

BOARD OF APPEALS
COUNTY OF HAWAI'I

HEARING TRANSCRIPT
JUNE 12, 2009

A regularly advertised hearing on the appeal of **ALI GHALAMFARSA (BOA 09-000077)** was called to order at 10:05 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i with Vice Chairman Peter Hendricks presiding.

PRESENT: Peter Hendricks
David Drury
Joel Gimpel (from 11:15 a.m.)
Charlene Hart
Karen Maedo
Kim Tavares

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

Ali Ghalamfarsa, Petitioner
Steven Kornberg, Attorney for Petitioner
BJ Leithead Todd, Planning Director
Amy Self, Counsel to the Planning Director
Roy Vitousek III representing Meredith Kailua-Kona, LLC (excused between 2:30 p.m. and 3:10 p.m.)

Allen Meredith and Cory Foulk representing Meredith Kailua-Kona, LLC and one person from the public in attendance

PETITIONER: ALI GHALAMFARSA (BOA 09-000077) - Appeal of Decision by the Planning Director dated February 23, 2009, relating to determination of shoreline setback requirement as set forth in Planning Department Rule 11(b)(1) (a) and (b). The subject property consists of approximately 33,979 square feet and is located on the makai side of Ali'i Drive, Hōlualoa 3rd, North Kona, Hawai'i, TMK: (3) 7-7-4:25.

HENDRICKS: We'll move to New Business, and I'll read the citation. Petitioner: Ali Ghalamfarsa (BOA 09-000077) - Appeal of Decision by the Planning Director dated February 23, 2009, relating to the determination of shoreline setback requirement as set forth in Planning Department Rule 11 (b)(1) (a) and (b). The subject property consists of approximately 33,979 square feet and is located on the makai side of Ali'i Drive, Hōlualoa 3rd, North Kona, Hawai'i, TMK: (3) 7-7-4:25. And we can hear from the appellant first.

KORNBERG: Mr. Chairman, is it customary to make an opening statement?

HENDRICKS: That's correct. I'm sorry. Could both parties introduce themselves first? And then we'll start with the appellant.

KORNBERG: Good morning, Board. My name -.

SCHOEN: Microphone.

KORNBERG: I'm sorry. Good morning, Board. I'm Steve Kornberg, representative for Appellant, Ali Ghalamfarsa who is sitting right here.

SELF: Good morning, Board. Amy Self, Deputy Corporation Counsel, on behalf of the Planning Director, Bobby Jean Leithead Todd who is to my immediate right.

VITOUSEK: Good morning, Members of the Board. Randy Vitousek, and I represent Meredith who is the, requested to intervene in this proceeding. With me are Allen Meredith and Cory Foulk who represent the intervenors. I don't know if there's going to have to be a procedure where the Board decides whether or not the intervenor is entitled to intervene or -. I don't know how we would do that procedurally. I think because that may also be, you know, may also be a jurisdictional standing type of issue involved, that you may want to consider before we get into the merits of the hearing.

HENDRICKS: I think the suggestion was that we should handle this all in one meeting.

KORNBERG: Yes.

HENDRICKS: So I'll be glad to take some advice.

SCHOEN: What would be the Planning Department's preference? And then we can hear from the appellant as well with respect to Mr. Vitousek's request.

SELF: We would prefer to have the Board listen to arguments regarding standing before proceeding on the merits of the case.

KORNBERG: Board, we would take the position that we think we should submit our entire matter to the Board, and that can be one of the issues that are argued part of it. So we would prefer just to proceed with the whole matter so that Board has the full picture at the time it makes its decision.

VITOUSEK: Mr. Chair, may I ask, maybe the parties would stipulate that my clients can intervene as parties to the appeal because they are the owners of the property, which is the subject of this appeal. And so I think that, generally the Board has to make a determination in that the intervenors are entitled to intervene before we can participate in the hearing.

SELF: I'm sorry, I think I was a little confused here. I thought that the landowner was always a party to the proceeding; the standing I was referring to is the standing of the appellant.

SCHOEN: Okay, just for the clarification for the Board, I'm referring you to Rule 8-9 of the Board's Rules of Practice and Procedure, and it does say in Subsection (3) that all owners of the affected property in all appeals shall be parties to an appeal. So because this appeal would affect Mr. Vitousek's client, I believe he is a proper party before this Board. But if the Board would like, it could receive a response from the appellant on that.

HENDRICKS: We would be glad to take your response, Mr. Kornberg.

KORNBERG: We have no objection to the intervention of the owner to this matter.

HENDRICKS: Thank you. Then let's proceed.

KORNBERG: Again, good morning, Board. In this appeal, the Board of Appeals is presented the question of whether the subject lot, TMK: 7-7-4:25 – and with your indulgence I'll refer to this as Lot 3 because that's the designation given the lot by the Land Court in the Order of Subdivision that, not to beg the question but, created these lots in 2002 – the question is whether the subject lot, Lot 3, was created before January 19, 1997. To qualify for the exception of Rule 11-5 (b), the lot would have to be created before the rule was adopted in 1997.

It is the contention of the appellant that in 2002 a consolidation and resubdivision of two lots that were numbered 1 and 2 created by subdivision in 1957, this 2002 consolidation and resubdivision created two new lots, now known as Lots 3 and 4, which lots now have different boundaries and different sizes from Lots 1 and 2. And thus it is the position of the appellant that the subject Lot 3 was created after 1997 and does not qualify for the exception. Appellant owns and lives on what is now Lot 4, old Lot 2, and the two lots abut each other and were both created at the same consolidation and resubdivision in 2002.

