

BOARD OF APPEALS  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
APRIL 11, 2008

A regularly advertised hearing on the application of **BEN AKAMINE (BOA 08-000055)** was called to order at 10:25 a.m. in the County of Hawaii, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawaii, with Chairman Joel Gimpel presiding.

PRESENT: Joel Gimpel  
David Drury  
Peter Hendricks  
Karen Maedo  
Kim Tavares

ABSENT & EXCUSED: Kelly Ann Soo

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

Jeffrey Choi representing Ben Akamine  
Molly Lugo representing Planning Director  
Amy Self representing Planning Director  
Daryn Arai representing Planning Director

And approximately 14 people from the public in attendance.

**PETITIONER: BEN AKAMINE (BOA 08-000055)** - Appeal of Decision by the Planning Director dated January 17, 2008, approval of Variance application (VAR 07-075), to landowner Charles Allen Jr., from Chapter 25, Zoning Code, relating to minimum yards. The property consists of approximately 7,413 square feet and is located on the Puna side of Puainako Street across of Waiakea Elementary School, Waiakea Homesteads, South Hilo, Hawai'i, TMK: (3) 2-4-9:53.

**GIMPEL:** So finally on our agenda today we have the Akamine case, the appeal of decision by the Planning Director dated January 17, 2008, approval of Variance application (VAR 07-075), to landowner Charles Allen Jr., from Chapter 25, Zoning Code, relating to minimum yards. The property consists of approximately 7,413 square feet and is located on the Puna side of Puainako Street across of Waiakea Elementary School, Waiakea Homesteads, South Hilo, Hawai'i, TMK: (3) 2-4-9:53. Are the parties here and would you introduce yourselves, please.

**CHOI:** Good morning. My name is Jeff Choi. I represent the Akamine's. At the risk of upsetting you I may take a few minutes longer than you're normally used to because this case is very, very unusual. I would venture to guess that 99.9 percent of the cases that you receive requesting a setback variance involve situations where the person who is asking for the variance through some kind of mistake -- either on their part, or their contractor, or surveyor, or what have you, may be a stupid mistake, but still an honest mistake -- comes and asks for your

consideration. In trying to evaluate this thing, I did what I'm sure all of you probably did the first time you came to sit at one of these meetings, is sit down and analyze the County Code to decide how the Planning Director is supposed to go about making a decision. And you read that language and you read it over and over and over and you say what the heck does this mean? And I came to the conclusion that those big words -- arbitrary, capricious, all of that stuff -- basically takes us back to a method of legal evaluation that probably predates most of you in this room. They don't teach it in law school anymore but back in the old days up to the fifties and early sixties you could go to Court and ask for either a law proceeding or an equity proceeding, equity meaning, you know, fairness. And obviously there's a danger when you let a planning director, or a board, or what have you evaluate things and just -. I feel like that's arbitrary, capricious, well, breakfast didn't sit well with me this morning. As time went on, this went on for hundreds of years. The equity courts developed guidelines to help them make rational decisions about what was fair.

Two of those rules come into play in this proceeding. The first rule is something that the courts used to call detrimental reliance; and that's basically what the Planning Director was talking about. If you go into the Building Department and the clerk stamps your plans okay and you build your house half way through and they come and say, no, you've got to tear it down because we made a mistake, the person who was building the house is going to say but I relied on the approval and you're causing detriment to me. So that's detrimental reliance. And the Planning Director basically is saying our guys made a mistake so it's unfair to force Mr. Allen to do something because it was our mistake. The problem with that rationale in this case is the mistake happened back in, on June 4<sup>th</sup>, let's see, June 5<sup>th</sup>, well I know it had happened on a weekend of June 15<sup>th</sup> and 16<sup>th</sup>, which was way before anything, it predates everything that you see in your file. What happened was, the reason I know is I was sitting in Mr. Akamine's garage having a plate lunch with him and we looked over at this lot that we thought would never be built on because it's so small and it would be hard to put a house on it, what have you. And we see these guys -.

LUGO: Excuse me -.

CHOI: Getting ready to pour the form.

LUGO: Excuse me, excuse me. I'm sorry, Mr. Chair. Respectfully, I could request that we reserve the presentation of evidence at argument until after I've introduced myself.

CHOI: I apologize.

GIMPEL: I think that's a good point. If you would merely indicate what you intend to prove with whatever witnesses you have.

CHOI: I intend to prove that the Planning Director made mistakes both of law and in fact.

GIMPEL: Okay. Now we can hear from the Planning Director.

LUGO: Thank you. I'm Molly Lugo, Deputy Corporation Counsel representing the Planning Director and the Planning Department. And to my right is Mr. Daryn Arai from the Planning Department. You have before you the record on appeal; and in a moment you'll hear perhaps testimony and other evidence; and at the conclusion the question to be presented to this Board will be whether the Planning Director in granting the variance abused his discretion or was arbitrary or capricious. And the evidence will show that he did not abuse his discretion. There are special circumstances that exist here. He carefully reviewed the application for a variance, considered the surrounding facts and circumstances and found that the criteria for granting a variance were met; and we'd ask that the Board affirm that decision. Thank you.

GIMPEL: Okay, now you can present your case.

CHOI: If I may just make a slight aside. I had asked the Planning Director to make available to you and to himself the comprehensive record in this case because it's very, very pertinent. And I anticipated that I would otherwise have to take extra time to explore items that were not -.

GIMPEL: We have been provided with the record on appeal. Have you seen that?

CHOI: Yes. But what's missing, for example, in the -.

GIMPEL: If you want to introduce something in addition to the record on appeal you're free to do that.

CHOI: I don't know what all was available to you. But, for example, the Planning Director states that the Building Department, somebody made a mistake and granted a building permit when the setback was shown to be erroneous. That's in his letter; and I think it influences his thinking. That is absolutely false, absolutely wrong.

GIMPEL: That's a matter for witnesses. What I'm looking for now is if you have evidence, written evidence, to introduce in addition to the record on appeal.

CHOI: Mr. Gimpel?

GIMPEL: Yes.

CHOI: The problem is I went to the Department and examined the building permit issuance, all the documents that go with it. They do not let anyone other than the owner take any documentation out of that Department. The only thing that they would give me was this summary. It says the date, the building permit issuance, electrical permit issuance, plumbing permit -.

GIMPEL: Okay. Do you object to the record on appeal that the Planning Department furnished us?

CHOI: Yes.

GIMPEL: In that it is incomplete?

CHOI: Yes.

GIMPEL: Then if there's more then you can draw attention to that. Are you willing to admit -?

CHOI: We would submit anything that we have in our possession. The problem is it's not in our possession. It's in the possession of the County which, as I understand the person at the office, is not available to us.

GIMPEL: So you're suggesting that there may be things in the Planning Department's records that were not included in this record on appeal?

CHOI: Absolutely.

