirt bike riding only by people residing on the property, we are considering this level of use to be below the threshold of activity that we will enforce but it exceeds this level," whatever that level is. So it already said it's illegal but it says you can do it. Let's be clear, this is not construction noise. This is not agricultural noise, like chain saws or tractors or things that, you know, we accept or even utility ATV's. It's recreational noise, it's for somebody's pleasure. The law is clear, there it is, not including drag strips, airports. The writers of that Statute I'm sure considered noise when they said no airports and no drag strips. The Zoning Code, any use not listed among the permitted uses in the zoning district is a prohibited use. And ATV's and dirt bikes are not listed

We do believe the Director should have discretion in these matters, but the decisions must be based on a rational policy and include consideration of the environmental effects of an activity on surrounding properties. Does the Director protect the recreational activities of a single person to the detriment of an entire neighborhood, or does the Director preserve the law, the Zoning Code and the rights of property owners?

It might make sense, and I'm almost finished, to use the following recommendations from a Washington state study on noise, what they call ORV (off-road recreational vehicle). This expert is a, from a study which encompasses 88 pages, and I'll be happy to provide it, "We recommend that the primary basis of noise enforcement actions remain as it is now, based on complaints from affected neighbors. In this way, no actions will be necessary in situations where ORV noise is not adversely affecting neighboring properties, but enforcement will be possible in circumstances where ORV noise is received on and adversely affecting residential uses."

The Hawaiian perspective finishes it up. Two short clips (from video presentation). "I would say to most Hawaiians who have grown up here in the island, this is the classroom that we belong to. You know, our classroom is really not within an enclosed building or so. To hear the sounds of nature, to hear the water flow and things like this, this is something that invigorates I feel the human being or the Hawaiian in him. It's a privilege you've got that comes out of when you malama something. You don't automatically get the right to do something without doing in reverse. You've got to malama the aina if you want the privilege to gather from it."

Okay, the summary is property owners need confidence that zoning is fairly applied. They don't want to put their life savings into a piece of property and then find out that it's only usable certain times. The effects are untenable for some residents, the impact of continued operation is

clear. The residents have no remedy except to come in here and put ourselves before the Board of Appeals. The track operator does have an option of transporting his equipment to a legal track, he could go to Hilo as you'll see that Brian Gleason does; and he can apply for a special use permit.

So all of us in this room need to examine how we will approach issues that affect the quality of life for Big Island residents. Are we going to cast a blind eye to the seemingly small events that (for now) only affect a few people, or are we going to take a pro active stance and address environmental issues to insure that the Big Island continues to be a wonderful place to live? Mahalo.

GIMPEL: Thank you. Do you have any other questions of your witness?

OKUMURA: Not at this time, no.

GIMPEL: Okay, thank you. Ms. Self.

SELF: Yes. Mr. George, you were speaking about noise abatement. So has the noise level of the dirt bikes ever been tested on this property?

GEORGE: Has it been tested on his property?

SELF: Well, your property the noise level.

GEORGE: On mine?

SELF: Right.

GEORGE: No, Ma'm. But I would be happy to have the County put in a noise monitor.

SELF: Okay, and then -.

GEORGE: I have made some measurements, though.

SELF: That's okay. That's all I needed to know.

GEORGE: Okay.

SELF: And as far as the appeal filed by the Liu's, you had an opportunity to intervene in that appeal, did you not?

GEORGE: I presume I did.

SELF: You had an opportunity to intervene, is that correct?

GEORGE: I believe I did.

SELF: Thank you.

GEORGE: But I didn't think it was necessary because I was the original complainant.

SELF: Yes, you've already answered my question. Thank you.

OKUMURA: I object to that question on relevance, your honor. We're at a different hearing.

SELF: We're also -.

GIMPEL: We'll leave it in.

SELF: This is -. I'll rest. That's okay, thank you.

GIMPEL: Are there any questions by Members of the Board?

TAVARES: I guess I might have a couple.

GIMPEL: Go ahead.

TAVARES: Okay. Mr. George, I just want to make sure I have the sequence of events right first in trying to get to this question. How many times did you send official letters of complaint to the Planning Department?

GEORGE: Well, I have a correspondence record that shows that I sent the first one, since I did not know who had the jurisdiction I sent an identical copy to the Land Use Commission Chairman of the Hawaii State Land Use and I sent one to Mr. Yuen simultaneously. And I did not receive a response from Mr. Yuen on that.

TAVARES: So the first complaint that you made was sent in, the Planning Department got it?

GEORGE: Right.

TAVARES: They did an investigation and the issue-?

GEORGE: No, no, no. That's not correct, Ma'am. That's not what happened. My initial complaint was sent on January 16, 2006.

TAVARES: And that's the one you didn't get any response to?

GEORGE: No response, that's correct, Ma'am.

TAVARES: Okay.

GEORGE: And then I had also sent it to the Land Use Commission on -.

TAVARES: Okay, well, that doesn't matter to me. What I'm trying to figure out is how many times you put in a complaint to the Planning Department and what -. Because what I see in all the documents here, there was a complaint, there was an investigation and there was a notice of violation issue. That was the first big thing, I guess. And then there was another complaint because the notice of violation seemed to have been ignored. And there was another investigation and there was a first reoccurring violation that was issued.

GEORGE: Right.

TAVARES: And then there was a hearing scheduled, and then it was, oh, there was an appeal, excuse me. The appeal came in from the Liu's, and then the hearing was set, and then the appeal was withdrawn. So as much as I can sympathize with the noise, if there's no appeal then really we have nothing to hear. I mean, it was withdrawn. And that's what you're saying, is that you didn't have any input on the settlement that they made because you didn't get to talk and -.

GEORGE: I didn't get to testify, that's correct.

TAVARES: Right. So -.

GEORGE: But I was called as a witness, the record will show that.

TAVARES: I understand. So you could technically continue to complain to the Planning Department if the noise continues. What I'm saying is that there is, you know, this Board can't hear something if there's no appeal on the table; and right now, you know, they made a settlement, you were not a party to it because you didn't intervene. That's the procedure that we have. If you want to be involved with the settlement, if you were an intervenor you would have been involved with that settlement. And that's why I think your gripe is that you were not involved with that. So you could probably put in another complaint, initiate another investigation, and then become an intervenor and start in a case.

OKUMURA: Mr. Chairman, can I answer, respond to that line of inquiry?

GIMPEL: Go ahead.

OKUMURA: I understand that there is some concern over with what might be perceived as Mr. George not filing as an intervenor. First of all the County was aggressively pursuing the violation. There are three or four letters of violation and they did a great job. Mr. Usagawa, I believe his name was in looking at the transcript, did a good job getting out there. The County did a good job of filing their letters of violation, and so forth. And then they filed, they came, of course, you know, on the appeal from the landowners once they saw that dollar amount. At that time the County was pursuing the case aggressively. They were doing their job. They were doing the job that a citizen relies on them to enforce the Code. They went by the letter. All the magic words were there, violation of permitted uses. What is a citizen to do? He's ready to testify -.

SELF: Objection.

OKUMURA: He's ready to testify.

SELF: Objection.

OKUMURA: And then they turn around and settle for something that is the opposite of what they said they were going to do, pursue the violation.

And, again, we're not here on the Liu's violation. We are here on the conduct of the Planning Director, the general procedures that's used, or the procedures used in this specific case. And what our job is is to provide you evidence, not clear and convincing, just by the preponderance that he failed to do his job, that he was acting arbitrary. Arbitrary defined is a disregard for the facts. And that's what we're here to do, to show that he disregarded the facts and did not follow proper legal procedures. We're not arguing about the Liu's behavior. We're arguing about the Planning Director's behavior and, you know, the procedure of entering into this particular agreement or similar pieces of paper.

SELF: Are we into arguments now?

GIMPEL: No.

SELF: Objection, -.

GIMPEL: No, he -.

OKUMURA: I was just trying to respond to the question, your honor. And may I respond and redirect to the questions that counsel makes?

GIMPEL: I would still want to ask if any more Members of the Board have any questions? Any questions from any other Members of the Board?

HART: Yes, I do.

GIMPEL: Go ahead.

HART: Mr. George, I stayed up till 2 reading all of this last night; and I tried to run your DVD and I couldn't get it to work at all. I tried it on the computer and then I tried it on a DVD player with the TV.

GEORGE: This was, excuse me ma'am, this was the one that was sent as Exhibit 15.

HART: Yes, this one right here.

GEORGE: Well, we'll have it here. We can show it to -.

HART: Well, I just wondered if it was the same material that we saw -.

GEORGE: No.

HART: That you presented.

GEORGE: No, no. This material is relevant because it was done after the agreement, after the agreement. Some of this other stuff was done before the agreement. But we've got, I probably have maybe 15 days of little clips of videos for that.

HART: Okay, thank you. I just wanted to note that we were unable to view your disk.

GEORGE: Well, yeah, okay. Thank you very much.

GIMPEL: That may or may not be relevant because we're not arguing, according to your counsel, whether the Liu's have violated the agreement or not, or violated the Zoning. We're arguing whether the Planning Director erred in his determination. But I do have one question and being the Chair I get to ask it. According to the exhibits your counsel has notified the Planning Department on two occasions of violations that occurred subsequent to the settlement agreement. Is that correct?

GEORGE: That's correct.

GIMPEL: All right. And those two letters capture a number of violations that occurred since the settlement agreement. Have you received a response from the Planning Director with respect to either of those two letters?

GEORGE: I have not.

GIMPEL: Counsel?

OKUMURA: No, your honor.

GIMPEL: Thank you. Okay. Are there any other questions from the Board? All right. You had redirect, Ms. Self? Oh, Ms. Self, you had a redirect. Mr. Okumura.

OKUMURA: I'll redirect. The Corporation Counsel raised the question of measurements of noise. Mr. George, have you ever measured the noise level of the sound emanating from the dirt bike racing track?

GEORGE: Yes, sir. I've measured it on my property right on the front of my front door.

OKUMURA: What instrument did you use to measure that sound?

GEORGE: Amazingly I have it right here.

OKUMURA: That's wonderful, Mr. George.

GEORGE: It looks like this.

OKUMURA: Could you describe it for the audio record, please, Mr. George?

GEORGE: Yes, this is an EXTECH Model 407730 Sound Level Meter.

OKUMURA: Mr. George, are you familiar with the measurements of sound such as the SAE (Society of American Engineers), the term decibels and so forth, and various ordinances which have numeric measurements of noise pollution?

GEORGE: I am.

OKUMURA: Could you tell me what examples you can give of levels of sound that you measured on your property and describe where you were?