The County of Hawai'i Planning Department Rules of Practice and Procedure, Rule 11-5 (a) provides that except as provided in that section, all lots which abut the shoreline shall have a minimum shoreline setback of 40 feet. The rule was adopted pursuant to Hawai'i Revised Statutes Section 205A-45, which empowers counties to create the shoreline setback. Rule 11-5 (b) allows for an exception to the 40-foot setback for a lot which was created – and then the rule itself provides – by “(final subdivision approval or a legal lot of record as determined by the Planning Department)” prior to the adoption of the rule, if the lot has either an average depth of less than 100 feet or if the 40-foot setback reduces the buildable area of a parcel to less than 50 percent of the parcel.

The history of these parcels shows that in 1957 by Subdivision 1134, Lots 1 and 2 were created. Lots 1 and 2 had the configuration which is shown on Exhibit 5. And maybe this is the time, Mr. Chairman, Exhibit 5 is a copy of the -.

SELF: Excuse me. I thought this was just opening statements. Are we getting into arguments now, or -?

KORNBERG: I was just going to ask these documents to be admitted into evidence when I talked about it. If Mr. Chair would rather I wait until after opening, that's fine. Would you like me to wait on that?

HENDRICKS: Let's keep the introduction short, and then we'll go into the meat of the issue.

KORNBERG: Okay. Our review of the maps show that the lots that were created in 1957 are different than the lots that were created by the consolidation and resubdivision of 2002. The boundary between the two lots was completely altered. And in fact, this testimony will show the square footages of the resulting lots and the square footages of the buildable areas under the two lots were altered as a result of this consolidation and resubdivision. The evidence will also show that the consolidation and resubdivision created a lot that allowed a larger building with more units to be built than it could have been built under the old configuration.

Mr. Ghalamfarsa, when he purchased his lot, made an application for SMA assessment. And the Planning Director at that time took the position that the consolidation and resubdivision of 2002 created the two lots in question, and therefore Mr. Ghalamfarsa did not qualify for a 20-foot setback, but any new construction had to comply with the 40-foot setback. He complied with that, and his improvements all comply with these requirements. When Mr. Ghalamfarsa learned about the proposed development next door to him, he inquired to the Planning Department to confirm whether the same rules that apply to his lot would apply to Lot 3, which is the larger lot. In February 2009 Mr. Ghalamfarsa was told by the Planning Department that the consolidation and resubdivision had a minor impact on the shoreline, it did not create a larger number of lots, and thus the Planning Department would say that the lots were actually created in 1957 but modified in 2002. The appellant being aggrieved by this interpretation of Rule 11-5 seeks this appeal. The change in shoreline setback, as we will, the evidence will show, will interfere with the viewplane from Mr. Ghalamfarsa's lot, will interfere with a normal flow of sea breezes and will otherwise deprive him of the full enjoyment of his property.

It's the position in this appeal that the Planning Director's decision was contrary to a law, erroneous and also arbitrary, capricious and characterized by either an abusive discretion or clearly unwarranted exercise of discretion. The Planning Department's position is that since the number of lots has not been increased, there is no increased impact on the shoreline, and they will say that the lots were created in '57 and modified in 2002. Thus the Planning Department is saying that even if the lot was created in the normal use of the word that is it came into existence after 1997, since the new lot did not increase the impact on the shoreline, the Planning Department would consider it created at the earlier date and just consider the second consolidation and resubdivision a modification, thus would qualify for the exception. It is submitted that whether the exception applies to a lot or not has to do with whether the lot was created prior to 1997, and the impact of the newly created lot on the shoreline is not a factor that may legitimately be considered in determining when the lot was created. Appellant contends that this rule does not permit an analysis of the impact on the shoreline of a lot created after 1997 as a criteria for granting the exception. There is no discretion given to the Planning Director in the rule to determine anything other than when the lot was created. And by created, the lot itself, the Statute itself defines what is created by referring to final subdivision approval as what creates

a lot. The evidence will show that there was final subdivision approval of the present Lot 3 in its present configuration in 2002, and therefore it is the appellant's position that the same rules that were determined to apply to him according to the law should be applied to the subject lot, Lot 3.

It is respectfully submitted that if the Planning Department doesn't like the restrictive application of the exception of 11.5 in this case or in general, it can amend the rule. This is a Planning Department rule. But it has to follow proper procedures to amend the rule; the Planning Director cannot on its own discretion make that change. The owner may also apply for a variance from the rule because of special conditions that may apply to their lot. But again, this decision by the Planning Director circumvents the variance process that involves the Planning Commission, I believe, in its decision.

In addition the evidence will show that in fact in this subdivision the new configuration does add an additional burden on the shoreline even though the number of lots wasn't increased. The nature of the change – the boundary between the two lots is what was changed – allows a larger building because it leaves room for the 14-foot required setback, and that therefore the proposed 16-unit condominium building could not have been built on the Lot 2 under the original subdivision because the nature of the way the line was, the setback would have had the building be approximately 22 feet smaller. So even though we take the position that the impact is not a relevant factor, in fact the evidence will show that this change did impact not only the size of the building but it allows the building to be approximately 20 feet closer to the shoreline.

When interpreting a Statute, a normal, everyday use of language should be used; create, besides the definition in the rule referring to final subdivision approval, means to bring into existence to cause to exist. The Hawai'i Subdivision Code 23-3 (8) defines consolidation to mean a combining together of two or more lots into one lot. The first step of a consolidation and resubdivision is to consolidate the lots, and in fact the Order of Subdivision provides just that. So the two lots that were created by the Subdivision 1134 in 1957 were combined into one lot at the first stage of this process. If this -.

HENDRICKS: Mr. Kornberg, could you shorten your opening remarks? This sounds more like the crux of the presentation from the appellant.

KORNBERG: Yes, certainly. I'll sum up to say that the definitions of the Subdivision Code support the position that these lots were created in 2002. And at the Chairman's suggestion I'll stop now and cover anything else in closing argument. Thank you, Mr. Chairman.