LUGO: Excuse me. We do have three items from the Planning Department's records that were mistakenly not included in the record on appeal; and we'd ask to supplement the record on appeal at this time. I believe the Board has been provided with those three items. It's -.

GIMPEL: Is that what was provided to us today?

LUGO: Yes. It's a letter dated September 7, 2007, October 16, 2007, as well as the plot plan as part of the building permit plans.

GIMPEL: Okay. Have you provided copies of that to Mr. Choi?

LUGO: Yes, we have.

CHOI: Right on the very first page of what you've just received is an indication of the kinds of things that I was alluding to. If you take a look right on the front page it says -.

GIMPEL: Which letter?

KAWAHA: Front page.

GIMPEL: Okay.

CHOI: The very first page you'll see it's stamped on there "Builder shall assure proper setbacks of structures to property lines." This way predates -.

GIMPEL: Yes. Okay, but you don't contest that this should -?

CHOI: No, I do not contest it.

GIMPEL: Okay. Let's clear the record here first and see if we can get agreement on the materials that have been submitted for the record on appeal and accept those in evidence,

including these three documents that were furnished today. Do I have a motion to admit those for the record.

TAVARES: I'll make the motion.

GIMPEL: Okay. Second?

HENDRICKS: Second.

GIMPEL: All right. Do you have any objections to admitting these for the record?

CHOI: No objections, no objection.

GIMPEL: Okay. All in favor?

MEMBERS: Aye.

GIMPEL: Any opposed? None. All right. So now all of these are in the record on appeal officially.

CHOI: The other thing I would suggest be submitted, which I'm sure is in the possession of the Deputy Corporation Counsel, or someone, is the County keeps records of phone calls, letters, whatever happened, a timeline, chronology showing what happened in a particular case. I know they normally do that; and that should have been made available so that the Commission could see the history of it. I would imagine the Deputy Corporation Counsel probably has that right now.

LUGO: I'm not sure what Mr. Choi is referring to but I think the record at this point is complete with the chronology of events. We have the letter dating back to September 7<sup>th</sup> and -.

GIMPEL: Okay, let me suggest this, for the purpose of this hearing, I presume you have witnesses that will testify as to phone calls that they made. Is that correct?

CHOI: I made one of them. You can swear me in if you'd prefer -.

GIMPEL: Okay. Well, perhaps we will. But at least you can allude to it. But other people that may have made phone calls if you call them witnesses they can testify to that as well.

CHOI: I don't think any other witness will be necessary.

GIMPEL: Okay, that may well be. Have you, are you ready now to present your case?

CHOI: Yes, yes.

GIMPEL: Then would you proceed?

CHOI: As I indicated, there are these two principles -.

LUGO: Excuse me. If we're presenting evidence at this point and Mr. Choi is going to testify, then perhaps he should be sworn in as a witness at this point.

GIMPEL: I'm going to wait to see what he's going to do. Are you going to testify or -?

CHOI: Yes, yes.

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

CHOI: I do.

GIMPEL: Thank you. All right, now you may testify.

CHOI: Okay, where I digressed was back on June 14<sup>th</sup>. I remember because it was a Friday, I was sitting in the Akamine's garage having a plate lunch. And we looked over and we see a mad scramble of people building the form and were shocked by it. I walked 10 feet, picked up the phone, called the Building Department and said, hey, look it, there's no building permit and the form obviously is going to encroach into the setback. Nothing happens and the form gets poured over the weekend, without benefit of building permit or inspection. Several days later a building inspector comes by, there's a stop work order. The building was cited for several deficiencies. And as work progressed we just couldn't understand how this building could proceed without a permit with stop work orders marking the place. So finally in frustration I called Bruce McClure. He called me back at dinner time on a Friday night. Now here my recollection may be faulty because I thought he called me back, again, on Monday; but anyway, Friday night he tells me, don't worry, Jeff, we're going to take care of it, the guy is going to be fined, and what have you. I thought it was Monday, apparently according to the County records, it was Tuesday they issued the permit. Mr. McClure said that they were going to take care of, the building had been cited, there was a stop work order, a fine was being levied, the fine being \$330. And I thought that was the end of it. Instead a building permit was issued, work proceeds; and pretty soon the house is being finished. While all of this is going along, there are several stop work orders, not just one. There are numerous citations to the building. And out of frustration, things didn't look right. So I decided something was rotten some place but I didn't know where. I went to see the Mayor. About a month later the Mayor calls me back and says, okay, Jeff, it is taken care of, they're going to make sure everything is done properly, work with Bruce, fine. About three weeks later or so, we were informed that the Building Department has washed its hands of this matter and turned it over to the Planning Department because it's no longer a Building Department issue. It's a Planning Department issue. Now I believe that if the Planning Director had familiarized himself with all of this history, I mean I've compressed this a lot because there are numerous dates and numerous citations and numerous violations.

And I did take a quote, for example, on 6/20/07 the Building Department says "Charles Allen came in, paid penalty \$330. K. Masaki had discussion with him at counter. He said that in Maui where he's from they allow him to set up forms without a building permit. K. Masaki advised

him that in Hawaii setting up forms is starting construction. K. Masaki also advised him that part of the complaint is that they are building within setback. He said he was not within setback. K. Masaki advised him to recheck," etc. etc. The point being that there was no reliance on any false representations that Mr. Allen got from either the Planning Department or the Building Department. They told him he had a problem and he went ahead willy nilly continued to build in spite of all the warnings. So first principle, detrimental reliance, doesn't wash. So the Planning Director was in error in giving as his reason the fact that somebody had made a mistake at the counter, because the mistake at the counter had nothing to do with it. The building was almost ready for occupancy when it came to the attention of the clerk in the Planning Department.

The second principle that the Courts used to use to evaluate this kind of situation reminds me of something I saw in KTA last week. A mother was next to the big freezer thing standing there with her two boys about 10 years old. And one of the boys was tattling on his brother and said, you know what he did to me, blah, blah, blah? And so the mom says, well, did you do that? You know, she's trying to straighten it out. And as she listened to it, then finally she turns TO the first boy who was complaining and she said, yeah, he did that to you because you were being a jerk. Well, that's an instinctive principle we all follow; and the Courts used to call that having clean hands. If you come to the Court or the Planning Department or the Planning Appeals Board and you ask for mercy, you should come with clean hands. You shouldn't come asking for mercy if you're the one that caused the problem in the first place. If you were being a jerk then you don't get relief from mom. That's called having clean hands. And I submit that in light of this history Mr. Allen did not have clean hands.