GEORGE: Well, the first thing I did was to measure ambience sound when the track is not operating.

OKUMURA: What is ambient sound, Mr. George?

GEORGE: Ambient sound would be if we turned off all the air conditioners, well, you could leave them on, it's just sound with no disturbances. And if you were out in nature and you were listening to birds and perhaps a bubbling brook, that would be ambient sound.

OKUMURA: And, Mr. George, again, give some examples of measurements of the level of sound that you witnessed when the motorcycle dirt bike racing track was operating?

GEORGE: Well, the ambient sound is under the threshold of this meter, which is 40 decibels. I have another one that is not calibrated. It shows even less. The sound at my front door has reached 70 decibels; and the sound at peak reading on one occasion in our horse training area was 82.

OKUMURA: Mr. George, what is your familiarity, what's the basis of your familiarity with this measuring tool?

GEORGE: Well, I get to, I was a technician before I became a pilot and we were involved on all sorts of test equipment so I do have some knowledge of how to use it. And in researching the material for noise for noise pollution, I've got probably, I don't know, close to 50 studies on my computer that are done by NASA, that are done by the Environmental Protection Agency. So we have a reference standard of what is noise in terms of decibels and how much does it hurt the human body.

OKUMURA: Thank you. No further redirect, your honor.

GIMPEL: Any other questions?

SELF: One follow-up question.

GIMPEL: Sure.

SELF: The Planning Department as you know does not control noise levels. So have you called the police regarding the noise level?

GEORGE: Yes, we did early on; and the response on three occasions I believe early on when it started, and the responses were a little bit different.

One fella went, actually gone on the property, walked up there, and they had quit riding; and so he came back and said that they weren't doing it any more. And the other two instances they said they don't go on private property to deal with noise issues. I believe in the transcript for Ms. Liu she said that they had a, someone came up there with a sound level meter. I've talked to some officers. They don't have these. So, I don't know, maybe he had his own or -. I don't know.

OKUMURA: May we reredirect? Mr. Chairman?

GIMPEL: Reredirect.

OKUMURA: Reredirect. Regarding the question of the Planning Department not controlling noise levels, Mr. George, based on your understanding of the zoning ordinance which prohibits drag racing, go cart racing, amusement parks and perhaps dirt bike racing tracks, would that be a reasonable way to control the noise that you have experienced on your property?

GEORGE: Yes.

GIMPEL: Thank you.

OKUMURA: No further reredirect.

GIMPEL: Any other questions of Mr. George? Thank you.

OKUMURA: We'd like to call the witnesses that have been patiently waiting to make their statements, although it's out of sequence from our optimal strategy, just as a convenience to these witnesses. I believe it's Brian Gleason, Eric Johnsen, other people are here for sworn testimony. I see Eric is here and Brian. Any other sworn witnesses that were here? Okay -.

GIMPEL: It's your case.

OKUMURA: We'll call Eric Johnsen first.

GIMPEL: Would you give your name and address, please.

JOHNSEN: My name is Eric Johnsen. I live in Ahualoa at 46-4061 Mamalahoa Highway.

GIMPEL: All right. Raise your hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

JOHNSEN: I do.

GIMPEL: Thank you. You may sit down if you wish.

JOHNSEN: Well, I don't have that much to say except that -.

GIMPEL: I think you should respond to questions from the counsel.

OKUMURA: Thank you, Mr. Johnsen, and Eric as I know. Mr. Johnsen, could you describe approximately how far away you live from this location.

JOHNSEN: Well, I don't know exactly on a map cause I've never pulled a scale on it. But I live on the upper Ahualoa Road; and I believe there's at least one, two, three, four or five acre parcels between myself and the subject property.

OKUMURA: Mr. Johnsen, for those who live in the city, would you say that's approximately three quarters of a mile as the crow would fly?

JOHNSEN: Yeah, a mile sounds about right.

OKUMURA: Okay. And Mr. Johnsen can you hear the noise of the dirt bike racing track as they operate it?

JOHNSEN: I can hear the noise.

OKUMURA: Okay. Are you within the 300-foot range where you were required by law to be noticed about the particular dispute?

JOHNSEN: No, I am not.

OKUMURA: Have you ever spoken to Mr. George about the noise?

JOHNSEN: Yes.

OKUMURA: Do you recall a time when you actually called him when the noise was occurring?

JOHNSEN: Actually not that long ago, just within the past few weeks. I was hearing it and I called Bill George to say is it happening next door to you because this kind of activity is kind of proliferating around the neighborhood I noticed. And he said, yes, it was. So it was not somebody closer to me.

OKUMURA: So you heard the noise at the same time Mr. George did?

JOHNSEN: Yes.

OKUMURA: The crow is a mile away. And was the noise coming from the direction of Mr. George's house?

JOHNSEN: Yes.

OKUMURA: Okay. So I'm not good at the compass here, but looking at that map are you west, south-west of the location?

JOHNSEN: Yes. And I would say the noise is coming from the northwest, northeast.

OKUMURA: The direction of Mr. George's house.

JOHNSEN: Northeast.

OKUMURA: So it was coming from his direction, and he lives south of it, and he heard it. That means, using some kind of a triangulation, it would be that lot that he has claimed that it is, it was -?

JOHNSEN: I'm very confident of the noise source being that lot, having been hearing it for quite a while now.

OKUMURA: Thank you very much, Mr. Johnsen. No further questions at this time.

GIMPEL: Ms. Self, any questions?

SELF: No questions.

GIMPEL: Board, any questions? Thank you, Mr. Johnsen, you're excused. Mr. Okumura, your next witness.

OKUMURA: Brian Gleason, our next witness.

GIMPEL: Mr. Gleason, if you'll give your name and address.

GLEASON: My name is Brian K. Gleason. I live on 43-2101 Pohakea Muka Road in Paauilo, Hawaii 96706.

GIMPEL: Okay. If you'd raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth?

GLEASON: Yes.

GIMPEL: Thank you. You may begin. Go ahead.

OKUMURA: Just to give you some background the line of questioning is going to be directed at certain specifications about racing motorcycles. And, Mr. Gleason, do you own a motorcycle?

GLEASON: Yes, I do.

OKUMURA: You own a racing motorcycle?

GLEASON: Yes, I do.

OKUMURA: How long have you had racing motorcycles?

GLEASON: I have had them for at least 12 years now.

OKUMURA: Have you ever had occasion to measure the volume of the sound of a motorcycle or deal with it in terms of mufflers and so forth?

GLEASON: After the instance of this dirt bike track we went ahead and measured my bike personally, as well as I've had instances where I've gone to the mainland and a friend of mine who races professionally in the AMA Supercross Tour had me in as his mechanic where we rode the bike through tech inspection, at which time they measured sound specifications on the bikes, and you have to pass sound test prior to an event such as that.

OKUMURA: When you say sound test you mean levels of volumes, is that correct?

GLEASON: Correct.

OKUMURA: Are there industry standards, are there drag racing standards for sound levels?

SELF: Objection.

GIMPEL: What's your objection?

SELF: The relevancy of this line of questioning. This is not the issue of the claim that's here to begin. The issue is I thought I heard the counsel say the Director's behavior, not a noise level, not the behavior of motorcycle riders, definitely not a motorcycle rider who was not even a part of this at all.

OKUMURA: The counsel respond with the question whether we had made measurements of sound. The real strategy here is we're going to assert that Mr. Yuen did not consider such things as the level of sound, the sound volume of this activity, the basis of which is the -.

GIMPEL: I tend to agree with Ms. Self, however. Whether or not the Director considered the level of sound, this witness cannot testify to that. This witness can only testify, as I understand it, to the fact that motorcycles can make a lot of noise.

OKUMURA: That's what, we'll have them do that.

GIMPEL: But I think that we can take judicial, what am I saying, we can take judicial notice of that. And whether he measured his own motorcycle sound, there has been no offer of proof that that motorcycle was used on the Liu property, or whether the Liu property indeed used racing motorcycles or not is not in evidence here and not to be considered. I think that this line of questioning doesn't lead to any relevant evidence that we can consider in determining whether the Director acted arbitrarily or without due process.

OKUMURA: Our line of questioning and our offer of proof is going to be based on the Director acting with disregard for facts; and we're going to make the case of how many facts he disregarded. This will be just one of them.

GIMPEL: But this isn't a fact that was brought to the Director's notice. This was not a fact that was brought to the Director's notice by the complaint that was filed. This fact that racing motorcycles make a lot of noise I'm sure the Director can take judicial notice of that as well. But this testimony I don't think is relevant to this issue.

SELF: I might, excuse me, Mr. Chair. I'd like to point out also that noise is not part of the Zoning Code. That is not what the whole zoning violation was about. Zoning deals with the use of the property.

GIMPEL: Correct. So I think I'm going to have to disallow this line of questioning. Unless you have something else of this witness, we'll have to allow it.

OKUMURA: I have more, your honor. The particular settlement agreement listed a condition regarding mufflers; and we're going to go in that direction. Because what he did was put a muffler on his motorcycle and measured the sound, and the Director should have been thinking of the sound reduction value of mufflers. And we're going to make the case that there were many facts he did not take into consideration to the point where it rises to the level of being arbitrary.

GIMPEL: I'll let you proceed along those lines and we'll see what happens. Go ahead.

OKUMURA: Thank you. I'll stick to the mufflers at this time. Mr. Gleason, did you take any measurements of the sound variation when you put a particular muffler on? Have you ever done that before?

GLEASON: When we did my bike, what happened was the silencer that I purchased has adjustable ends, and you can put in a US Forestry approved spark arrestor which runs it a little bit quieter; and you can run it pretty much wide opened with a different end cap. And there's a significant difference between the two. When we checked, we actually tried it without

any restriction, you know, with just the silencer on it and with the US Forestry approved spark arrestor.

OKUMURA: And what happened when you put these particular mufflers on in terms of measurement of sound? Let's get more specific.

GLEASON: It decreased the sound output.

OKUMURA: And how much did it decrease it? Do you have particular numbers?

GLEASON: I believe we did do the test and Mr. George has the numbers on the test.

OKUMURA: And when the muffler was put on, did it reduce the level of the volume to the standard that's required by the American Motorcycle Association for drag racing motorcycles?

GLEASON: No. It didn't reduce it down to that level.

OKUMURA: Thank you. No further questions.

GIMPEL: Ms. Self, any questions?

SELF: No.

GIMPEL: Board, any questions? I have some. Did I understand you correctly, Mr. Gleason, that different mufflers produce different results?

GLEASON: Correct.

GIMPEL: Okay. And some are quieter than others, correct? Obviously different results, some resulted in less noise than others?