HENDRICKS: Thank you very much. Ms. Self?

SELF: Okay. The first contention of the County is that the appellant has no standing in this issue. And we will contend that for two reasons. Under the Board of Appeals' Rule 8-2 the appellant has not been aggrieved. And there will be evidence in our case that will show that the appellant has not been aggrieved by the decision of the Planning Director. You will find that there will be evidence that there was a mistake in an interpretation made by the former Planning Director; that mistake was corrected, and the appellant was notified that the new

decision would also apply to him so that he can, he will also have a 20-foot setback, shoreline setback just like the owner of the property that is the subject of this case today. The second reason that the Planning Director contends that there is no standing in this case is that under Hawai'i Revised Statutes 205A, Part III, which is the authorization for shoreline setbacks, the U. S. District Court of Hawai'i found that there is no private right of action in that statute to enforce a shoreline setback; in other words a private party does not have, cannot sue the County or bring the action against the County to force the County to enforce this shoreline setback law, and that is because there is no specific provision under 205A that allows it. And the Hawai'i Intermediate Court of Appeals in another case, Pono v. Molokai Ranch, found that if the legislature does not expressly provide a right for a private party to sue a government entity to force them to enforce a particular statute, then they do not have a right of private action. Essentially, that's what is going on in this case is the appellant is bringing an appeal of this case to the Board of Appeals to try to get the Board of Appeals to force the Planning Director to enforce a shoreline setback on the property owner. But he does not have that right because it's not expressly provided for under 205A.

Getting to the merits of the case, as I mentioned before, the evidence will show that there was a mistake, there was a misinterpretation of the Code by the former Planning Director; that was corrected. And I would think that that would be a good thing that, you know -. People or human beings are not perfect. The former Planning Director nor the present Planning Director is perfect in any way, but it is important that when they do discover mistakes, that it is corrected. And that's what happened in this case.

We will also provide evidence that the Subdivision Code does not apply to this type of consolidation and resubdivision. And that's specifically stated under Section 23-7 of the Subdivision Code. Because this did not create new lots, it was the same lots, it only changed one corner of one lot, the provisions of the Subdivision Code do not apply to that type of consolidation and resubdivision. And the reason for that is, the reason you have to do a consolidation and resubdivision for this type of situation anyway is just because there is no other procedure for modifying the lot line; so that's why you have to go through a consolidation and resubdivision process in order to modify the lot line. But if you look at Section 23-7 of the Subdivision Code, it specifically states that the provisions of the Subdivision Code do not apply to this type of consolidation and resubdivision. And that's, I'll just leave at that for now. Thank you.

VITOUSEK: Members of the Board, on behalf of the property owner we'd like to join the County's arguments about the jurisdiction, I think, both on the fact that the appellant has not sustained any injury and on the fact that there really is no private right by an adjoining property owner or anybody else to try to force the County to enforce a particular shoreline setback.

On the injury issue, it's important to know that when the Planning Director re-interpreted the shoreline, in other words, when it went back and evaluated what the minimum shoreline should be, it informed the appellant that the 20-foot set back applies to his property as well as to the adjoining property. So really what we have, strangely, is an appellant arguing that the shoreline setback -. You know, they had gone to the County and asked for a 20-foot setback. The initial interpretation by the Planning Director was it was a 40-foot setback. And so when the Planning

Director re-interpreted, he told both my client and the appellant that your setback is now 20 feet. So what we have is an appellant who is challenging a ruling and saying that his own setback should be 40 feet instead of 20 feet, which really doesn't make sense. I mean, there is really no injury, if the setback on your own property, if the result of the decision is that the setback of your own property is 20 feet as opposed to 40 feet.

The arguments about the building or the, you know, whether there is going to be a condo or not, really aren't before this Board because there is no application pending at this time. It's certainly not before the Board to build anything on Lot 3. The issue is at some point in the future they may apply to build something on Lot 3, and if they do, if it's a condo, then they have to get an SMA Major Permit, and that permit application goes to the County Planning Commission, and the appellant can intervene in the Planning Commission action. He does have a right to intervene in an SMA Permit as an adjoining property owner. And the decision of the Director is not on the minimum setback, is not binding on the Planning Commission in the SMA; in other words, all the Planning Director is saying is that under my rules the minimum setback is 20 feet. The Planning Commission can set whatever setback it feels is appropriate when it grants, if it grants, an SMA Permit to build something on that lot. So not only is he not injured now, but he has a right to enforce his environmental concerns to the extent, you know, Ali, the architect, has environmental concerns, he has a right to enforce those environmental concerns in an SMA proceeding. So there is no current injury.

The present condition on the property is both properties have houses that were built in the 50s. And both of those houses extend well into the 20-foot setback; in other words, the houses were built right up to the shoreline pretty much. And so the arguments about blocking the view are actually absurd because the present buildings, the buildings that were on the property when Ali bought it, extend right up to the shoreline, and clearly affect any view in that direction. And that's the existing conditions. So we have two, both houses, I mean, both lots have legal houses, you know, they're preexisting, they were built before June 22, 1970, they are in the shoreline setback. That's the condition we are looking at. And so it would be our -. And you know, I mean, this is a situation where the -. Actually, it's interesting because the Planning Director made an interpretation of the shoreline setback back in 2005 at a request of the previous owner of the property that the appellant now owns, and the Planning Director said at that time that there is a 40-foot setback, therefore you have to get a variance for the new building, which is the carport, and but when the, in the next paragraph they said, okay, so then they repeated, said you have to get a variance from the 20-foot setback; and that was a mistake, you know, it should have been 40 feet. So what the owner did was capitalize on that mistake, and kept the, got a building permit for the carport based on the 20-foot setback on that property; in other words, they capitalized on a mistake made by the Planning Director to get a building permit for, without getting, you know -. So the carport meets a 20-foot setback; it doesn't meet a 40-foot setback. And so everything on that property has been built using on, Appellant's property has been built based on the 20-foot setback. The idea that they've experienced some harm as a result of change in interpretation is just not the case.