Now I've seen cases where people built houses on the wrong lot. I don't understand how they can do that, but it happened. Or I've seen one where the house was built with the boundary line smack dab underneath the middle of the house. Stupid, I think. But at least it's honest. They didn't intentionally go out there and make it happen. They'll probably come before you very embarrassed that they have to do it. But they don't go out there, build without a building permit, ignore the directions from the Building Department and do it anyway. I think the reason why this happened is some kind of relationship that Mr. Allen had with somebody in the Building Department. I can't point a finger at anybody specifically. But you take a look through the record as I did there are numerous citations by the Building Inspectors. This summary that I got, which was all that I could get, it says, "Building Permit date of issuance," and it says under there, "no inspections; Electrical Permit issued, no inspections; Plumbing permit issued, no inspections." There's also an indication in the record that subsequent to the first time when he poured the big slab and after being cited, paying the fine, he went ahead and poured again without a permit or even having a building inspector take a look at it; and he paid the \$330. But as I told the Mayor, I have a boat in my yard next to my garage and it would be in the setback area, and I have one of those temporary tarp-type things to cover it. If they told me I could pay \$330, build and cover that without a building permit and violate the setback requirement, I'd pay in a heartbeat. And I bet thousands of people in Hilo would do that, \$330, no building permit, no inspections, repeated violations.

As this thing was going on I kept telling Mr. Akamine, look, get ready because one of these days Mr. Allen is going to come over ask to talk story and see if you guys can work something out. He never came, never approached Akamine and said, hey, you know, I'm in a jam, let's try to work something out. It finally dawned on me that he never did that because he was so arrogant and so sure that whatever he had going on in the Building Department was going to scathe him

through the process, and he didn't have to worry and he didn't have to come and talk to Mr. Akamine. I don't know what it is, I don't know who he knows or what the arrangement is there; but I don't blame the Planning Director in not realizing how bad it was. If you take a look at the fact that the, one of the plans that he submitted finally, he had to submit plans twice. The first time they were rejected, then he got an architect to stamp the plans, but the second set does show that it's in violation of the setback. And so the Planning Director looking at the record sees that they issued the permit when the plans clearly show the violation of the setback. So the Planning, I think that's where the Planning Director came up with that statement in the decision about the Building Department making a mistake and issuing a building permit in clear violation of the setback. Well, that isn't really what happened. They issued the permit; and they don't normally issue the permit if there's a clear violation. But what they did is told the inspectors to back off, cause throughout this whole thing the inspectors are constantly trying to get their bosses to enforce the rule. The inspectors are being told by their bosses never mind let it go. I don't understand it, and I can't accuse anybody, but that's the fact and that's what happened. In fact, that's why I held up going to the Mayor earlier because I didn't know where all this stuff was coming from; and I was afraid that maybe it came from the Mayor's office, fortunately I don't think that any more. But it was troublesome then and it's troublesome now.

There is a reason that our form of government have a system of using citizen appeal boards, to take care of just this kind of situation where you have people who are covered by Civil Service or what have you and the Mayor is about to go out, lame duck, and people can do things with impunity. And if we don't have citizens like yourselves to take care of these kinds of situations, we'll have chaos. That is why we're here asking that you do the right thing.

Clearly, the Planning Director made an innocent mistake thinking that here was this guy -. I told Mr. Yuen, I said, you know, if you folks made a mistake which caused Mr. Allen to suffer we wouldn't be here. I wouldn't say anything and the Akamine's wouldn't say anything. But that's not what happened. There was no detrimental reliance, everything predated what you have. I was afraid that the Deputy Corporation Counsel would argue, as I expected they might, that we shouldn't be talking about what happened in the Building Department because that's not before you. But I submit that it's very relevant in evaluating the fairness of this whole thing, which is in essence what the Planning Director is doing here, saying, hey, cut the guy some slack because no skin off the nose to the Akamine's and we made a mistake.

There's one other reason for appealing and I'll sit down and shut up. Mr. Akamine asked me what happens if I get harmed by all of this some time down the road? There are other issues, there's a wall over the boundary into his property and drainage being blocked and all of that. But these building violations which include not having the building anchored to the cement slab which they all require now, hurricane straps and all of that, mean that although the probability is slight that if we have another hurricane or windstorm or what have you, and this house like Dorothy's house in Wizard of Oz goes flying off -- the Akamine's house is makai of the subject property and his rental is Puna side of the property -- extremely unlikely, but if part of that house flies away because it's not built according to Code and hits one of the Akamine's structures -.

LUGO:                   Excuse me, I'm going to have to object at this point just for the record for this line of testimony that relates to things that are within the purview of the Building Division and the Department of Public Works. It's not relevant to the issue before the Board today.

GIMPEL: Yeah, this goes beyond the Planning Department's error, I think; and it's very highly speculative. I don't know that, I don't believe that it's necessary for this.

CHOI: Mr. Gimpel, I guess I didn't explain my point. I don't expect this Board to do anything about what happened at the Building Department. But it is relevant to having this Board decide whether or not it's appropriate to give leniency to this gentleman. You're absolutely right that whatever happened at the Building Department is not before you.

GIMPEL: Your concern is that, your challenge is that the Planning Director's exercise of discretion was an abuse of discretion -?

CHOI: Yes.

GIMPEL: And that he should not have taken into account, or he should have taken into account certain other factors which you're bringing to us now?

CHOI: Yes.

GIMPEL: And one of those factors I think we understand is the possibility in the event of a disaster like a hurricane that the building might somehow fly off its foundation and hit a neighboring thing. But that could happen anywhere. I think we understand that; and I don't think you need to go into it any more.

CHOI: Well, Mr. Gimpel -.

GIMPEL: Yes.

CHOI: If you take a look at the Planning Director's decision, one of the reasons given for the decision basically is that there's no harm to the Akamine -. What difference does it make to the Akamines, so the building is a little bit closer? But if the building is built not according to Code and if -.

GIMPEL: Yeah, but that is not the Planning Director's jurisdiction to assure that the building is according to Code. So that would be your dispute before the Building Department, not the Planning Department.

CHOI: If we were arguing about whether or not a permit should be issued. But insofar that it goes to the question of its impact on the Akamine's, which is alluded to in the Planning Director's own decision, I think it's very relevant.

GIMPEL: It may be relevant -.

CHOI: Basically the Planning Director is saying no skin off your nose so why do you care.

GIMPEL: It may be relevant but it's too speculative, I think, for this Board to take into account at this point. We understand the concern that you have, that there are other possible

harms that the Planning Director may or may not have taken into account in making a decision. I don't think we need to go into it any more, I really don't. So I'll allow the objection.

CHOI: Well, I'll close then. But I do ask that the Board restore people's faith in the system. There are all kinds of people who have been, the word that comes to mind is hassled but who have had to do battle with the Building Department or the Planning Department over small issues. It takes months to get approval. This man got his approval in weeks, days -.

GIMPEL: I believe you can rest assured that this Board will evaluate the facts presented at this hearing and come up with a fair decision. Thank you. Do you have any cross examination of the witness? Mr. Choi, you're still under oath, and the Planning Department is entitled to cross examine you. Is there any cross examination?