GLEASON: Correct, yes. What happens is when, as the bikes came out they realized they were really loud. So throughout the years they've been implementing stricter sound requirements. And if you purchased something that was a few years back it's not eligible no longer to meet those sound requirements for the current set of guidelines that they use.

GIMPEL: Okay. Now are those older mufflers still available for sale?

GLEASON: Yes.

GIMPEL: Do you know personally, of your own knowledge, what kind of mufflers if any were purchased and installed by the Liu's?

GLEASON: I have no knowledge.

GIMPEL: Thank you. That's all the questions I have.

OKUMURA: Just one more to clarify, which is what the point I want to make, so either yes or no with some details. If you require someone to put a muffler on a motorcycle, is it possible to put a muffler on the motorcycle but it's still too loud to legally compete in the American Motorcycle Association's dirt bike drag races?

GLEASON: Yes.

OKUMURA: Okay, thank you.

GIMPEL: No further questions? Anything else? Do you have any further witnesses Mr. Okumura?

OKUMURA: I'd like to recall Mr. Bill George.

GIMPEL: Okay, Mr. George, you're still under oath. Thank you, Mr. Gleason.

OKUMURA: We're going to pursue a line of questioning here, again, based on our mission to provide you evidence that show that Mr. Yuen acted with disregard for the facts or with disregard for any logical procedures. Mr. George, you seem to have studied a lot about noise levels and ordinances regarding dirt bike racing and ATV racing. Is that correct?

GEORGE: That's correct, more than I've ever wanted to know.

OKUMURA: Can you give us an idea of how many articles you might have read about it over the last three years?

GEORGE: Well, I know we had to stop this somehow so I started researching; and I have a little over a thousand documents on my computer relating to noise, zoning, and principally ATV and dirt bike regulations that are municipal or County wide or State wide.

OKUMURA: All right. Let's, can you give me an example of an ordinance referencing off-highway vehicle racing?

GEORGE: Yeah. They call that off-highway vehicles and some states call it, I think California calls it ORV, that's off-road recreational vehicles. That includes ATV's and dirt motorcycles.

OKUMURA: Would Boulder, Colorado be an example of a municipality that has an ordinance regulating that?

SELF: Objection. Relevancy?

OKUMURA: We're pursuing a line of, producing evidence that shows that Mr. Yuen must not have referred to any other ordinances or municipal codes throughout the country.

SELF: Mr. Yuen is only, only has the authority to administer the Hawaii County Zoning Code, not the Colorado Zoning Code or the California Zoning Code.

OKUMURA: Mr. Yuen has an obligation to make rationale decisions in interpreting and enforcing the Code. In this case there evidently is no specific reference to dirt bike racing. And while we will argue that it is not a permitted use, somehow decided it was a permitted use on some basis. It should have been on some facts and on some foundation of law. And we're going to produce evidence that it's likely that he did not pursue the route of pursuit of facts and evidence or rationale decisions based on ordinance, laws, public policy and so forth.

GIMPEL: Well, I don't think that Mr. George can testify that Mr. Yuen failed to take into account the laws of the State of California or any other state. I think Mr. George and your burden is to show that Mr. Yuen failed to properly administer the Zoning Code of the County of Hawaii. Now if that Zoning Code is silent with respect to the particular issue that you're concerned with, then he has obviously the obligation to use his best judgment. You say he didn't use his best judgment but I don't think you can prove that by showing that Colorado or California had a law specifically governing this issue. So I'm going to disallow this.

OKUMURA: Your honor, our line of questioning and our offer of proof is that there are rational ways to make decisions about licensing, permitting, or allowing dirt bike racing tracks. There are standards that are not of this County, that's correct. But where is the rationality? We're going to offer some of those, and then we're going to ask Mr. Yuen to tell us what he did do, what rational basis did he use, what facts did he use. I don't see Mr. Yuen here but we will ask him when he shows up.

GIMPEL: Well, I think until he answers that, if he's going to be produced as a witness I don't know, I think until he answers that that any evidence regarding what the laws of Colorado or California are is really immaterial, irrelevant to this case. We can, and he is not obligated to review those laws. So I'm going to disallow this line of questioning, thank you, at this point.

OKUMURA: Of the information, I believe -. Mr. George, were you informed of any of the ordinances, laws and regulations or standards of any industry organizations or any governmental bodies regarding noise levels of motorcycle dirt bike racing tracks? Were you informed of any of these, any of this information in the course of Mr. Yuen's decision to allow the dirt bike racing track next to you?

GEORGE: I became informed of national and association -.

OKUMURA: No, excuse me. To save some time I just want to know, were you informed that Mr. Yuen -?

GEORGE: No.

OKUMURA: Okay. Okay, thank you. Mr. George, the settlement agreement refers to the application or the installing of mufflers on the motorcycles. For the Board Members I believe it's Exhibit 12, Exhibit 9, I'm sorry. Exhibit 9 -.

SELF: Page 28 of the record on appeal.

OKUMURA: Do you have that? You want to read my copy? Mr. George, I'm directing you to the Exhibit 9, page 2. I'll have you read it into the record.

GEORGE: Paragraph d, "That Appellants shall install noise reduction mufflers to their motorcycles within thirty (30) days from the date of this Agreement."

OKUMURA: Okay. To your knowledge has there been any verification of this?

GEORGE: Not to my knowledge.

OKUMURA: Were you informed of any procedures where the Planning Director was going to verify whether the mufflers were installed?

GEORGE: No.

OKUMURA: Has there been a reduction of noise since the date of this settlement agreement?

GEORGE: No.

OKUMURA: Okay, thank you. Mr. George, has the County ever inquired as to the legal status of the people listed in the settlement agreement, the nine names, to your knowledge?

GEORGE: Not to my knowledge.

OKUMURA: Have they ever asked for any birth certificates?

GEORGE: Not to my knowledge.

OKUMURA: Have they asked for any marriage certificates?

GEORGE: Not to my knowledge.

OKUMURA: Have they asked records of title of ownership?

GEORGE: Not to my knowledge.

OKUMURA: Do you know whether or not the, excuse me. Has the County, to the best of your knowledge, inquired as to whether or not the people listed as household members are household members for the purpose of the Federal Revenue Code?

GEORGE: No.

OKUMURA: Okay. I'm going to pursue a line of questioning that I'll also use for Mr. Yuen when he appears. To your knowledge, Mr. George, were any noise level standards considered in requiring mufflers to be applied?

GEORGE: No.

OKUMURA: Were any measurements made of the volume of noise during the course of violation by the County?

GEORGE: Not that I know of.

OKUMURA: Were there measurements taken after the settlement agreement was instituted?

GEORGE: Not that I know of.

OKUMURA: Was there any inquiry into the size of the motorcycle engines relative to the mufflers that were to be used?

GEORGE: Not that I know.

OKUMURA: Okay. What is the maximum number of people allowed to ride at once on a dirt bike racing track, according to the settlement agreement, Mr. George?

GEORGE: I don't know. How many are there, there's about -?

OKUMURA: There's nine people.

GEORGE: Nine people.

OKUMURA: That's the correct answer, Mr. George, yes, nine. To your knowledge are the dirt bike motorcycles operating at the levels of the American Motorcycle Association standard of noise?

GEORGE: No.

OKUMURA: Do you think it would be reasonable for them to be required to operate at least at the level of racing motorcycles?

GEORGE: Yes.

OKUMURA: Were you informed of any recommendations from the Corporation Counsel in any of these questions that I've just asked you?

GEORGE: No.

OKUMURA: Okay. Is it your understanding that Monday through Friday it is illegal to ride motorcycles on the dirt bike racing track?

GEORGE: Yes.

OKUMURA: Is it your understanding that it's legal for them to ride on Saturday or Sunday?

GEORGE: Yes.

OKUMURA: Are you aware of any ordinances, codes, statutes that make it legal on Sunday and Saturday but illegal on Monday through Friday?

GEORGE: No.

OKUMURA: Are there any code, violations, any zoning ordinance that require compliance on Monday through Friday but allow operation on Saturday and Sunday?

GEORGE: Not to my knowledge.

OKUMURA: Are you aware of whether or not consideration was given to any noise measurement standards such as from the Society of American Engineers?

GEORGE: No.

OKUMURA: Were they used in any way in requiring mufflers to be installed?

GEORGE: Not to my knowledge.

OKUMURA: Did the Corporation Counsel or the Planning Director receive evidence or review any evidence as far as you know regarding the impact on real estate values in the neighborhood?

GEORGE: Not to my knowledge.

OKUMURA: On the impacts of the legal repercussions of requiring to insert or apply, attach disclosures in real estate contracts?

GEORGE: I know that you're supposed to.

OKUMURA: Was the Planning Director informed of any of these?

GEORGE: I have no idea.

OKUMURA: Okay. Was the Planning Director in attendance at the public presentation of the letters that were submitted by the citizens at the October 11<sup>th</sup> hearing?

GEORGE: No.

OKUMURA: Okay. Do you believe there was any measurement at all of the level of the noise by the County?

GEORGE: No.

OKUMURA: Was the Planning Director aware of the violations and the number of violations that occurred after the three cease and desist letters?

GEORGE: Yes.

OKUMURA: Approximately how many violations took place that you personally witnessed following the three cease and desist letters? An approximation is fine, Mr. George. Twenty, thirty, forty?

GEORGE: At least. That was April -.

OKUMURA: Prior to April, prior to April 11<sup>th</sup>.

GEORGE: I would say probably 70 occasions.

OKUMURA: After the County sent out cease and desist letters, there were at least 70 violations?

GEORGE: Yes.

OKUMURA: Okay. Do you know if Mr. Yuen was aware of these violations?

GEORGE: Yes -.

OKUMURA: Okay.

GEORGE: If he reads his mail.

OKUMURA: Yes. Is Mr. Yuen familiar with the technical specifics and capabilities of various mufflers on the market, to the best of your knowledge?

GEORGE: To the best of my knowledge, no.

OKUMURA: Do you know whether or not he's familiar with the American Motorcycle Association race track sound level standards?

SELF: Objection, irrelevant.

OKUMURA: Your honor, again, this is the line of evidence to convince the Board that Mr. Yuen acted with disregard for facts. You cannot regard facts if you don't investigate, if they're not presented, if you don't know. You don't know what you don't know.

SELF: Mr. George cannot testify on what the Director knows or does not know.

GIMPEL: The question was to his knowledge does the Director know, is that correct?

OKUMURA: That's correct, yes. I'll rephrase the question then, your honor.

GIMPEL: Okay.