The other issue is when the consolidation and resubdivision occurred, the County didn't give the owners any kind of notice that by changing, by doing this modification of a lot line, that it would take away the 20-foot setback; in other words, there was never a notice that if we grant your

request to subdivide, this will result in a significant reduction in the buildable area of your lot. And so you know, there is an argument available that the Planning Department, when it reviewed the subdivision, it should have given notice to the owners that if we approve this, our interpretation will be that that results in a significant loss of your buildable area on your property. And so, I mean, the Planning Department looked at this, and they looked at the fact that this lot line modification didn't change really anything on the shoreline, didn't change anything on the buildings, and therefore that it's a reasonable interpretation to say the lots were created back in 1957 and the 20-foot shoreline still applies. That's a reasonable, that's a reasonable interpretation of the rule on the part of the Planning Director. And the Planning Director has discretion to interpret the rules, has discretion to decide what constitute a lot, and did so. And when they did so, they went back and advised the appellant that that rule, the 20-foot setback rule, applies to his property as well.

So you know, we just ask that the Board determine that there is no standing to appeal, there was no injury in fact to the appellant, that there is no private right of action, and that the Planning Director appropriately exercised his and then her discretion, because both Chris Yuen and Ms. Leithead Todd made the same decision; in other words, the letter was drafted under Chris' administration, revised under Ms. Leithead's administration and signed by Ms. Leithead. So you know, it's had the exercise of discretion by two Planning Directors and it appears to be an appropriate exercise. Thank you.

HENDRICKS: Thank you. The Board is well aware with recent meetings, but I'd just like to remind us all that the Board of Appeals only acts on final decisions of the department heads, and we need to focus on that rather than any other side issues or possible developments or things of that sort. We are only authorized to rule on decisions – those being final decisions of the department heads, usually Planning and Public Works. Mr. Kornberg, would you like to present?

KORNBERG: Thank you, Mr. Chairman. Mr. Ghalamfarsa, did you get sworn in for this, or -? I'll call Mr. Ghalamfarsa as a witness.

HENDRICKS: Yes. And Mr. Ghalamfarsa needs to use the mike. Mr. Ghalamfarsa, do you swear to tell the whole truth?

GHALAMFARSA: I do.

HENDRICKS: Thank you.

KORNBERG: Mr. Ghalamfarsa, what's your full name, please?

GHALAMFARSA: Ali Ghalamfarsa.

KORNBERG: And where do you live?

GHALAMFARSA: On 77-6306 Ali'i Drive.

KORNBERG: Okay. And how long have you lived there?

GHALAMFARSA: Over a year.

KORNBERG: Okay. And is that the lot that abuts the subject lot that we are discussing here today?

GHALAMFARSA: Yes.

KORNBERG: What do you do for living?

GHALAMFARSA: I'm an architect.

KORNBERG: And how long have you been an architect?

GHALAMFARSA: Almost 32 years.

KORNBERG: And are you a licensed architect in the State of Hawai'i?

GHALAMFARSA: Yes, I am.

KORNBERG: And how long have you been a licensed architect in the State of Hawai'i?

GHALAMFARSA: Seventeen years.

KORNBERG: Okay. As part of your work as an architect, have you been involved in development projects in Hawai'i?

GHALAMFARSA: Numerous projects, yes.

KORNBERG: Okay. And also as part of your work in preparation of plans, do you have familiarity with the AutoCAD program that architects use for various purposes?

GHALAMFARSA: Yes, I have.

KORNBERG: And you are the owner of the property known as 7-7-4:96, is that correct?

GHALAMFARSA: That's correct.

KORNBERG: And where is that property in relationship to the subject property, 7-7-04:25?

GHALAMFARSA: It abuts it south-west side.

KORNBERG: Okay. When you purchased your property, which we will refer to as Lot 4, if the Board will indulge me, so we just call it one thing, did you communicate with the Planning Department regarding the remodeling and renovation of the existing structures?

GHALAMFARSA: Yes, I did.

KORNBERG: Did you receive a response from the Planning Department?

GHALAMFARSA: I did, and -.

KORNBERG: Let me just ask you. Is this -? I'd like to show you what is Appellant's Exhibit 3, and ask if this is the letter that you received from the Planning Department in response to your SMA assessment request.

GHALAMFARSA: Yes, it is.

KORNBERG: Okay. I request that Exhibit 3 come into evidence.

HENDRICKS: Yes.

KORNBERG: And in this letter, Mr. Ghalamfarsa, what does the Planning Department talk about in terms of when that lot was created? And I refer your attention to the second – let's see, this is the, I'm sorry I'm on the wrong letter here, excuse me one second – I'd like to show you, turn to the second page, and ask to read to the Board what the Planning Department talked about in terms of the creation of your lot.

GHALAMFARSA: Basically in referring to Rule 11-6 (b).

KORNBERG: And what does the letter say?

GHALAMFARSA: This part says, "Because the subject lot was created after January 19, 1997, being the date Rule 11 regarding the establishment of shoreline setback lines, it does not qualify for the application of a minimum 20-foot shoreline setback under § 11-5"

KORNBERG: Okay. And the letter refers to an earlier determination by the Planning Department, does it not, regarding a letter to Mr. Kashiwa in 2005?

GHALAMFARSA: Yes, basically repeating the same.

KORNBERG: And did you get a copy of that September 14, 2005, letter when you received Exhibit 3?