LUGO: I just have a couple of questions.

GIMPEL: Okay.

LUGO: Okay. Mr. Choi, in the letter that you wrote on behalf of Mr. Akamine, attached to the petition for appeal, you say "It may be true that the monetary harm to Mr. Akamine is probably slight and difficult to measure." Would you agree that that slight and difficult to measure is different than causing a substantial adverse impact?

CHOI: Yes. But what that refers to is measurement at this moment. What that refers to is measurement at this moment. If nothing ever happened and the weather is not bad, maybe that's going to be the end of it.

LUGO: Okay, so any further detriment you would agree is speculative?

CHOI: It's speculative, absolutely.

LUGO: Okay. And you do agree that the issues would be inspection within the purview of the Building Division and not the Planning Department?

CHOI: The original application which repeats the legal requirement, when Mr. Allen applied for the variance in the first place, he had to comply with language in the ordinance which says the variance shall be consistent with the general purpose of the zoning district, the intent and purpose of the zoning and subdivision codes and the county general plan and will not materially, da, da, da, da. I submit everything that had happened in this case, all of Mr. Allen's activities have to be considered inconsistent with the purpose of the zoning and subdivision codes.

LUGO: Okay, I have no further questions for Mr. Choi. Thank you.

GIMPEL: Thank you. The Board is now entitled to ask you some questions. Are there any questions from any members of the Board?

TAVARES: I just wanted to clarify -.

GIMPEL: Go ahead.

TAVARES: What is on the property now? Is it a complete building or -?

CHOI: The building is complete. There's a "For Sale" sign in the front yard. The building was complete last year.

TAVARES: All right. Yeah, I couldn't tell on paper if it was just a slab still there or if it was the whole building, so okay. Thank you.

GIMPEL: I have a couple of questions. I just want to get a little bit straighter on the timeline. As I recall Mr. Choi you testified that around June 15<sup>th</sup> of that weekend you called the County to complain that there -?

CHOI: The 14<sup>th</sup>.

GIMPEL: The 14<sup>th</sup>, that there was -?

CHOI: Which was a Friday.

GIMPEL: That there was no building permit for the property and there was obviously construction going on? And then you testified that a stop work order was subsequently issued. When was that about, if you know?

CHOI: Well, actually -.

NOMURA: Microphone, please.

GIMPEL: Use the microphone, please.

CHOI: As near as I can figure out from what information I was provided, on June 13<sup>th</sup> pursuant to some other anonymous call an inspector put a, noted in the Building Department's computer that building had been started without a permit and put "stop work order on in computer." I don't know what that means. I mean why would you put it on the computer?

GIMPEL: Okay, so along about that same time?

CHOI: Along about the same time.

GIMPEL: In other words, mid June, this is '07, the stop work order was issued?

CHOI: One was mailed to him on the 20<sup>th</sup>.

GIMPEL: All right, that's close enough. Then you say that subsequently a permit, a building permit was issued. Do you know about when that was?

CHOI: July 18<sup>th</sup>.

GIMPEL: July 18<sup>th</sup> the building permit was issued and he paid the fine of three hundred and some dollars.

CHOI: Three hundred and thirty dollars.

GIMPEL: Okay. And then subsequently you testified there were several stop work orders and citations issued. Do you know about when those occurred and about what they were for?

CHOI: Mr. Gimpel, I'm sorry I don't have the specific dates.

GIMPEL: About?

CHOI: But it just ran, there are many of them.

GIMPEL: Okay. Did they occur between, let us say, July 18<sup>th</sup> and September?

CHOI: As near as I can tell, yes.

GIMPEL: Okay. Were there any after September, if you know?

CHOI: I do not know.

GIMPEL: Okay. And you also testified and I believe it's in the documents that several permits were issued without inspections, is that correct?

CHOI: That's correct.

GIMPEL: Okay. All right.

CHOI: All of the permits were issued without inspection.

GIMPEL: Including the building permit?

CHOI: Yes. And it's so marked in the County's official records.

GIMPEL: And what about, has there been a certificate of occupancy issued?

CHOI: I do not know.

GIMPEL: Thank you. Are there any other questions? Mr. Hendricks.

HENDRICKS: Maybe Mr. Choi doesn't know, but I'm interested in whether this situation is an owner/build or there's a licensed contractor involved? I'm assuming it's an owner/build.

CHOI: My understanding is that Mr. Allen is a developer and he hired a contractor from Maui to build it.

GIMPEL: Okay, thank you. Does that answer your question?

HENDRICKS: Thank you.

GIMPEL: That was my understanding, too, at least -. I knew he was a developer, I didn't know who he hired.

DRURY: Mr. Chairman, I have one very small question.

GIMPEL: I'm sorry. Go ahead.

DRURY: What is the distance from the building, Mr. Allen's building, as built, to Mr. Akamine's building? What is the distance between the two houses?

CHOI: It's about 20 feet from the house itself. But the subject building is 9 feet from the boundary.

GIMPEL: Any other questions? Any other questions from the Board? All right, thank you. You may present your case.

LUGO: I'd like to call Mr. Daryn Arai as a witness.

GIMPEL: Mr. Arai, do you swear to tell the whole truth, nothing but the truth, so help you?

ARAI: I do.

GIMPEL: Thank you. All right, go ahead. Mr. Arai -.

LUGO: Mr. Arai, could you please state your occupation for the record.

ARAI: I am a planner with the Hawaii County Planning Department.

LUGO: And you're familiar with the variance that's the subject of this appeal?

ARAI: I am.

LUGO: Okay. Can you describe when and in what manner it came to the attention of the Planning Department that there was a possible setback violation on the subject property?

ARAI: The Building Department contacted one of our zoning inspectors, I believe it was via email on or about August 13<sup>th</sup> of 2007, indicating that there may be a potential problem regarding setbacks on this property.

LUGO: Okay. And after becoming aware of a possible setback violation, the Planning Director sent a letter to the property owner, Mr. Allen, is that correct?

ARAI: That is correct.

LUGO: Okay. That's the letter dated September 7, 2007 as part of the supplemental record on appeal. Can you tell what corrective actions that letter required?

ARAI: The corrective actions consisted of hiring a licensed surveyor to conduct a survey of the property to confirm the placement of the single family dwelling structure, and second is that once the survey is complete that the survey be provided to our office so we can assess the situation.

LUGO: Okay. And did the survey verify that the property was in fact in violation of the setback requirements?

ARAI: Yes, it did.

LUGO: Okay, by how many feet?

ARAI: The intrusion, bear with me, it confirmed that the dwelling structure is situated approximately 10.29 feet from the southeastern boundary line therefore, within the required 15-foot rear yard setback.

LUGO: Okay. So it encroaches by, what is that, 4.71 feet?

ARAI: That's correct.

LUGO: Okay. Now a short time later it was discovered by someone in your Department that an error had been made in approving the building plans, is that correct?