OKUMURA: Did Mr. Yuen inform you that he's familiar with the American Motorcycle Association's race track sound level standards?

GEORGE: No.

OKUMURA: Did either the defendants or Mr. Yuen provide you with any confirmation or information regarding the agricultural activities on the premises owned by the Liu's?

GEORGE: No.

OKUMURA: Okay. Did Mr. Yuen confirm with you that he had read the 16 letters submitted by the neighbors opposing the use by the Liu's?

GEORGE: No.

OKUMURA: Did he inform you or let you know that he read them?

GEORGE: No.

OKUMURA: Do you know whether or not he viewed copies of the marriage license?

GEORGE: No.

OKUMURA: Regarding the list of "household members," I'll use that term in quote, the "household members" listed on the settlement agreement, and there are approximately nine, they're exactly nine, did Mr. Yuen confirm with you that he verified whether or not they were household members?

GEORGE: No.

OKUMURA: Did the Corporation Counsel provide that information to you?

GEORGE: No.

OKUMURA: Did the counsel for the Liu's provide that information for you?

GEORGE: No.

OKUMURA: Did any of those parties, Mr. Yuen, Corporation Counsel, and Mr. Kaapu, attorney for the Liu's, did any of them provide you tax returns to confirm that the listed persons were household dependents as defined in the Internal Revenue Code?

GEORGE: No.

OKUMURA: Did the County, specifically Mr. Yuen, the Planning Director, provide you with any evidence regarding the difference in the decrease in sound from the source to your property line?

GEORGE: No.

OKUMURA: Did the County inform you whether or not they compared the noise levels to the Department of Health standards?

GEORGE: No.

OKUMURA: Do you know what the Department of Health standards are, Mr. George?

GEORGE: I know, maybe not quite specifically. But it's 5 decibels, I believe, over ambient at the property line.

OKUMURA: I'm going to direct your attention, Mr. George, to Exhibit 12, pages 5 through 6, and the Board as well. This is Chapter 25 of the Zoning Code. I'm directing your attention to page, well, I circled it as five I believe. At the bottom it says 25-61. For the Board, again, it's Exhibit 12 in the large bundle. On the bottom it says 25-61, it's circled as page 5 of that exhibit. I direct your attention, Mr. George, you can read off of mine if you'd like, to Division 7.A, Agricultural Districts. Is the property that Mr. Yuen provided with a settlement agreement, is that property located in the agricultural district?

GEORGE: Yes.

OKUMURA: Yes, it is. Section 25-5-72 is entitled "Permitted uses." There are approximately 25, there are exactly 25 permitted uses. Is a racing motorcycle dirt, excuse me, dirt bike racing track one of the listed permitted uses?

GEORGE: No.

OKUMURA: Okay. On that same exhibit Page 8, circled as Page 8, at the bottom of the page it also says 25-31, it's Section 25-4-4. What is the title of that section, Mr. George?

GEORGE: Uses prohibited.

OKUMURA: I'll read it into the record and correct me if I'm mistaken, "Any use not listed among the permitted uses in a zoning district is a prohibited use within that district, except as otherwise provided in this chapter." Isn't that a reasonable accurate reading, Mr. George?

GEORGE: Yes.

OKUMURA: Okay. Once again, is dirt bike racing track listed among the permitted uses?

GEORGE: No.

OKUMURA: Okay. To the best of your knowledge in this chapter, is there any exception for dirt bike racing?

GEORGE: No.

OKUMURA: If they wanted to have a dirt bike racing track could they get a special permit? Is that possible?

GEORGE: Yes.

OKUMURA: To your knowledge, did the Liu's ever apply for a special permit for a dirt bike racing track?

GEORGE: Not to my knowledge.

OKUMURA: So although it might be an exception, they did not avail themselves of that particular exception. Are you aware of any other exceptions where they'd be permitted to have a dirt bike racing track?

GEORGE: No.

OKUMURA: Were there any codes or statutes referred as guides in determining the terms of the settlement agreement? Were any of them cited in the settlement agreement?

GEORGE: Yes.

OKUMURA: I'll repeat that question, Mr. George.

GEORGE: Let me check.

OKUMURA: In the settlement agreement did Planning Director Yuen -?.

GEORGE: Oh, no.

OKUMURA: Refer to any codes or statutes?

GEORGE: No, no.

OKUMURA: Prior to you being informed of the settlement agreement, did the Corporation Counsel or Mr. Yuen's Office, or any attorney, or any party call you about any codes, any ordinances, any standards that were going to be used in deciding on the terms of the settlement agreement?

GEORGE: No.

OKUMURA: Okay. Going back to page 2 of the same exhibit, it's the list of definitions. Again, it's page 2 of Exhibit 12. The section is 25-1-5. At the bottom it's also denominated as page 25-2. Is it correct that there is a definition for amusement and recreation facility, major outdoor?

GEORGE: Yes.

OKUMURA: I'm going to assume that it's meant to refer to the term major outdoor amusement and recreation facilities. Is a skateboard park listed as one of those?

GEORGE: Yes.

OKUMURA: Okay. Referring to page 6 of that same section, page 6, circled page 6, down below it's 25-62. There is a section called subsection (d) that says a special permit may be issued for major outdoor amusement purposes. Is that correct?

GEORGE: That's correct.

OKUMURA: I draw attention to the Board to subsection 5, sub subsection (d) Major outdoor amusement and recreation facilities. Is it correct that someone could get a special permit to do that?

GEORGE: Yes.

OKUMURA: Okay. The skateboard park is one of them, you just mentioned that. So someone could get a special permit for a skateboard park perhaps, right?

GEORGE: Yes.

OKUMURA: Were you given any information about the relative difference in level of nuisance and noise nuisance between a skateboard park and a dirt bike racing track?

GEORGE: No.

OKUMURA: Did anyone tell you that a skateboard park is louder than a dirt bike racing track?

GEORGE: No.

OKUMURA: Okay. So something that's softer than a dirt bike racing track, namely a skateboard park, would require a special use permit, is that right?

GEORGE: That's correct.

OKUMURA: Based on your reading of the Code, Mr. George, does the Code authorize any specific exceptions, or exemptions, or permissions, or privileges for what are called household members?

GEORGE: No.

OKUMURA: Do you know whether that term is used in the Code anywhere?

GEORGE: No.

OKUMURA: Do you know whether that term is used in a court of law, in any legal cases regarding Code interpretation, zoning interpretation? Do you know if that term household members is given any special privilege in the law as far as you know, Mr. George?

GEORGE: As far as I know, no.

OKUMURA: Okay. Are there any clauses in the Code that says household members are given permission to have different privileges than the public at large?

GEORGE: No.

OKUMURA: Is there anything in the Code that authorizes the Liu's to use the property for a dirt bike racing track?

GEORGE: No.

OKUMURA: Okay. Is there anything in the Code that specifically names the Liu's?

GEORGE: No.

OKUMURA: Okay. I raise that question because I'm going to turn you back to page 4 of the Zoning Code. That's page 4 at the bottom. It says 25-13. The attention is drawn to Section 25-2-10. The title is Privileges granted run with the land, Privileges granted run with the land. Since Mr. Yuen is not here, Mr. George, I'm going to ask you to read that section out loud very clearly, please.

GEORGE: Yes, "All amendments to this chapter and all permits and approvals issued under this chapter shall apply to the applicable land, building, development, or use and shall not be granted if the action sought would not be equally acceptable under a variety of owners, and such privileges granted shall run with the land and shall not reside in any particular owner or occupant of any premises."

OKUMURA: Thank you, Mr. George. Mr. George, when you received a copy of the settlement agreement was it your understanding that the Liu's had a privilege to operate a dirt bike racing track on a Saturday or a Sunday?

GEORGE: Yes.

OKUMURA: Did Mr. Yuen approve of an operation of a dirt bike racing track on a Saturday or a Sunday?

GEORGE: Yes.

OKUMURA: I'm going to reread what you stated just to make sure, such privileges granted shall run with the land and shall not reside in any particular occupant of any premises. Are the household members supposedly occupants of the premises, Mr. George?

GEORGE: Supposedly, yes.

OKUMURA: Is it your understanding that Mr. Yuen granted the privilege to occupants of the premises and that they are actually named in the settlement agreement which gives them approval of the privilege to operate a dirt bike racing track on Saturday or Sunday?

GEORGE: Yes.

OKUMURA: Turn your attention to Exhibit No. 9. Page 2 at the top, it's paragraph a of the settlement agreement. This is relevant to the point I just made about the Code, the Code subsection. Will you read the first sentence of that paragraph.

GEORGE: "The Planning Director shall approve Appellants use and the use by any household member of the Appellants' property TMK: 4-7-08:24 for the riding of motorcycles and/or ATV's , one day per week on either Saturday or Sunday."

OKUMURA: Is it your understanding that the Planning Director has given approval to the Liu's to operate the dirt bike racing track?

GEORGE: Yes.

OKUMURA: Is it your understanding that this is a use of the land?

GEORGE: Yes.

OKUMURA: And is it correct that the particular recipients are actually named in this settlement agreement?

GEORGE: Yes.

OKUMURA: And to hammer it a little heavier, is that permissible under the Code?

GEORGE: No.

OKUMURA: Thanks. Does the settlement agreement by its terms confer, give approval of a privilege that runs with the land? Do you understand that term by chance, Mr. George?

GEORGE: Yes.

OKUMURA: Okay. What does run with the land mean as far as you know, Mr. George?

GEORGE: Well, it means if they sell the property to someone else then they too can use motorcycles, they can use their track and run motorcycles and ATV's.

OKUMURA: To the best of your knowledge, who owns this property?

GEORGE: I think it's Sonia Kealoha-Patterson. I think her name is now Liu.

OKUMURA: On what basis do you know that her name is Liu?

GEORGE: From the appeal, from the Liu's appeal. When I was notified of their appeal in the document her name is Liu.

OKUMURA: On the title records, to the best of your knowledge, what is the name of the property owner?

GEORGE: I think it's Sonia Kealoha-Patterson.

OKUMURA: If Sonia Kealoha-Patterson were to sell this property, will the privilege or running a dirt bike racing track on Saturday/Sunday be conveyed to the owner, the new owners?

GEORGE: Yes.

OKUMURA: Once again, you probably didn't understand my question. If Ms. -.

GEORGE: Oh, no.

OKUMURA: Kealoha-Petterson were to sell the property would that privilege be offered -?

GEORGE: No. It wouldn't, it wouldn't because there has been people named to have that privilege; and that would not run with the property.

OKUMURA: Thank you very much, sir.

GEORGE: I'm sorry.