GHALAMFARSA: Yes, it was attached.

KORNBERG: And I'd like to show you Appellant's Exhibit 4, and ask if you can identify that.

GHALAMFARSA: Yes. It says the subject -.

KORNBERG: Let me just say, is this the letter that -?

GHALAMFARSA: Yes, it is, yes.

KORNBERG: Let me finish. Is this the letter that you received from the Planning Department along with Exhibit 3?

GHALAMFARSA: Yes, I did.

KORNBERG: Okay. Mr. Chairman, I request that Exhibit 4 come into evidence.

HENDRICKS: That's acceptable.

KORNBERG: And what does Exhibit 4 say about the creation of your lot and the date it was created?

GHALAMFARSA: In the second paragraph, it says, "The subject 7,794-square foot shorefront property, being Lot 4 of Land Court Application 1705 as shown on Map 3, was created by subdivision (SUB 7582) on August 23, 2002."

KORNBERG: Okay. And again, what does this letter say about the effect of that creation date on the application of the possibility of an exception allowing a 20-foot setback?

GHALAMFARSA: "Because the subject lot was created after January 19, 1997, being the date Rule 11 regarding the establishment of shoreline setback lines, it does not qualify for the application of a minimum 20-foot shoreline setback under §11-5, PD Rules for any addition or enlargement of the existing structures or activities."

KORNBERG: And in reliance on this communication from the Planning Department, did this affect how you were able to renovate and remodel your property?

GHALAMFARSA: Yes.

KORNBERG: In what way?

GHALAMFARSA: Because of limitation of the setback.

KORNBERG: Okay. So just to -. When you applied to the Planning Department then for your Special Management Area Use Permit Assessment, the Planning Department took the position that as a result of the 2002 consolidation and resubdivision 7582, that your Lot 4 was created after 1997, so the exception to the 40-foot setback of Rule 11-5 (b) did not apply, is that correct?

GHALAMFARSA: Yes.

KORNBERG: Okay. When did you first become interested in the development of the property that abuts your property, the subject property, which we'll call Lot 3?

GHALAMFARSA: Almost three and a half years ago when it first time was listed.

KORNBERG: And -.

GHALAMFARSA: By previous owner, not the current owner.

KORNBERG: No, no, I'm talking about -. In February did you -?

GHALAMFARSA: Which lot is mine? I'm sorry, you refer to Lot 4 being my lot, or -?

KORNBERG: No. I'm sorry. Let me start again. When did you inquire -? Let me ask you this. In around 2008, 2009, did you make any inquiries of the Planning Department of the application of the rule -.

GHALAMFARSA: Yes.

KORNBERG: That was applied to you, to your neighboring lot, which we call Lot 3?

GHALAMFARSA: Yes, I did.

KORNBERG: Okay. And I'd like to show you what's marked as County of Hawai'i Exhibit 1, a letter dated January 19 (sic), 2009, and ask if this is a copy of the letter that you wrote the Planning Department for such confirmation.

GHALAMFARSA: Yes.

KORNBERG: Okay. I would like County Exhibit No. 1 to be entered into evidence, please.

HENDRICKS: Has the Board been able to find that?

SELF: I think he is referring to the Record on Appeal.

KORNBERG: Yeah, the County Record on Appeal Exhibit 1.

SELF: So we're going to go by page number.

KORNBERG: It's a -. Is that page, is that down here, 049432?

SELF: This one?

KORNBERG: Yes.

SELF: Page 1 on Record on Appeal.

KORNBERG: Okay. Page 1 on Record on Appeal, Mr. Chairman, is requested to come into evidence.

HENDRICKS: That's acceptable. Give us a moment for the Board to find that item.

SELF: Excuse me. It might save time, if we get everything on the record. The County has no objection to admitting any of the Exhibits from the appellant or Mr. Vitousek's client, and we would also add that the Record on Appeal should be admitted in whole into the record.

KORNBERG: We have no objection to any of the Exhibits, and we would request that all our Exhibits 1 through 18 as well as the others go into evidence. We have no objection.

HENDRICKS: Thank you.

VITOUSEK: Let's see -.

HENDRICKS: Mr. Vitousek?

VITOUSEK: Yeah, I do have objection to some of their Exhibits. Let me look. Yeah, we object to the appellant's proposed Exhibits 10, 11 and 15, which are somebody's drawings of some building on Lot 3 that are not relevant to the issues and without any kind of foundation.

SCHOEN: Based upon those objections the Board may want to hear an offer of proof from Appellant with respect to those Exhibits 10, 11 and 15.

KORNBERG: Thank you. If we can, maybe we can admit all the other documents and then I'll lay a foundation for those Exhibits in the course of my testimony, so it's in order of telling what they are and why they are there and the Board can rule on the objection once I lay a foundation. Or would you rather me jump ahead and deal with those Exhibits now?

HENDRICKS: No, that sounds acceptable. We'll accept excepting 10, 11 and 15 items, and you can talk to them later.

KORNBERG: Thank you, Mr. Chairman. So Mr. -.

SCHOEN: I'm sorry, Mr. Kornberg, you said that you wanted to admit all your Exhibits 1 through 18; I only have 17. I don't know if the Board -.

KORNBERG: Correct. We submitted Exhibit 18 which is a copy of the Land Court Subdivision Order, and it's an official record of which official notice could be taken anyway.

SCHOEN: Okay, sorry about that. Everybody else has that?

HENDRICKS: So accepted 1 through 18 less 10, 11 and 15 for the present time.

KORNBERG: Correct. Thank you, Mr. Chairman. So Mr. Ghalamfarsa, you received a response from your January 16, 2009 letter from the County?

GHALAMFARSA: Yes.

KORNBERG: Okay. And I'd like to show you Exhibit 2 and ask if that is the response you received from the County.