ARAI: That is correct.

LUGO: Can you describe what that error was?

ARAI: The error basically consisted of the Planning Department not confirming that the site plan shows that the building meets the proper minimum yard setbacks required by the Zoning Code. The plan itself showed the building situated approximately 9 ½ feet from the rear property line. Our zoning clerks went ahead and stamped the required and proper rear yard property line of 15 feet when they really should also be confirming that the building itself as shown as meeting the required 15 feet.

LUGO: So the individual who stamped the plans at 15 feet as a minimum rear yard setback approved the plans when they should have rejected them at that point?

ARAI: That is correct.

LUGO: Okay, so once that error was discovered what action was taken? In other words, you sent another letter?

ARAI: We sent another letter that was dated October 31, 2007 informing the landowner that we would be waiving the filing fee for the application of a variance.

LUGO: So Mr. Allen was still required to apply for a variance even though there was this error? Essentially the remedy for the error was that the filing fee was waived, is that correct?

ARAI: Absolutely.

LUGO: Okay. So generally speaking, what steps does the Planning Director take when reviewing an application for a variance? In other words what factors does the Planning Director take into consideration?

ARAI: The Director will take into consideration like the basic history on how the situation evolved, that is in addition to reviewing the grounds for approving a variance that's articulated in our Zoning Code.

LUGO: Okay. This is a substandard size lot, is that correct?

ARAI: That is correct.

LUGO: It's about 7400 square feet?

ARAI: Approximately, yes.

LUGO: Okay. And what's the minimum size lot required by the Zoning Code?

ARAI: The zoning of the property is RS-15 or Single-Family Residential 15,000 square feet minimum lot size. So it should be 15,000 square feet at minimum. The smallest lot permitted within the County of Hawaii is 7,500 square feet, so the lot itself is even smaller than the smallest lot you can create on this island.

LUGO: So since it's smaller than the smallest lot you can create would you surmise that it was created before the enactment of the Zoning Code?

ARAI: Yes.

LUGO: And before the enactment of the requirements for the 15-foot minimum setback?

ARAI: Right. So we considered that like a nonconforming lot.

LUGO: Okay. Are you familiar with the section of the Zoning Code that sets out the criteria for granting a variance?

ARAI: Yes.

LUGO: Okay, could you just describe in simple terms what those three criteria are?

ARAI: There are three basic criteria. One is that there are special and unusual circumstances applying to the property which exist to a degree that would deprive the owner or applicant of substantial property rights that would otherwise be available, or obviously interferes with the best use of the property. Second is that there are no other reasonable alternatives that would resolve the difficulty. And the third is that the granting of the variance will be consistent with the general purpose of the zoned district, the general plan, and would not be materially detrimental to the public welfare or cause substantial adverse impact to the area's character or to adjoining properties.

LUGO: Okay. Let's take each of those criteria separately. And can you explain how in the present situation the Planning Director determined that those criteria were met here, looking first at the requirement that there are certain special or unusual circumstances that might deprive the property owner of substantial property rights or otherwise interfere with the best manner of development. In the present case, how was it that the Planning Director determined there was special and unusual circumstances?

ARAI: What we took into consideration was the fact that the lot itself is nonconforming. It is not only smaller than what the Zoning Code requires, which 15,000 square feet, it is also smaller than the smallest lot you can create in the County, which is 7,500 square feet. That does create constraints on proper siting of a reasonable size, which I reviewed that this home is. It's just a typical home, nothing extraordinarily large or elaborate. We looked at options, for example, like the lot's geometry, we looked at adjoining properties and how the other homes are situated in the area, we even considered the possibility of rebuilding the home to like two stories in order to make it properly fit on the property, and the reasonableness of having to correct the situation, which means in large part destroying parts of the home.

LUGO: Okay, so you've described some of the reasonable alternatives that were considered, which is part of the second criteria?

ARAI: Yes. I'm sorry.

LUGO: Oh, that's okay. And then, but then the unusual circumstances you would agree that one of the factors was the error that was made by the Planning Department, the fact that the plans were approved even though they were submitted with, they clearly showed on the plans that there was going to be, that the minimum setback was not met, there was an error to approve it?

ARAI: It was a clear error, you know. We should have caught it; and by signing off on the building permit it allowed the building permit to be issued, which therefore allowed the applicant to proceed with the completion of their dwelling.

LUGO: Okay. So basically the error in addition to the fact that this is a small lot making it more difficult to meet the minimum setback requirements, those were the circumstances that went towards the Planning Director's decision?

ARAI: Yes.

LUGO: Okay. And then could you briefly explain the third criteria, which is consistent with the general plan, with the district, and not materially detrimental to surrounding property owners. How is that determination made here?

ARAI: Well, even if the property or the building itself is situated partially within the setback the fact of the matter is that it still is a single family residential use which is not only consistent with zoning it is consistent with the general plan which calls for this area to be low

density urban, which is single family residential use. So the granting of the variance wouldn't detract from that basic and permitted use.

LUGO: And pursuant to the requirements of the Code was notice sent out to all property owners and lessees in the surrounding area?

ARAI: Yes, it was.

LUGO: And were comments received back?

ARAI: Just from Mr. Choi representing Mr. Akamine.

LUGO: Okay. No other comments?

ARAI: No.

LUGO: And was the letter written on behalf of Mr. Akamine taken into consideration?

ARAI: Yes, it was.

LUGO: Okay. And the issues that were raised by Mr. Choi relating to alleged failures in getting inspections in the right order in terms of getting inspections before starting construction, those are not within the authority or purview of the Planning Department, is that correct?

ARAI: That is correct.

LUGO: Okay. Thank you. Those are all the questions I have right now.

GIMPEL: Mr. Choi, do you have any cross-examination of Mr. Arai?

CHOI: Just a couple questions.

GIMPEL: Go ahead.

CHOI: In evaluating whether the granting of the variance would or would not deprive the applicant of property rights or value, what have you, did your Department consider whether or not Mr. Allen had already received some kind of premium in the purchase price to make up for the fact that the lot was small? In other words, if the lot would be worth \$100,000, just making a round figure, and he paid \$50,000 for the lot, then he has already gotten all of that paid for, so to speak, right? Did you folks look into the question of how much he paid for this lot?

ARAI: No, we did not, because it is not a specific criteria for granting of a variance.

CHOI: But if you had known that he had paid less than market value for what was obviously going to be a difficult lot to build on, would you have considered that in making your decision?

LUGO: I'm going to object. He already answered the question; and what Mr. Allen paid for the lot wouldn't be relevant to the Planning Director's decision to grant a variance.

GIMPEL: I think that's pretty speculative, I think. We'll sustain the objection.

CHOI: If Mr. Allen had a building inspector on site before he poured for the slab, would you have expected the building inspector to point out to him that the form was in violation of the setback right from the get-go?