OKUMURA: Aside from Ms. George who is in the room, Mr. George, does anyone in this room have any more experience and knowledge about the volume of sound before and after the settlement agreement?

GEORGE: No, it would be us, and perhaps Brian Gleason. He has been there before and after.

OKUMURA: Did Mr. Yuen inform you that he was aware of the level of sound on your premises and was aware of the sound on your premises, or what it might be after the installation of mufflers?

GEORGE: No.

OKUMURA: Did he indicate to you that the installation of mufflers was going to make the level of sound reasonable?

GEORGE: No.

OKUMURA: Okay. Were there any measurements in the settlement agreement to determine whether or not the installation of mufflers would reasonably reduce the level of sound as it says in the settlement agreement?

GEORGE: No.

SELF: Objection, objection. Relevancy? Mr. George is not a party to the settlement agreement so this line of questioning is redundant and does not go to the issue.

OKUMURA: Mr. George is very knowledgeable about the sound volumes and can give sworn testimony about the reasonableness of the installation of the mufflers and the effect. The mufflers are in that settlement agreement probably for a reason; and we're trying to present evidence that it's not enough reason, it's not enough of a specification to accomplish what is ostensibly the purpose.

GIMPEL: I think you've already made the point with the testimony that was admitted of the difference in mufflers that can be installed.

OKUMURA: We have one short, I believe it's a two-minute DVD that Ms. Hart was referring to that didn't work for her.

GEORGE: It works for me.

OKUMURA: It works for you, okay.

GEORGE: I hope works for me.

OKUMURA: The general purpose of presenting this, it's a video, isn't it, Mr. George?

GEORGE: Yes.

OKUMURA: Video, is to convey to you an idea, excuse me, convey to you some of the considerations that would have been reasonable to regard in granting this privilege in making this decision in signing off on the settlement agreement, the purpose of which is to execute on the duties and obligations of the Planning Director in enforcing the Zoning Code of the County of Hawaii.

GIMPEL: We'll let it go to, unless it goes beyond the border that -.

OKUMURA: The sound you will hear is the sound after the settlement agreement. You've heard sounds before the settlement agreement. This is an example of the effect of applying mufflers (played DVD video with loud noises from motorcycle).

GIMPEL: Would you cut it off completely. Thank you. I'm afraid this goes beyond the scope of the issue that's before us. This goes to whether or not the Planning Director has enforced the settlement agreement. It does not go to his judgment in entering into the settlement agreement. Therefore, I'm going to have to disallow that line of questioning. And I might add we already have admitted as an exhibit a catalogue of violations that were both observed by Mr. George before and since the settlement agreement. We already have evidence in the record of at least two letters that you have sent recounting those post-settlement violations. So I think we have enough already in there. We don't need to hear it again. Thank you.

OKUMURA: No further questions of Mr. George at this time.

GIMPEL: Is there any cross-examination now, Ms. Self?

SELF: Yes, quickly. Mr. George, are you a party to the settlement agreement?

GEORGE: A party, explain that, please.

SELF: Are you, is the agreement, the settlement agreement, between you and the County, or between the Liu's and the County?

OKUMURA: Objection, irrelevant.

GIMPEL: I think it's a valid question to get on the record.

GEORGE: Do you mean am I named in the paperwork?

SELF: Yes, are you named as a party?

GEORGE: No.

SELF: In the agreement as a party?

GEORGE: Right, I'm the aggrieved party but I'm not in the agreement.

SELF: Has your attorney discussed with you -?

OKUMURA: Objection.

SELF: An opportunity of filing a law suit -?

OKUMURA: Objection.

SELF: An original claim in court regarding noise or nuisance?

GIMPEL: I hear an objection. I anticipate that as asking for attorney-client privilege information. Is that correct?

OKUMURA: Yes, sir.

GIMPEL: I'll sustain the objection.

SELF: I'll restate the question. Are you aware of the possibility of filing a law suit in Circuit Court regarding nuisance?

GEORGE: I'm not a lawyer so I'm not sure what the process goes beyond here.

SELF: Are you planning to ask your attorney to -?

OKUMURA: Objection. Relevance?

GIMPEL: I'll sustain. Go ahead.

SELF: Mr. George, are you aware of a previous Board of Appeals case regarding Shirakawa -?

OKUMURA: Objection. Relevance?

SELF: The dirt bike track?

GIMPEL: Would you explain the relevance to that question?

SELF: Just to see whether or not he's aware that there has been a previous case before the Board of Appeals where the Board of Appeals allowed a dirt bike track, they ruled against the Director.

OKUMURA: Objection.

GIMPEL: And the basis for your objection?

OKUMURA: We're not here to argue precedence. We're here to argue evidence of facts.

GIMPEL: I'll allow it. I'll allow the objection. Go on.

SELF: Okay. That's all the questions I have. Thank you.

GIMPEL: Any questions by the Members of the Board? None. Do you have any further witnesses, additional witnesses?

OKUMURA: No. But a re-redirect on just one question she raised.

GIMPEL: Redirect real quickly. Thank you.

OKUMURA: You've stated you're not an aggrieved party. Is it your understanding that you have standing to bring this complaint?

GEORGE: Yes.

OKUMURA: Okay. As an aggrieved person?

GEORGE: Yes.

OKUMURA: No further questions.

GIMPEL: Okay. Ms. Self, anything else?

SELF: No.

GIMPEL: Okay. Do you have any additional witnesses?

OKUMURA: No additional witnesses, except may I make a statement of, not, not a summary but just evidentiary statement? It'll take ten seconds.

GIMPEL: Go ahead.

OKUMURA: Just a reminder to the Board, all these documents have been entered and accepted into evidence. I know you don't relish looking at all of them but they are -.

GIMPEL: I can assure you that if, we have examined them all.

OKUMURA: You have examined them, beyond looking -.

GIMPEL: We have examined them all.

OKUMURA: That's very good, thank you.

GIMPEL: Thank you. Ms. Self, any witnesses on your behalf?

SELF: No.

GIMPEL: Okay. I notice that the time is now 20 to 1 and it is lunch time. So we're going to take a luncheon break and then come back; and we will hear final arguments at that time and rule on and make a determination on the motion to dismiss that we heard.

OKUMURA: Point of clarification.

GIMPEL: Yes.

OKUMURA: Has Corp. Counsel rested her case -?

GIMPEL: Have you rested your case?

OKUMURA: Exclusive of final argument?

SELF: Yes.

GIMPEL: Yes. We will come back, hear arguments on this issue. And we've already heard the arguments on the Motion to Dismiss, so we'll decide one or the other or both. Thank you. So we will now adjourn for lunch and be back here no later than 2 o'clock. It will give us an hour and what, an hour and 20 minutes. So about 2:10, an hour and a half. Thank you. So at 2:10 we will reconvene. Thank you.

RECESSED The Chair called a recess at 12:41 p.m.

RECONVENED The meeting reconvened at 2:15 p.m.

GIMPEL: We'll reconvene at this time. And where we left it I think was that each party would present their final arguments on the case and then we will consider the Motion to Dismiss. So can we have the final argument from the Appellants' side. Mr. Okumura?

OKUMURA: Thank you, Members of the Board. I forgot to say the usual, thanks for coming and serving and volunteering your time, and working really hard on this particular dispute.

You know the background of this case and history so I won't get into that too much. Speaking more in generalities and principles, again, the issue of my clients' complaint is about the way the Planning Director is administering and enforcing the Zoning Code. Zoning regulations you know are historically based on nuisance. They are not common law. They are not the old tradition. It's something new. They come down with all these rules on how you can use a property so that you can preserve the government society's plan, so we can have law and order, so we can preserve quiet enjoyment so people know when they buy that piece of land they can enjoy the land according to what the deal is -- this is ag, this industrial, this is residential, this is commercial.

There are, of course, variances. This is not technically what you call a variance but the principle of a variance is as such that there has to be some consideration of special reasons. Is there something special about this particular piece of property in this zone? Is there a hardship? Is this owner going to suffer a hardship if they can't get this variance, and so forth? And there's nothing on the record to justify this variance.

This is kind of addressing the motion but at the same time addressing our argument here and our mission here. If you apply for a permit and you don't get it, there seems to be an understanding that you can come to this Board for an appeal. I don't see it in the Statute, in the Ordinance, in the Code where it says that is a final decision and you can now go to the Board. It's understood that under the rules of procedure he or she, that person, can go because they are an aggrieved party, they are upset and they object to the way the Planning Director is enforcing the Code. If you apply for a permit and you don't get the permit, you were denied, that's very common, they come to the Board. Again, whether that falls under some legal definition of what is a final decision I don't know, I haven't heard. If they applied for a permit and the Planning Director sits on it, and sits on it, and sits on it for some unknown reason, doesn't a citizen have a right to come before this Board? I think it's clear in the wording of the Code, yes, they are an aggrieved party. They don't like the way the Planning Director is enforcing the Code, I'm going to go before the Board of Appeals and squawk, I'm going to make a claim that he or she is not doing it, I want my permit.

Suppose there's no permit request, it's just that the Planning Director is giving people permission, okay, not an application permit, but permission, written permission. You can use your property, arguably, contrary to what the wording of the Zoning Code is. Right? You can use your property in this way, I'm going to put it in writing, I'm going to tell you, send it to your lawyer or give it to your neighbors. Someone can come in and file a claim with this Board of Appeals, saying the Planning Director, I'm an aggrieved person, I live next door, I live whatever distance away that still bothers me, I'm an aggrieved person. The Planning Director is supposed to enforce the Code. He's telling people, he's writing people, he's giving letters that says it's okay to have a dirt bike racing track on your property, so long as you just restrict it to household members and Saturday or Sunday, not both, no Mondays through Fridays, but you must notify one neighbor, let's make it the neighbor that's closest to you. Sending these papers around the city, the County, an aggrieved person has a right to come and say I don't like the way the Planning Director is enforcing the Code, what's going on, I'm filing a grievance, I'm an aggrieved person, I have a beef, I have standing because it says I can come in cause I disagree with the way the Planning Director is enforcing the Code. Here there was a hearing but no there wasn't, it was not complete. The complaining party here happens to have been a witness, they're ready to join the fight. The hearing was not completed. Is it a nonentity, is it nonexistent? Is the tree that fell half way down, is there a hearing? You cannot go to the Circuit Court and complain about that. There's a suggestion you could go file a nuisance complaint. The defendant will bring in that paper, the Planning Director will be joined in, the Corp. Counsel will be joined in. We're going to be right back to where it came. And the Court is going to wonder what's going on. There was no hearing. This is a situation where there was no hearing. Was there a hearing? There wasn't a hearing. It was not completed. The arguments were not fully made. There was no hearing.