GHALAMFARSA: Yes.

KORNBERG: Okay. And that's a letter dated February 25, 2009?

GHALAMFARSA: Yes.

KORNBERG: And what does the County say in response to your request to confirm that the same rules that were applied to your lot will apply to the Lot 3?

GHALAMFARSA: "Subsequently, at a November 12, 2008 meeting with Dr. William C. Foulk regarding a proposed 16-unit apartment complex for TMK: 7-7-4:25, it was the Director's determination that Subdivision No. 7582, approved on August 23, 2002, only resulted in a relatively minor lot line adjustment that did not increase the area of the subject lot and did not increased the number of shoreline lots. Therefore, TMK: 7-7-4:25 would still qualify for the 20-foot shoreline setback."

KORNBERG: And that letter refers, does it not, to a February 23, 2009 letter to Dr. William Foulk, and it says a copy which was sent to you under a separate cover?

GHALAMFARSA: Yes.

KORNBERG: Did you receive a copy of that letter to Dr. Foulk?

GHALAMFARSA: Yes.

KORNBERG: And I'd like to show you what's Appellant 1, and ask if you can identify that.

GHALAMFARSA: Yes, that is the letter.

KORNBERG: So that's the February 23rd letter. And you did receive this from the Planning Department?

GHALAMFARSA: Yes.

KORNBERG: And what does this letter to Dr. Foulk say about the situation of when the lots were created?

GHALAMFARSA: “This lot was originally created by Subdivision No. 1134, which divided a large area into two lots, Lots 1 and 2. See attached. The date of final subdivision approval was June 3, 1957. Subsequently, there was a consolidation/resubdivision, Subdivision No. 7582 (see attached), from two lots to two lots. This was a relatively minor lot line adjustment between this property and the same lot created in Sub. 1134. The adjustment involved a small corner of Lot 2 and did not change the number of shoreline lots. Had this not occurred, the ‘old’ Lot 1 would have qualified for a 20-foot shoreline setback under the rule, and Subdivision No. 7582 did not increase the problem in any way.

“Under these circumstances, we believe it would be keeping with the intent of the rule to say that the lots in question were ‘created’ in 1957 and modified in 2002. The situation might be different if the consolidation/resubdivision resulted in the lots appearing to qualify for a 20-foot setback when they would not have in their original configuration, or if the number of shoreline lots was increased in the consolidation/resubdivision.”

KORNBERG: Okay. Now, the Planning Director states in her letters, does she not, that the areas of the lots remain the same after the consolidation and resubdivision of 2002, is that correct?

GHALAMFARSA: Yes.

KORNBERG: Okay. Could we take a look at Exhibit 10, please? I’m going to open it up and then I’m going to lay a foundation for it, if that’s okay, Mr. Chairman?

HENDRICKS: That’s okay. Then we’ll decide to accept or not.

KORNBERG: Showing everyone’s attention to Exhibit 10, Mr. Ghalamfarsa, who prepared Exhibit 10?

GHALAMFARSA: Dawn Tavares from my office.

KORNBERG: And who is Dawn Tavares at your office.

GHALAMFARSA: She is a senior CAD operator.

KORNBERG: Okay. And did she prepare this map under your direction?

GHALAMFARSA: Yes, she did.

KORNBERG: And looking at the three sections -. Well, let me ask you first. Where did you get the dimensions and the scale of the two parcels that are shown on this map?

GHALAMFARSA: We got electronic files from Wes Thomas Associates who prepared the survey.

KORNBERG: So that you took the electronic maps prepared by Wes Thomas that showed the configuration of the old lot and the new lot, and then imposed them on the same document?

GHALAMFARSA: Yes.

KORNBERG: Okay. And the areas marked 1, 2 and 3, what do they represent?

GHALAMFARSA: The areas that were exchanged between the two lots for the subdivision.

KORNBERG: So Let's take -.

VITOUSEK: Excuse me, Mr. Chair, can I object to this line of questions? I mean, this is, he is basically putting a document in through testimony that hasn't been received in evidence. I mean, he has to show where, I mean, basically, he offered it, we objected to it, he's made no showing as to the relevance of the document. And yet he's trying to introduce it to you by having the witness walk through the document, and that's not appropriate. You have to make a decision about whether the document is permissible or not. He's not doing voir dire about the permissibility of the document.

KORNBERG: Excuse me, Mr. Chairman, I don't see how we can inform the Board of the relevance of this Exhibit or how it was prepared or anything without asking questions about it. So if we want to consider this voir dire to lay a foundation for the document, I don't have an objection with that approach. But I think I'm entitled to ask foundational questions to help the Board understand what this document is, how it was prepared, and what it shows.

HENDRICKS: You can proceed for now.

KORNBERG: Thank you, Mr. Chairman. Mr. Ghalamfarsa, the triangle crosshatched identified as No. 2, what does that show?

GHALAMFARSA: That shows the area that was taken away from the smaller lot and given to the larger lot.

KORNBERG: Okay. And -.

GHALAMFARSA: I'm sorry, I just want to be clear. Is the smaller lot as Lot 4 you are referring to?

KORNBERG: Lot 4, yes.

GHALAMFARSA: Okay. It was taken away from Lot 4, given to Lot 3.

KORNBERG: And so the, we haven't looked at the other maps, but the section that's No. 2 shows the shape of your old lot that was taken away from your old lot by the lot line adjustment and added to Lot 3, is that correct?

GHALAMFARSA: Yes.

KORNBERG: And how did you determine the size and shape of that triangle No. 2?

GHALAMFARSA: The shape was, again, the electronic file that was given to us. As far as determining the area, AutoCAD has a very basic function, you connect the dots and it gives you the area -.

KORNBERG: So that -.

GHALAMFARSA: Very accurate.