LUGO: Again, I'm going to object because I don't think that Mr. Arai should be called on to speculate what the building inspector would have done.

CHOI: How long have you worked for the Planning Department? Are you familiar with your procedure?

ARAI: I am -.

CHOI: The Building Department procedure rather.

ARAI: I've been with the Department close to 20 years and I'm not familiar with the Building Department's procedures since that is a different agency.

CHOI: So you're telling the Board that you don't know whether the building inspector would have pointed out that the setback requirement was not being met?

ARAI: That is correct, because I don't work for the Building Department.

CHOI: Okay.

GIMPEL: Any other questions? Any Members of the Board have any questions?

TAVARES: I have -.

GIMPEL: Ms. Tavares, go ahead.

TAVARES: For Mr. Arai. What has the Planning Department done since this to make sure that problems like this don't happen again?

ARAI: Aside from sitting down with all of the personnel in our office that could possibly deal with approving building plans, we have reinforced the need to make sure that not only the setbacks are stamped with the correct setbacks but also making sure that the site plan accurately represents what's going to go on the ground. That is the whole purpose for a site plan. I don't know if I just shot myself in the foot. But anyway the site has to accurately show where the home plans to be placed; and we then look at the plans to make sure the home meets the minimum yard setback. We have gone the extra length to work with the Building Division, and we've come up with sort of like a guideline on how setbacks should be identified on a site plan. We've asked that the designers actually show dash lines where the setback boundaries are located, so it's sort of like you have the property boundaries on the outside, then a series of dash lines on the inside. That way it's sort of like a check and balance thing to make sure not only is it measured properly but it's also clearly highlighted where the setback areas are located. So it was an unfortunate situation but we are taking proper actions to ensure that it won't happen again.

TAVARES: So when they put this stamp on there, "Builders shall assure proper setbacks," that will only, theoretically that will only go on a plan that is accurate? In other words, if this plan were submitted today they would look at it and say that it's in the building setback, go back and redo your plan, your plot plan?

ARAI: Yes.

TAVARES: Okay. All right, thank you.

GIMPEL: Any other questions?

MAEDO: Yeah.

GIMPEL: Ms. Maedo.

MAEDO: I'm sorry. I'm the new kid on the block and I'm not familiar too much with what this group does. However, I'm looking at page 5 of this, this amendment to the Planning Director, it's dated October 31<sup>st</sup>; and when I first read this on page 2 it says "Our Zoning Clerk indicated that he was aware of this encroachment, but thought that by identifying the correct 'rear yard (setback)', this would override the written dimensions and the builder would adjust the location of the dwelling structure according to our setback requirements." I guess, you know, if I'm a zoning person, I'm trying to put myself into his boots, and I'm dealing with somebody I feel should know about setbacks because he makes a living building houses, that it might be an assumption that would be valid. So right here I'm thinking wait a minute, no permit, no this, no that, and it was pointed out to him and he failed to deliver on the final inspection, I mean, on the final permit process, where am I, what am I missing here?

ARAI: You're not missing a lot, I mean, in the sense that you are correct that when we stamp something on a set of plans we would hope that not only the applicant but other, you know, agencies, or whoever looks at the site plan would read it and see that if we stamp 15 feet rear yard it should be 15 feet rear yard. But this is also in recognition of the fact that, you know, the Department does have responsibilities. We shouldn't just stamp stuff and say, okay, you know, you comply and cross our fingers and hope that it happens. A site plan, and we tell people this all the time, should be accurate and should be drawn to scale and should represent what's going to go on the ground. So, you know, we could have easily said, oh, you know, we stamped our setbacks, it's not our kuleana, it's their problem, you know. But the right thing to do is that the site plans should have been accurate, we should have checked it, we should have caught it, and made the necessary corrections.

MAEDO: Well, I thank you for the responsibility on the part of government. But I would like to know about the responsibility onto the individual who should have known better. And I guess that is where I'm coming from. You know, I am not even a builder but I'm in the process of building a house. Now my architect made a mistake, he thought he had a 15-foot setback, it was 20 feet. So before building my house as responsible individuals we're going to fix the plan, you know. So I guess I'm all about personal responsibility, I guess, and that I kind of feel that sometimes when we -. The lunatic fringe out there used to be real small; and it gets larger and larger when bodies like ours take the responsibility off, take the monkey off the back of these guys; and I guess that is what's bothering me more than anything upon my first meeting.

ARAI: Thank you.

GIMPEL: Yes, go ahead.

HENDRICKS: Mr. Arai, just a point of information. How many staff do you have qualified and checking plans in Hilo and in Kona, just for us to get better idea of your operation.

ARAI: We have a total of 4 zoning clerks, two in Hilo and two in Kona. In addition, every single planner in our office has the ability to sign off on building plans. So we're probably on the order of close to 26 people who could possibly sign off on building plans.

HENDRICKS: This really isn't to the presentation, but just for information. Do you consider both sides of the island adequately staffed now for the workload?

ARAI: Yeah. Especially with the down turn in the economy the number of building permits has really declined. There was a point in time, and I can't say specifically, in 2002 when we reviewed, no, not 2002, what am I saying, in the last year where there was a flood of applications and it was difficult for our staff to keep up.

HENDRICKS: And one last question. There is a process that's standardized in the Planning Department for planning and zoning. When the plans are checked by a clerk the overall plan is rechecked by a supervisor before the final okay on them, I assume?

ARAI: No. It's largely that the person who reviews is the only person, but they should be adequately trained to apply the setbacks properly.

HENDRICKS: Okay, thank you. That's informative.

GIMPEL: Any other questions? Mr. Drury?

DRURY: Yes, something related, that in your normal course of giving permissions, if the clerk had made the same note about the setbacks but not put the stamp saying approved, in that circumstance, would there be any chance for a variance application? Would a variance application come into play at all had that stamp not been put on that piece of paper?

ARAI: I'm trying to make sure I understand your question very clearly. If we stamped the incorrect setback, for example, on these plans then I think that would add further evidence on why we should support a variance. We made an additional mistake by stamping the wrong setback. Is that what you're saying?

DRURY: Well, actually, it was more that the clerk did notice the correct setback and apparently did notice that the building was not within the correct setback. It seems that the mistake that carried forward was he put the stamp on the piece of paper. It's not that you didn't catch the mistake, but he approved it in spite of not catching the mistake. What I was asking is had that stamp not been put there and Mr. Allen had then gone to the Planning Department and said, well, I've got concrete poured, I really would like a variance to apply, would you consider that application?

ARAI: More so because the purpose of the stamp is to convey the proper setbacks to whoever is reviewing the plans. If we didn't stamp it then who would know? The applicant/landowner wouldn't know what the proper setbacks were. They would have just assumed that whatever is shown on the plan is proper.