Okay, pretend like there was a hearing. The Planning Director goes and signs this piece of paper, the same piece of paper that we'd do maybe without a hearing. Has he signed papers like, has he put things in writing like that? You know, maybe he does that. Is he allowed to do that, is he supposed to do that, is that under the Code? Maybe? No. A citizen can come in and say he's not supposed to sign pieces of paper like that, that's not in the Code. And we can argue about the standing probably a little bit more but I'm trying to get to the principle of what we're going at here; and you know it. He is writing these pieces of paper, he is putting them in writing. These people have a lawyer. When the next person that buys a property across the street comes in and say what the heck is going on -. Say our lawyer got a piece of paper right from the Planning Director, what is that? We got permission to do this, it's in writing. Okay.

I guess I should address the Shirakawa case, maybe some people know about it. I'll distinguish the Shirakawa case, although a dispute that's anything other than bad practice -. For those who don't know, the Shirakawa case I understand was a person who lived on the other side, Hilo/Kau side and was running a dirt bike racing track. I mean he wasn't racing, but he was running a dirt bike track. Somebody must have complained. And he eventually, I understand, was given permission, was given permission to have the dirt bike track on his property even though it was in a residential zone, even though it was less than 4 acres, not 19 here. So in one respect it's a bad case for us. Another way to look at it is it's terrible. Where in the law, where in the Code, this is a statutorily run system here? This is not common law. It's in the Zoning Ordinance. This is something new. None of this fairness business. I own a piece of property, why can't I grow and have fighting cocks and roosters out there? It's not ag. Come on, I paid good money for this. No, that's just how it is. That's just how it is, that's the rules. That's unfair. That's the rules. What do the rules say? It has a list of permitted uses and it says anything not on that list is unpermitted except as otherwise provided. Where is the exception for the dirt bike racing track? That's the legal argument. Where is the exception? There has been no argument made on the record that that is an exception. There is no pleading here, there is no pleading here. There is no legal argument made today that that is an exception. We have made a legal argument that it's not an exception and you have heard nothing else. You have not heard anyone say, yes, it's an exception. It is not in the pleadings. It is not a legal exception. It doesn't say that in the pleadings.

In the filings you have the settlement agreement. On that settlement agreement it doesn't say that it's a legal exception. It doesn't say it's a permitted use. It's not a permitted use so it's not permitted, unless an exception. It doesn't say that's an exception. There are no justifications for this exception. It flies in the face of the very Code of enforcement that says you must not give permission to individual people, no names, no occupants, pretty close to household members, whatever that is. There is no definition of household members. There is no privilege of household members to have an exception under the Code.

I'll go through a general discussion of our theory here. Our claim is that the Planning Director acted, okay, either, and I'm addressing, again, I realize this is not one of our exhibits but something you gave us with your Code. You might have discussed it with yourselves. It's called the Rules of Practice and Procedure. You don't have to read it, I'll read it for you. On Appeals, you know what our appeal is. The standard of proof, the burden on Mr. George and myself, okay, we must prove, oh, excuse me. You must make your decision based on the preponderance of evidence. You cannot make your decision on facts that you know. Evidence is

not the same thing as facts. It's a fact that, and you can go through your incredible intellect and name me all the facts. No, you must base your decision on the evidence presented today, the evidence, not what you know. It says right here, the decision will be based on the preponderance of evidence, not what you know. What has been presented today? You heard too much, probably.

And you will find, and this is one of the three things, and they're "or's", not "and's," these are the three things we're going to ask you to consider: Did the Director err, did he make a mistake in his decision, or did his decision violate the zoning chapter of the code or other law, here we're talking about the Zoning Code, or the decision was arbitrary or capricious or characterize by an abuse of discretion or clearly unwarranted exercise of discretion? Legalese stuff. I'm going to help you.

Preponderance of the evidence, it's not guilty beyond a reasonable doubt. It doesn't even have to be clear and convincing. It has to be more likely true than not. Preponderance means 50.0001. If you had a \$100 and you're going to place 100 bets, what is your last bet going to be? You go 49, 49 and then you go 50, and where is the 50<sup>th</sup>, the 100<sup>th</sup> bet going to be? Cause you know you're going to win that dollar, you're hoping to win that dollar. You hedge your bet but your last dollar goes down on the one that you think is the way to go, 50.001. You'll listen to the evidence and you say, hum, do I think by the preponderance of the evidence that he erred? Mr. George says yes. Mr. George starts prattling among all kinds of stuff. Someone was like out there you think? Someone is like, yeah, yeah, yeah, that's pretty loud. Oh, how loud? I don't know how loud. How loud, Mr. Yuen? Mr. Yuen is silent. Mr. Yuen has presented zero evidence. Corporation Counsel has presented zero evidence. You have nothing. You have nothing to go on in their favor, unless we misspoke today. You have nothing to go on when it comes to evidence that Mr. Yuen acted properly. You have nothing. You might have some facts. You have zero evidence.

Mr. Yuen is a party to this proceeding. The Liu's are parties to this proceeding. It's right there in the Code. When we filed this proceeding the respondent is a party, the appellant is a party, and the owner of the relevant parcel of property. That parcel is relevant. They were served, they were notified, they're on the record, they know what's going on. This is a big deal. I don't get it. This is a big deal. They might get their permit, excuse me, their settlement agreement torn up. They are bound by this proceeding. Mr. Yuen is a party to this proceeding. Did Mr. Yuen err, did he make a mistake? We say yes he did. Who says no he didn't? No one said, no, he didn't. Mr. Yuen didn't say it, Corp. Counsel didn't say it. Corp. Counsel filed no pleadings. No one said, no, Mr. Yuen didn't err, no one said he didn't err. We said he erred. You have no evidence to the contrary. We give all these reasons why we think it didn't make sense. He made a mistake. Yeah, I'm not sure. Not reasonable doubt, not clear convincing. Just like I think he did. If I had to put down money, my last dollar would go I think he did, 50.001. You don't have to be all the way over there. You've got to sit back and think. They said he erred. I have nothing to go on to say he did not err. You have no evidence. He did not come and say, no, I didn't. He's not going to say, no, here's why I did it, this makes good sense. You might think it makes good sense but there is no evidence that it makes good sense, only our claim and our words, our statements under oath, the pictures you see, the stuff you didn't even want us to produce because it's overbearing and it's in the file, the conduct, and the volume and the effect of this so-called piece of paper.

The way it was processed, you don't even know how it was done. You have no facts. You don't know what he meant by silencing, the silencing with the muffler. You don't know what he was thinking about the muffler. And I'm not going to require anything else just the muffler, because why? No, you don't know that. You know nothing about what Mr. Yuen was doing. He tells you nothing today. No filings, no issues of law, no evidence put on the record, except cross-examination of my client who constantly tells you under oath this is goofy, this is goofy, he should have done that, I did this, this is what you would do, this is what you should do, this is what other ordinances do, the other government bodies do, other planning directors do, other Board of Appeals, other zoning laws, other noise pollution requirements.

Are there rational foundations to make a decision on, should I let these people run these bikes, and how should I let them do it? Where is the law? There is no legal, there's no ordinance, there's no statutes. Right? There's nothing in the Code that says he can do this. If there is, it hasn't been presented. It's not evidence before you. Where in the Code does it say, yeah, but -? This is not so loud, oh, wait a minute, I don't know if loudness is a problem. Is that a problem? Is that a standard? You don't know what the standard is. What is the standard? Okay, at least a standard is they must be household members. Where is that standard in the Code? So far no, and definitely Mr. Yuen is not telling you. He has presented no argument to justify the household members. We have protested that and we say you should think about this, it's not in the Code. You look there and promise to you know who it's not in there. Right? So what does Mr. Yuen say? What's the defense? Counsel has rested. There is no defense to our claim it's not in the Code. It's not in the Code. Where does he have a right to say okay? But dirt bike racing tracks, it must be okay to him. Where is the justification? We said it sounds lolo. Right? You know that. That's our point. Right? You don't know how loud it is, but neither does Mr. Yuen, cause he doesn't tell you that he knows how loud it is. He's not going to say I know how loud, it's not so loud. He doesn't say that. He says nothing. He does not justify application of the muffler. So it will do what? What is he trying to do? You don't know. I'll tell you what he is trying to do. He's trying to give them a privilege, that's pretty clear. Where is the justification for that privilege? Prove to me, counter our evidence that he did not err. There is no evidence. He erred. You've got no evidence to go on. You're got to say I think he erred cause you have no justification to say nah, he didn't err because he -. You have nothing to go on.

Arbitrary and capricious, Black's Law Dictionary, don't look it up, with disregard for the facts. Okay? We're saying it's arbitrary and capricious, he didn't regard the facts. You don't want to hear too much about -. We presented to you some of the facts that maybe he should have because other municipalities do this, because some motorcycle people think about this, and so on. Right? What are the facts? Why did he do this? We'll give you some facts and say you should be measuring, you should have some standard. The racers have a standard. Do you have a standard, Mr. Yuen? No, he doesn't. You know why? Because we say he doesn't. And he says nothing. So he doesn't have standards. On the preponderance of the evidence, that might not be the fact, that might not be reality. But here in this hearing, not Shirakawa, not the other letter he sends out or whatever, here in this hearing, did Mr. Yuen regard the facts? You've got to say yes or no. Are you going to say yes? What facts? He didn't regard any facts, and you can't rebut that cause you don't know. It wasn't presented here. There are no facts. I'm going to tell you that right now. How you're going to say it when he says he didn't do it, he didn't do

it, he didn't do it? He didn't do it, measure by SAE. He didn't measure it, he didn't use a sound level meter, he didn't listen to how loud it is. He didn't compare it. He didn't look at the mufflers. What are you going to say to that? Nothing. We win. Right? He disregarded the facts because he cannot rebut that statement. We have sworn testimony, we have documentations, you know. We have examples of facts that maybe he should have considered, not absolutely but maybe. I'm going to bet that this wouldn't pass muster with 51 out of 100 municipalities. Yeah, I think so. I think they would have considered other things, who don't even have an HOV or HV Ordinance.