KORNBERG: But just to go back, the electronic documents that you used were the final subdivision maps that were submitted to the County as part of the 2002 consolidation and resubdivision?

GHALAMFARSA: The coordination of the lines, yes -.

KORNBERG: Okay.

GHALAMFARSA: Given to us by Wes Thomas electronically.

KORNBERG: So that in effect if we look at the final subdivision map from the original 1957 subdivision and compared it with the final subdivision map of the 2002 subdivision, that results in the Exhibit 10 with one imposed on the other?

GHALAMFARSA: Yes.

KORNBERG: Okay. And space 1 and 3, what do they represent on this Exhibit?

GHALAMFARSA: Taken away from Lot 3 and given to Lot 4.

KORNBERG: So that areas 1 and 3 as shown on this Exhibit were the areas of Lot, the big lot, Lot 3, that were given to your lot, Lot 4, as part of this exchange, correct?

GHALAMFARSA: Yes.

KORNBERG: Okay. And does this map accurately reflect the size, shape and configuration of the property both from the original subdivision and the new consolidation and resubdivision? Is it an accurate depiction?

GHALAMFARSA: Yes, it is.

KORNBERG: Okay. And there -.

GHALAMFARSA: I must say in the original there was more information under the original subdivision map showing the shoreline and other information.

KORNBERG: But the outside -.

GHALAMFARSA: The outside, the property line that was changed is exactly like the subdivision map, yes.

KORNBERG: Okay. And there is a mark here that says "2007 SHORELINE." Do you see that?

GHALAMFARSA: Yes.

KORNBERG: And how was that determined?

GHALAMFARSA: That was determined, I believe, by Lot 3 owners when they applied for a shoreline certificate.

KORNBERG: So let me draw your attention to Exhibit 12.

GHALAMFARSA: Yes.

KORNBERG: Okay. And what is Exhibit 12?

GHALAMFARSA: It's a shoreline certificate that – it is indeed in our record – and this was sent to me electronically by DLNR office.

KORNBERG: Okay. And was the shoreline that was shown on Exhibit 10 taken from the shoreline which was shown on Exhibit 12, which is the shoreline certificate survey of 2007?

GHALAMFARSA: Right, yes, for Lot, Lot 3.

KORNBERG: For the whole shoreline, correct?

GHALAMFARSA: For Lot 3, yes, this one.

KORNBERG: Correct, okay.

GHALAMFARSA: Exhibit 12, right?

KORNBERG: Right, Exhibit 12.

GHALAMFARSA: Yes, it is.

KORNBERG: Okay. And then the 20-foot shoreline setback line that's shown on Exhibit 10, how was that determined?

GHALAMFARSA: Basically offsetting 20 feet -.

KORNBERG: By a scale?

GHALAMFARSA: Electronically.

KORNBERG: Okay. And the footprint of the proposed building that is shown on this Exhibit to be on Lot 3, where did you get that footprint from?

GHALAMFARSA: Well, from the Planning Department.

KORNBERG: And how did you get that from the Planning Department?

GHALAMFARSA: We got it, it was mailed to us, and we took that, digitized it electronically, very accurately, and superimposed on this plan. This was, I believe, one of the plans when, as a part of the application of the lot owner.

KORNBERG: Okay. And does the position of the proposed building on Exhibit 10, is that an accurate depiction of the planned or proposed building that you received from the Planning Department?

GHALAMFARSA: Very accurate, yes.

KORNBERG: Okay. Mr. Chairman, I request that this document now be come into evidence.

HENDRICKS: Comments from the Board?

TAVARES: I don't know.

DRURY: I would like to, I would like to hear if there are specific objections from the County side or from the landowner.

VITOUSEK: Yeah, our objection is that it's without foundation. I mean, the inclusion of a proposed building, you know, is -. I mean, there's been no foundation for there being any current proposal for a building nor is there any relevance to the location of a proposed building to this proceeding before the Board. The Board does not have the discretion to determine the SMA application or anything of that nature.

DRURY: Could I ask where this footprint came from? Obviously, there was an application from the owner that the County Planning Department has.

VITOUSEK: There was an application that was withdrawn, yes. So there is no, there was an SMA application that had been filed that was withdrawn; so there is no currently pending application. What I'm saying is that I'm objecting to the -. And there has been no foundation that this is in fact the location for one as to this document. And secondly the location of a proposed building is just plain not relevant to this application. The issue is, you know, the issue of what the Planning Director determined is what the minimum shoreline setback is on this lot based on Planning Director's Rule 11, and -.

DRURY: That seems to be, I'm sorry, that seems to be going beyond the question that's before us as to whether this has foundation and some kind of fact, and you are saying that the building location and size is based on an SMA Permit (sic) that has been withdrawn.

VITOUSEK: That's correct.

DRURY: Do you have any objections to the triangles and the square footage that's suggested by those triangles? Do you have objections to that aspect of Exhibit 10?

VITOUSEK: Yes, I do, because I have no, I don't know what this is meant by 4. There is triangle 4 -.

DRURY: I don't, neither. I was going to ask about that, but -.

VITOUSEK: And so, and so basically, you know, we are offering a document without any foundation, that's the -.

DRURY: Well, no, no, no, 1, 2 and 3 are the ones that seem to be relevant; I was going to ask about what 4 means. But it seems that there is an argument that is going to follow on 1, 2 and 3. Do you have any objections to the source of and size of those pieces of land?

VITOUSEK: As to showing there where 1, 2 and 3 were, that they depict the changes in the size of the parcels due to the lot line adjustment, I don't really have the basis to dispute that because I haven't done the calculations. But if that's all the document was offered for, I wouldn't have an objection to it.

KORNBERG: Mr. Chairman, we'll limit -.

VITOUSEK: That doesn't -.