DRURY: No, I'll try once more. It's maybe my fault for not conveying things right. That had the County recognized that the actual building was in fact encroaching in the setback area would, in that circumstance, would you entertain an application for a variance?

ARAI: We would entertain it but I wouldn't know what position the Director would take regarding, we'd have to look at the situation, we'd have to look at whatever the applicant presented as far as alternatives and so forth, so on. So I wouldn't be able to speculate at this point. He could apply but whether it would be granted I wouldn't know.

GIMPEL: Any other questions? First, this document that we refer to today, is that the plan that was mistakenly approved?

ARAI: Yes, it is.

GIMPEL: Okay. And on it it says "Min. 15' Rear Yard Setback Required." And then it has in handwriting measurements that don't, it doesn't say that it has been approved anywhere on this plan, does it?

ARAI: No, the stamp must be somewhere else.

GIMPEL: Stamp must be somewhere else, all right. But it does -.

ARAI: Oh, you can see portions of it at the very top. You see where it says "Date" and then the rest of it? It's just the way it was xeroxed.

GIMPEL: But it does say "Min. 15 Rear Yard Setback Required," and no where does it say that it has been met.

ARAI: That's correct.

GIMPEL: Okay. I have a couple of other questions. Do I understand correctly that in approving this variance the Planning Director did not investigate the issues regarding the late issuance of the building permit?

ARAI: No.

GIMPEL: So he didn't investigate the fact that the building permit was issued well after the construction began, is that correct?

ARAI: I mean in a sense that we were aware simply because of the fact that we were first notified by the Building Department that there may be a problem.

GIMPEL: Did you investigate that further that there may be a problem?

ARAI: If you're alluding to all of the problems that Mr. Choi experienced with the Building Department and what -.

GIMPEL: Yes.

ARAI: Not to that detail, no.

GIMPEL: Thank you. All right. So you didn't investigate to any kind of detail the fact that (1) the building permit was issued well after construction began, and (2) that there were many violations cited, and (3) some of the permits were issued without inspection, is that correct?

ARAI: That is correct.

GIMPEL: Okay. Now if the Building Permit rules had been followed by the Building Department that would have required then that this, and by the developer, that this building would have met the 15-foot setback, would that have been unduly detrimental to the owner?

ARAI: I can't answer that question because a lot of it -.

GIMPEL: But you did answer that question because you said that requiring the setback would be unduly detrimental to the owner.

ARAI: True, but then you're also making reference to a lot of problems that were between the applicant and the Building Department that pertains to what the Building Department regulates, which is the Building Code. We at the Planning Department, we just administer or enforce the requirements of the Zoning Code.

GIMPEL: Okay. But in the exercise of the Planning Department's, Director's discretion one of the elements is that it not be unduly detrimental to the owner to require him to follow the building setback. Now had the Building Department required him to follow the building setback requirements, that wouldn't have been unduly detrimental to the owner, would it have been?

ARAI: Well, we believe that having to destroy a portion of a home or picking it up and moving it can be detrimental.

GIMPEL: Okay, if he had to destroy it. But then you look again at had you looked at the fact that he began construction without a building permit then you might have changed your discretion, exercised your discretion a bit. I'm just saying that those are things that I have to think about in making my decision. So what you're telling me is that the Planning Director did not take into account the fact that he violated the Building Department's rules by constructing before getting a permit. The Planning Department didn't look into that.

ARAI: It wasn't a major component of our decision.

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

MAEDO: Mr. Chair, I have a comment or I have a question of this stamped -.

GIMPEL: Sure, go ahead.

MAEDO: This is a stamped paperwork, is that right, the one that we were just given this morning?

ARAI: Yes.

MAEDO: It says here in very big print, in capital letters, "BUILDER SHALL ASSURE PROPER SETBACKS OF STRUCTURES TO PROPERTY LINES," does it not?

ARAI: Yes, it does.

MAEDO: Thank you.

GIMPEL: Are there any other question from the Board? All right, I think it's time for final summation from both parties as to what you think you proved and what you'd like us to decide; and then we'll take this under advisement and see if we can come to a decision. Mr. Choi?

CHOI: I think I've said it all.

GIMPEL: That's as a concise a final argument as I've heard in a long time. Thank you. Go ahead.

LUGO: I think what we've heard from Mr. Choi today and also an issue that members of the Board have identified, it's certain frustration with Mr. Allen's actions and a feeling that he didn't approach the building of this house in a responsible manner. But I'd like to remind the Board that the issue that's presented to you today is not whether or not Mr. Allen was

responsible and got his inspections from the Building Department on time, but rather you're looking at the decision of the Planning Director.

The Planning Director has the discretion to grant variances based on criteria that's set out in the Code in Section 25-2-51. There are three criteria for when a variance can be granted. In this case the Planning Director looked at the surrounding circumstances. First and foremost is the fact that this is a substandard sized lot. It makes it more difficult and burdensome to build a normal-sized house within the setback requirements. Also is the fact that when the plot plan came before the zoning clerk in the Planning Department they stamped their approval. And, yes, it does say right on there that the builder shall assure proper setbacks. But I think what Mr. Arai explained to me, and it was very clear, is that the stamp of approval and the writing in the minimum 15 feet, that should be verifying the correctness of the plans, rather than saying, okay, here's your plans, there's an incorrect setback but you have to change it. So what should have happened is that the plans should have been rejected at that point, but they weren't rejected; and that error also contributed to a sense that the builder then proceeded with his construction and making it more burdensome not to issue the variance.

So the Planning Director considered all the surrounding facts and circumstances; and his decision to grant the variance was not arbitrary and capricious, was not an abuse of discretion. The surrounding property owners were duly noticed and there was only one objection from Mr. Akamine. He himself in his petition for an appeal has said that the detriment is slight and speculative. So with all those circumstances the granting of the variance was an appropriate exercise of the Planning Director's decision; and we would ask this Board to affirm that decision. That's the only issue that's before you today. It's not whether Mr. Allen should have handled his dealings with the Building Division in a different manner. Those are not the questions before the Board today. And we'd respectfully ask that you confine your determination to whether or not this is an appropriate decision by the Planning Director; and we'd ask that you affirm his decision. Thank you.

GIMPEL: Thank you. Are there any further questions of any of the parties by the Board? Thank you for excellent presentations. I think we have time to discuss among the Board now. Let's first, I'll entertain a motion regarding this appeal. Somebody wish to make a motion either to accept or deny so that we can discuss the matter? It doesn't bind you at all. As Chair I can't move.

TAVARES: I think I'll make a motion.

GIMPEL: Thank you.

TAVARES: Okay, I guess I'll make a motion for discussion, for the sake of discussion, to uphold the Planning Director's decision.

GIMPEL: Do I have a second?

MAEDO: Maedo second.

GIMPEL: Okay. Discussion? Since you moved you can be the first.