Mr. Yuen violated the Zoning Ordinance. We gave it to you very clearly, permitted uses, not on the list. Okay, we're there, it's not permitted. Now how is it permitted? On the ordinance it says certain exceptions, certain exceptions. Maybe, yeah, just by applying for a permit, could be. There are specific requirements, specific examples. But that's not the case here. So it's not one of those on the rest of the list, right, that says you apply for a permit. So it's not permitted, it's not an exception. So where is it? I say it's nowhere. Mr. Yuen says I can, no he doesn't even say that. Mr. Yuen is not under oath here, he did not say I can because -. You don't know why he did it, he has no justification. He might in fact have a justification but there is no evidence. You're not supposed to know that, you're not supposed to know that. Otherwise, I'm going to cross-examine it. That's the whole point of evidentiary proceedings. You bring it there, we look at it, we argue, we cross-examine. I get a chance to, to work on it. I was ready. I had to work over Bill George instead. I used him as a shell. Right? Mr. Yuen did not apply the Zoning Ordinance. You've seen it. Well, you might not agree but yeah, it says that. It says that, it says that he's not -. There's nothing in here that gives him that right, sorry, there's nothing that gives him that right. Okay? You've got to give us that. We showed you in the Ordinance, it says permitted, exceptions, and it says specifically anything else is not permitted. If it's not in the permitted uses it's not permitted, unless it's an exception. That's pretty good. Maybe not perfect, maybe only 51 out of 100, maybe only 51-49. I think we win. You've got nothing else. Don't tell me you've got something else to go on cause I didn't hear it. And if you're using that, that's not ethical, that's not fair. I want to talk about it. If you're using Shirakawa, maybe I should talk about that. That's not fair. That wasn't presented. I objected to that, it's irrelevant. So we keep saying it's not a permitted use, look at the Code; and you've got to look at it. You'll go, yeah, okay, except maybe. Maybe what? Nothing, right?

Unwarranted exercise of discretion, unwarranted, lacking authorization or justification, lacking authorization or justification. Authorization may be meaning law, some kind of code, some kind of procedure that is official, legal. What is the authorization? I say nothing. He might say, eh, Shirakawa, just general practice, cultural custom, we're allowed to make exceptions. You don't know. There is no authorization here. There was no discussion of authorization. You do not know anything. We know, you know that the Code at least says this is what he has got to do, this is what he can do, this is what the Code says. Oh, nowhere in the Code does it talk about this. Exception, yeah, get a permit. It says get a permit. But that's not where we're at. Okay?

Lacking justification, it's okay, we can be real loose about the word justification. It's okay, it's all right to do this because what? Does it fit the spirit of zoning, hardship, getting your money's worth out of your property, you know, some kind of detrimental reliance or something like that? I know, you know, does it fit something? I say no. Mr. Yuen says nothing. You've got nothing to go on. You cannot make a decision other than what we present. There is no justification.

This doesn't make sense. It flies in the face of quiet enjoyment. Yeah, okay, that's a good one. That's one point right there. It flies in the face of quiet enjoyment. It's kind of noisy. I don't know how noisy but it's kind of noisy. Mr. Yuen says it's not that noisy? No, he doesn't. We say it's too noisy. They say nothing. Yeah, right, okay, it's too noisy. It is too noisy. That's the only evidence you have. You have evidence that it's too noisy. You have nothing to say it's not that noisy. You don't know how noisy noise is. We didn't use this. We ran out of time. We could turn this thing on, put it right there, turn this up to get it to be honest to God the volume that Mr. and Mrs. George have to hear for six hours.

PUBLIC: Five.

OKUMURA: Five, okay, only five hours they can run. It says six. I trust her. Six hours, okay, from 10 till 4 only one day a week. Should we turn that on? Does Mr. Yuen know what it's like for six hours? Probably not, we say so. He doesn't say I know and it's okay. No, he doesn't know. You have to know that he doesn't know because he doesn't contest our facts. No one has contested our facts. You have no other evidence except our evidence. This is what the rule is of the hearing, you must decide on the preponderance of evidence, not on reality, sad to say, you know, what is presented here. Okay, it is five hours.

Abuse of discretion, defined as failure to take into proper consideration the facts and the law. All right? We say he did not take into consideration certain facts. It's scary how much stuff Mr. George has. All right, you know, you can see that – Thousand documents, 60 different ordinances for other municipalities. Right? We say that he should have, we say as part of being reasonable -. There is no noise ordinance. You're allowing someone, we're going to assume, to do something that's pretty noisy, that's what everyone says. And now how are you going to make a decision about how you'll allow it? What are the facts? The facts are that it must be noisy. We can tell you how noisy it is, too noisy. Mr. Yuen doesn't say anything. So how do you make this decision on putting the muffler on? You don't know. What kind of muffler do you want? Why did he choose this muffler instead of a muffler to make it this much softer, or this one? What is the basis of that decision? It sounds very arbitrary. Where's the basis? You don't know. We don't know. We're saying it was a mistake, we're saying it's arbitrary, we're saying it's incapable of being justified. He is supposed to justify this when we bring our evidence. He's supposed to say, yeah, I got a justification for that, I have authorization for that, I can make some sense, I can explain to you why. Okay? Why are these people allowed to do it? Where's the rule of law? Where is it in the ordinance? We tell you we said no. I don't hear anybody else saying yes. I don't hear anyone else giving us a yes, or no you're wrong, it's okay, the law says.

Okay, so it's not a law. It's not justified by law that these nine people can do it. How come they didn't allow the sister, the daughter and the kids from Waikoloa and their two little grandchildren? We don't know. It's arbitrary. Getting it onto those people, what's with the listing of the names? It's right there in, right there in the ordinance. You can't give a permission, you can't grant permission, you can't give a permit, you can't give a privilege and name specific people under the Zoning Code. The names are there. There might be an explanation. On its face it flies in the face, it's against the law, it's against the ordinance. Okay, but, but nothing. You have nothing to go on. It is, we said so, there's no rebuttal to that. It's in the law. Case closed. It's in there and you saw it. Now what is, what is an opposite of that,

what is contrary to that? Nothing. There might be but it's not in evidence. Where is he coming from? You've got nothing to go on.

So, in closing, we're asking that you follow the procedure, look at the evidence that has been presented. I'd like to think that all the evidence that we've presented is in our favor. Some of it might be a little weak, it's not dead-on. You can't put someone in jail for it beyond a reasonable doubt. Maybe it's clear and convincing, it's close though, I'm convinced. Yeah, it does not say that in the ordinance, it does say that in the ordinance. It's clear and convincing, I'm pretty good on that one. It's clear and convincing. It says you cannot hand out a privilege using someone's name. I think that's pretty clear and convincing. We don't even have to be that good. We just have to be like more likely truth than not. Which way are we going to go? You got to go one way or another.

In preponderance, you know, two people who come up, right, one is lying and one is not. By the preponderance, you're going to pick one. Cause in a certain situation where you know, well, it's got to be true or not true, I'm going to have to pick, you will. You have to gauge their demeanor and so forth. Here you have nothing else to go on. Good citizen, swearing under oath, he'll go to jail if he's lying. He tells you certain things, he gives you his opinion, he gives you examples that are facts of the ordinance, measurements that could be taken, steps that could be taken. We present evidence and statements on the record about the law and what it actually, actually says in black and white; and Mr. Yuen and the Liu's have presented nothing.

Your job is to find in our favor. I'll give you the actual cite according to the Zoning Code Section, 8-15A, it's page 8-4, General Standards for Appeals. Okay? You take an action if it's based upon the preponderance of the evidence, preponderance of evidence, not the going rate, not what we've been doing, not what this situation was, which can easily be distinguished by the way with Shirakawa. Right? No, what's going on here? What did you hear today? What did you hear today about the way business was conducted in furtherance of the mission of the Zoning Code under our rights where we can protest if a citizen does not like the way the Planning Director is enforcing the Code? That's my understanding it, the way he's enforcing the Code, not a permit or at a hearing or whatever, not even in writing maybe. Maybe he's enforcing the Code by not enforcing the Code. Okay? A citizen can come in and they have a right to raise a stink about it, come in here. And that's what we're doing, don't like the way he did it. And we say here's what he should have done, here's what he could have done, here's what we see, and look at the piece of paper. Where is the justification, where is the rebuttal, where is the evidence that says we're wrong?

GIMPEL: You've made these points many times.

OKUMURA: Thank you.

GIMPEL: Thank you. Ms. Self, closing?

SELF: Okay. To start with I'm going to just quickly respond to some of his argument. I was not going to get into the merits of the appeal because our contention is that this is not within your jurisdiction. But before I get into that I will respond to some of the arguments he made.

First of all, he began his argument by talking about a variance. This is not a variance. All of you know what a variance is. We have a section of the Code that deals with variances.

It's the Charter that determines the jurisdiction of the Board, not the Board's own rules. Regardless of what your rules, the section he referred to in, I believe it was Section 8-4, I'm sorry, 8-2 of your rules, standing to appeal, that does not override the Charter. The Charter is what sets your jurisdiction. The Charter, before the last amendments when they did an overhaul of the Charter in 2000, it did say decisions, appeals from decisions of the Planning Director, which is what I believe your rules probably say. But when they amended the Charter in 2000 that's when they added the final decision. So final decisions limit the jurisdictions, because otherwise anybody could appeal any decision that the Director makes. The Director makes who knows how many decisions every single day. And if there wasn't some sort of limitation put on the jurisdiction for appeals they would be able to come to the Board of Appeals for anything, any kind of a decision whatsoever that the Director made. Without getting too far into that, I'll come back to that.

The Director is charged under the Code with, I mean, under the Charter, with administering the Zoning Code. That includes, when he's administering the Zoning Code and the Subdivision Code, it includes interpreting the sections of the Code. Now his interpretation is entitled to deference. The Courts always gives deference to the agency's decision because the Director is supposedly the expert in that area because he is charged by the Charter to administer the Zoning Code. So you have to give deference to his decisions. When he was making this decision, you'll notice that sometimes the things in these Code provisions are not crystal clear. Zoning, you start with the idea that under the common law property owners have property rights. And while you can have zoning restrictions the Courts have said that you cannot go too far with the zoning. So you cannot restrict, you know, you have to, in other words, zoning ordinances are viewed as being in derogation of common law and therefore must be strictly construed so that you don't overly restrict someone's use of their property. They have rights to use their property. Under Section 25-572, Permitted Uses under the Agricultural District, there is a permitted use which allows for open area recreational facilities where none of the recreational features are entirely enclosed in a building. So you look at that, it starts with campgrounds, parks, playgrounds, tennis courts, swimming pools and other similar open area recreational facilities. You look at that, it's not, you know, it's open to interpretation. So when the Director -

OKUMURA: Mr. Chairman, this sounds like new arguments, or I guess it could be made in rebuttal rather than summary. They do not summarize the case of the respondent.

GIMPEL: I'll let her go on. Go on.