TAVARES: I'm going to have to argue with myself on this. It's a tough one because I can see both sides really clearly. You know, we really have to protect setbacks and buffers because that's why we have a law, is they need to really be there. I have concerns that this is going to happen again in the future, that somebody will decide that, oh, well, it's a small lot so it's okay to encroach in buffers. And I want to be assured that that's not going to happen; and I haven't really heard that yet today. So it's hard to make a decision.

GIMPEL: Anybody else? Ms. Maedo.

MAEDO: Sorry to talk so much for the first meeting, but I hate to see us -. I couldn't agree with you more. I guess we'd like to put on our black and white lenses. And while I think that the Planning Director indeed made a decision that he thought was not only the right one but a humane one for this person, we however are appointed to maybe when we listen to what it is we hear although you may say, I'm sorry, I forgot your name -.

LUGO: Mine?

MAEDO: Yes.

LUGO: Molly Lugo.

MAEDO: Hi, Molly. Where, yes, we know you're asking us to just look at this target, we're here to look at this, I mean, the bull's eye -. We're here to look at the target because the target enables us to see the bull's eye far more clearly. So it is very difficult to erase the information that we are asked to listen to; and that is what our charge is in the final analysis. So where we, you know, we respect where you're coming from, certainly, and certainly we respect our Planning Director, we have another charge, which is what I was told when I was appointed to this Commission. So thank you.

GIMPEL: Anybody else? All right, I have, I'm sorry. Mr. Drury?

DRURY: I agree this is a very hard one. In the normal course of events the Director has to rely on sister departments doing their jobs well; and it sounds like this did not happen in this case. But if you construe it narrowly, then the Director made the decision narrowly speaking with the information he had. One thing you've heard from the Board is it sounds like you do need new procedures and better coordination. Because if the Director is relying on bad information, even if it's sincere, it's still bad information and produces abuse in justice.

GIMPEL: And I have some concerns. The issue as I see it, is well put by both of the parties, is whether the Director's exercise of discretion was reasonable or unreasonable and that we have to look at all of the facts and find out whether the Director himself looked at the available facts in making his decision. We learned that, one, he didn't investigate the issue of the building permits being after the building started, he didn't investigate and learn when he has some indication that there was a problem of later building citations and so forth regarding violations, and he didn't take into account the fact that had the Building Department rules been followed there would be no unduly detrimental action upon the part of the owner.

So then I looked at to see, well, who suffered. The owner didn't come in with clean hands; and I agree with you. I think the owner as a developer should have known that he had a minimum 15-foot setback requirement. He should have known that he shouldn't start building without a permit. He should have known that all of these things were required when he bought the lot. He didn't come in with clean hands. The neighbors, however, although their ultimate damage is somewhat speculative, I think it's there. I think their property values would be affected by a nonconforming structure in your neighborhood. So I have a problem with the Planning Director's exercise of discretion that was exercised without fully informing himself of the facts of this case; and that's where I'm standing right now.

So if there are no other comments, I think we can call the question. The motion before us is to approve, to uphold the Planning Director's decision as not being illegal, an abuse of discussion, or otherwise contrary to law. So all in favor, can we call the roll then, please.

KAWAHA: Ms. Tavares?

TAVARES: No.

KAWAHA: Ms. Maedo?

MAEDO: No.

KAWAHA: Mr. Drury?

DRURY: No.

KAWAHA: Mr. Hendricks?

HENDRICKS: Nay, no.

KAWAHA: And Chair Gimpel?

GIMPEL: Yeah, no. I'm sorry.

KAWAHA: Chair, there are five noes, motion is carried.

GIMPEL: The motion is defeated.

KAWAHA: Yes, I mean the motion is defeated.

GIMPEL: The motion is defeated, the Planning Director is found to have abused his discretion.

KAWAHA: Right.

GIMPEL: So we need to, you'll need to draft conclusions of law and so forth.

CHOI: I'll submit it next week.

GIMPEL: You'll submit it next week. Then we can perhaps have that scheduled for our Kona hearing.

KAWAHA: The agenda already has been done.

GIMPEL: The agenda is already out. All right you have a little bit more time. You have to submit copies also to the Planning Director. And we will then consider that when we're next in Hilo which is -.

KAWAHA: June 13<sup>th</sup>.

GIMPEL: June 13<sup>th</sup>. Thank you.

DRURY: I'm sorry, Mr. Chairman. I don't quite understand, we voted down with the motion -.

GIMPEL: Yes.

DRURY: So we don't have a positive motion that we have voted on, do we? I don't understand that we've made a resolution on anything at this point.

GIMPEL: Yes, we have found that the Planning Director -. Well, the motion was to approve, so denied -.

KAWAHA: You have to do another motion -.

DRURY: You need to make a positive motion and positively approve it.

GIMPEL: All right, so we'll make a positive motion. Let's make a positive motion.

SELF: Based on what grounds, too.

GIMPEL: Yes, it will need grounds. You're right, you're right. Okay, we'll need grounds. So anybody wants to make a positive motion then to uphold the petition appealing -?

DRURY: Should we have another round of talking to make sure we're all on the same page?

GIMPEL: It's to uphold the appeal challenging the Planning Director's granting -.

TAVARES: I make a motion to uphold the appeal to the Planning Director's decision.

GIMPEL: On the grounds of -?

TAVARES: On the grounds of, what is -.

GIMPEL: Let me suggest that we believe that the Planning Director abused his discretion.

TAVARES: His discretion.

GIMPEL: Second?

MAEDO: Second.

GIMPEL: And we have a second. I guess we'll call the roll on that one. Go ahead.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Maedo?

MAEDO: I think Mr. Drury wants to have more discussion.

TAVARES: Oh, discussion.

DRURY: I'm sorry. I was going to say should we not have another round of discussion so that, or does no one else think we need any more discussion?

GIMPEL: Is there discussion on that? I'm sorry, we can if you'd like.

MAEDO: I'm confusing myself, I think. I heard her say that we should, her motion said we uphold the Planning Director's decision.

GIMPEL: No, we're upholding the appeal to the Planning Director's -.

MAEDO: Oh, oh, okay.

GIMPEL: Of the Planning Director's decision -.

MAEDO: Okay.

GIMPEL: On the grounds that it was an abuse of discretion.

MAEDO: Thank you for clarifying that then.

GIMPEL: All right, yeah. I'm sorry.

MAEDO: So I'm going to say yes this time, right. Okay, here I am an English teacher, the -.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: Mr. Drury?

DRURY: No.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: And Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Mr. Chair, there are four ayes and one no. Motion is carried.

GIMPEL: Thank you. That concludes this matter. Now you can draw up the Findings of Fact, Conclusions of Law and Order; and you'll have that and we'll have that scheduled for the next Hilo meeting on June 13<sup>th</sup>. Thank you.

The discussion ended at 11:48 a.m.

Respectfully submitted,

Sharon M. Nomura  
East Hawai'i Secretary