SELF: So looking at that, and then there's another section that allows for, you can have a major outdoor amusement and recreation facility if you get a permit. So this case could have gone on. It could have gone, probably it would have gone to Court and it would have been up to the Courts to determine, you know, to interpret this same section. But instead the Director made his interpretation, they were able to settle it, which is very favored by Courts to settle issues rather than going through litigation. And there is a settlement agreement in place and it will be enforced. I'm actually in conversation with the Liu's attorney. We have been discussing

whether or not they're in breach. So our office will be if we, you know, if the Department determines they're that they're in breach, it will be taken care of.

The other thing that he mentioned is, well, excuse me, the other thing I wanted to mention is that in this situation the Appellant could have intervened. The Board of Appeals has procedures in place for intervening; and it's, I would say it's a rare occasion that they were not be able to intervene. So had the Appellants petitioned this Board to intervene he could have been a party to the case. He would have been included in the settlement discussions and then he could have if he didn't like the outcome of the case he could have appealed to Circuit Court. But he didn't do that. And so now they're bringing a new claim before you; and it's an original claim. It's not based on a final decision by the Director. It's an agreement, it's a contract between two parties that was written by both parties. So I don't know how you get a final written decision from a settlement agreement. Even if you're in court and you have a case, and half way through they settle the case, that's never considered a final judgment by the Court. So in this case it's the same situation. You have a case where it was going to be tried in front of this Board, the parties reached a settlement, and part of the settlement was that they withdrew the appeal. So that's the end of it. It's not a final decision by this body. It's not a final decision by the Planning Director. The case that's before you is not a final decision by the Planning Director.

Appellant's counsel went on and on about the Code, interpreting the Code, the interpretation of the Code. He was giving you his interpretation of the Code. But it's the Director who interprets the Code when he's applying it. And his interpretation is entitled to deference because he is the one who is in charge of administering the Code. So there must be deference given to his decision.

I just want to reiterate that the Charter now says, it further limits the jurisdiction of this Board to hear and determine appeals from final decisions of the Planning Director regarding matters within their respective jurisdiction. The case was partially heard, there was no intervention. The parties settled. The appeal was withdrawn. So now you have the Appellant who did not intervene in the first case now trying to challenge a settlement agreement, instead of intervening and taking part in the discussions of the settlement. He wasn't a party to the appeal to begin with so, of course, he wasn't part of the settlement discussions. So essentially that would be an interference with the settlement agreement if you have someone who's now challenging the settlement agreement that they weren't even a party to.

This isn't their only option. They're probably bringing this appeal so that if, or when they go to Court they'll be able to tell the judge that they've exhausted their administrative remedies; and I can understand that. As an attorney I would do that as well. But this isn't their only option. They can bring an original claim in court if they aren't satisfied with the situation, the noise level. But, again, the Code does not, we don't have provisions about noise. Noise is handled in a different way. The Planning Director is only involved with administering the Zoning Code to make sure that people are not using their property in an unpermitted way that's not allowed under the Code. And in this situation it was like a gray area. So the case that was heard by you that ended up settling could have gone either way. Who knows how it would have ended up. But one thing for certain it probably would have been appealed to Circuit Court and then it would be up to the judge, the Court to decide. If the Court decided that it was a permitted use then the George's would be dealing with no limitation on the noise whatsoever. This way

they're only allowed to use their dirt bikes one day per week for a maximum, maximum of five hours in that one day. They can't start riding until after 10 o'clock in the morning, they can't ride after 4 o'clock p.m., one day a week, one day week, limitation to five hours. The mufflers, you can read it if you want, it's five hours. The muffler was added on just in consideration of the neighbors to try at least eliminate as much as the noise as they could. So that was another condition that was put on there.

OKUMURA: Objection, it's not found in any evidence, your honor.

GIMPEL: She's almost finished. We'll listen.

SELF: So, anyway, that's how this all came about. As a settlement agreement it was trying to reach a situation that would be tolerable; and it's unfortunate that they did not intervene. But this is not the only option they have; and they can file an original claim in court, which is where this matter actually should be. Thank you.

GIMPEL: Are there any questions of either counsel by the Board Members? All right, none. All right. I think the first -.

OKUMURA: May I be permitted a 30-second, 30 seconds, your honor?

GIMPEL: Thirty seconds, go on.

OKUMURA: Thank you. I'm not prepared to argue on the issue of deference. I don't really know much about that policy and I don't hear any citations. This is not an issue of standing. The parties are in here and you're hearing the case. It's not a matter of standing and so forth, although there have been cases that say just being a witness entitles you to appeal; and those are cases that have to do with trial courts, not Board of Appeals. Thank you.

GIMPEL: And you just made your 30 seconds. There being no questions by any Member of the Board, I think the first issue that we have to resolve is a determination of the Planning Director's Motion to Dismiss. For discussion purposes -.

MAEDO: Excuse me.

GIMPEL: Can we have, yes, I'm sorry.

MAEDO: Well, first, I'd like to make a disclosure at this time, that I happen to know Mr. Okumura and Ms. Higashi there. So I need to disclose it, you know.

GIMPEL: Thank you. And would that knowledge at all affect your determination in this case?

MAEDO: I don't think so, but I think that I would like you to, you know, if you feel like you'd like me to -.

GIMPEL: Are there any objections to Ms. Maedo's -?

SELF: No, no, that's okay. I understand, no problem.

GIMPEL: All right. Now I will entertain a motion regarding the Motion to Dismiss for discussion purposes. Can somebody on the Board make a motion regarding the Motion to Dismiss before us, whether to accept it or deny it.

TAVARES: I guess I could make a motion. I'll make a motion to accept the Planning Director's Motion to Dismiss based on the criteria that he didn't make a final decision so we don't have anything to decide on.

GIMPEL: Thank you. Is there a second to that motion?

HENDRICKS: Second.

GIMPEL: We have a second. All right, now we can discuss. Ms. Tavares.

TAVARES: Okay. I guess I agree with, you know, the stance that this Board hears appeals to final decisions of the Planning Director. That's in the Charter, so that's what I thought we were supposed to be here to do. Throwing in something that's a decision or a settlement or something else that the Planning Director made, did -. Like Ms. Self said, I don't see us being a Board that challenges every issue that the public would have against what the Planning Director has done. That's not what I subscribed to when I joined the Board. But appeals, appeals to certain cases that come before us is something that we do. I'm really curious why the George's didn't get involved as an intervenor. That seems like, you know, the simple solution to this, is being a part of the settlement. You could have been part of the settlement if you were an intervenor. So that's the Code as I see it.

GIMPEL: Okay, any other discussion, comments? Mr. Hendricks.

HENDRICKS: Based on the facts presented today from a right or wrong standpoint I have a strong bias in favor of the Appellant. However, I have to agree from a legal standpoint this body doesn't have standing here to make a decision as presented. It's going to have to go somewhere else. And I feel badly about that but I can't make a decision. But I think that's what I'll have to do.

GIMPEL: Any other comments? Hearing none, then I have a couple of comments. I think the issue is as stated, that it is the settlement, a final decision that is subject to our review, I'll add upon challenge by a nonintervenor, a nonparty to the case. But in deciding that I want to say that I'm appalled by the Planning Director's apparent failure to enforce the settlement until now, apparently. But here we've been asked to grant standing to a nonparty to hear a challenge to what was arguably not a final decision of the Planning Director that would be subject to our review. The plaintiff did not intervene as was his right. Instead this really constitutes a collateral attack on the settlement; and I believe that the law favors settlement, especially when the plaintiff had an opportunity to intervene. Now that is not to say that other options in my view don't exist for the plaintiff. He could sue the Planning Director for allowing the track without a special permit, especially in view of the Planning Code; and/or he could sue the Planning

Director for failing to enforce the settlement until now, that he could also do. But in my view this agreement to settle is not a final decision and, therefore, is not within our jurisdiction. The complaining party had an opportunity to intervene but failed to do so, and the law favors settlement, especially in that case. So those are my views. I think let's call for the vote. Alice, please.

OKUMURA: Mr. Chairman?

GIMPEL: Yes.

OKUMURA: Can I just state, ten seconds?

GIMPEL: Go ahead, I'll give you ten seconds.

OKUMURA: I'd like to file a motion for a continuance to further prepare for this. This action has been pending for five months, and seven days before the hearing, and two months, two and a half months asking for a continuance on a hearing. We received this at an 11<sup>th</sup> hour. We were preparing for trial, we were served with this motion seven days, the bare minimum of the time we're allowed to file a written response while we're preparing for the hearing itself. I think it would be not unreasonable, I think it would be unreasonable to not allow us a reasonable amount of time to respond to a motion that took 5 ½ months to file, even though it's a threshold matter in any litigation. I see, I respect the arguments and the statements of the Board Members. I did not have a chance to argue my pleading. I only served it to you, and then we took a break I understand, and then we ended up consolidating, oh, excuse me, taking under advisement. I would like a continuance for a reasonable amount of time to prepare, to argue my pleading and to present any other pleadings to argue this issue which is very important. And I know you think it's important, I realize that, and I appreciate hearing these things. These are things that we were not presented with until we were in the week where we're preparing for a hearing after 5 ½ months that this has been in the hopper. I don't think it's unreasonable if they took 5 ½ months to present this motion that we get a continuance to prepare for as strong an argument as it's fair and unreasonable and that it would not be unreasonable to grant the continuance because you've certainly heard the case, that part.

GIMPEL: Mr. Okumura, I'm looking at your 5 ½ page opposition to the Planning Director's Motion to Dismiss, which I think is well done and I must congratulate you in not only your eloquent thorough written statements and written arguments but also your eloquent oral arguments this morning and afternoon. I'm concerned -. If we do grant the Planning Director's Motion to Dismiss, I don't believe that that precludes you from what I consider to be your appropriate action, which would be to the Circuit Court. And you would have it in something to argue. I might want to, I do add one more thing. As I view the jurisdiction, you made an eloquent argument that your client is a person aggrieved by a decision of the Director. That's only one step. Our jurisdiction requires not only that it be a person aggrieved but that it be a final decision of the Director; and that's on what I'm basing my opinion, that this was not a final decision. Even though arguably Mr. George may be a person aggrieved by this decision, it was not a final decision. So I'm going to deny your motion to continue and ask for a roll call on the Motion to Dismiss, a motion to accept the Motion to Dismiss. Alice.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: Ms. Hart?

HART: No.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Chair, there are four ayes and one no.

GIMPEL: The Motion to Dismiss is granted. This case is closed. Thank you very much for all of your eloquent arguments; and thank you Board for your considerations of this that was excellent.

The discussion ended at 3:13 p.m.

Respectfully submitted,

Sharon M. Nomura, Secretary