KORNBERG: We'll limit the document to be offered purely and only for the limited purpose of showing the 1, 2 and 3 as the areas that were altered by the lot line adjustment, and then I'll get more testimony on how the square footages were figured. We'll only limit our request just to that one thing; we will not use the document concerning the building footprint. Triangle 4 is not part of the analysis. It was just put on the map; it's not relevant to what we are talking about. And we are just limiting this Exhibit just purely to counter the statement of the Planning Director in her letter that the consolidation and resubdivision of 2002 kept the lots the

same size. And we just think the Board should know what exactly was changed by the square footage.

SELF: We join in the objections voiced by Mr. Vitousek. We also object on the grounds that we don't know the qualifications used. He hasn't said anything about the qualifications of the person who drew this map, and he just said that he didn't draw it himself; it was drawn by Dawn Tavares from his office. So we have no evidence on her qualifications. And also we object to No. 4, the shaded areas No. 4 and 3 because it's uncertain, well, it's uncertain whether or not that was taken into consideration in the Planning Department's, Planning Director's decision. No. 4, I've been informed by the Planning Director, is not even part of a lot; it's under the water, so that doesn't even -. Did you want to -?

KORNBERG: We can provide more detail on Dawn Tavares. I thought the rules provided that actual rules of evidence don't apply, so -. But we can give the qualifications of the CAD operator that determined the areas 1, 2 and 3. And again, that's the only limited purpose that we are submitting this Exhibit, Mr. Chairman.

VITOUSEK: May I, Mr. Chairman, may I just add that I think it's improper to offer a document into evidence and say, well, we will only consider this little piece of it and that little piece of it, because that's just not, that's just not proper. If a document they are offering in evidence is not all relevant and all admissible, then it's a real risk that there is prejudice from allowing extraneous parts of a drawing. I mean, if they want to submit a drawing that just has the parts that are relevant, then resubmit it. If the drawing has things that aren't relevant, then it should be rejected. I think that's pretty simple. I just don't think you can admit part of a map into evidence.

KORNBERG: Well, the map would come in, we are just using it for a limited purpose because of the representation that the proposed building plan has been withdrawn. So it's not relevant where that building is for this line of questioning for the square footage. It's not improper to limit the use of a document, and therefore make it admissible, Mr. Chairman. But I will, if you want some more information about Dawn Tavares, I would be glad to -. She is a certified CAD operator. She has been working for Mr. Ghalamfarsa for a long time. I'll be glad to go through all that, if the Chairman wants me to.

HENDRICKS: Is your intent to show the exact square footage of the pieces which were changed around -.

KORNBERG: It's just my intent to show -.

HENDRICKS: As part of this argument?

KORNBERG: Yeah, that Parcel 3 was increased as an entire parcel by 411 feet; that's the only purpose of doing it. And in fact, I agree, I'm not sure if that's a relevant fact under our argument. But because the Planning Department used it as a basis of her letter, I believe we are entitled to offer evidence that her statement that the lots were the same size isn't accurate.

MAEDO: May I ask a question?

HENDRICKS: Go ahead.

MAEDO: Mr. Ghalamfarsa, when did you purchase this lot again?

GHALAMFARSA: August of 2003.

MAEDO: So you purchased this property knowing that that was the size of the property at the time of purchase; you knew what this property was -.

GHALAMFARSA: Yes.

MAEDO: And what the boundaries were at the time when you purchased it.

GHALAMFARSA: Yes.

MAEDO: Thank you.

HENDRICKS: Anything from this side from the Board. I think we are not going to allow this AutoCAD presentation; it's not specific enough to the question at hand, and you can show this by other means. We do have the square footage of the parcels and the changes which were made; those are facts.

KORNBERG: Well, I'd like to make an offer of proof then, Mr. Chairman.

HENDRICKS: Go ahead.

KORNBERG: I'd just like to offer that this Exhibit 10 would show that the Lot 3 after the consolidation and resubdivision as an entire lot was 411 feet larger than the old Lot 3, and that that was calculated by calculating the areas of 1, 2 and 3, and showing that the area 2 is bigger than the sum of 1 and 3 by 411 feet.

HENDRICKS: We can accept that as a stipulation – your statement you just made.

SELF: Which lot is he referring to, his own lot or the subject lot?

HENDRICKS: I'm assuming that it is current Lots 3 and 4, the two main parcels. And I hope I'm assuming the right thing.

KORNBERG: Correct, Mr. Chairman. I'm sorry if I was confusing -.

HENDRICKS: Not using graphic.

KORNBERG: That is, the testimony was that -.

SCHOEN: Okay, can we just stop just so that the record is clear? My understanding is you are submitting an offer of proof with respect to Exhibit 10 only. The Chair has already denied the request to admit that Exhibit, so now you are just placing your offer of proof on the record. And then we can proceed with your case.

KORNBERG: Correct. Mr. Ghalamfarsa, let me ask you -. Can I proceed, Mr. Chairman? Mr. Ghalamfarsa, as a licensed architect, did you compare the areas of the large parcel 3 before and after the consolidation and resubdivision?

GHALAMFARSA: Yes.

KORNBERG: And did you compute what the difference in the area was both before and after the consolidation and resubdivision?

GHALAMFARSA: Yes.

KORNBERG: And you did that using the AutoCAD program?

GHALAMFARSA: I did that with Dawn Tavares, using the subdivision map – I believe it's Exhibit 7 – same identical three areas, area 1, 2 and 3, same identical, same coordinates. Actually these are basic geometric shape; without even AutoCAD it would have been just as accurate, yes.

KORNBERG: So that Exhibit 7 shows the same three triangles 1, 2 and 3 that Exhibit 10 did, correct?

GHALAMFARSA: Yes, that's correct.

KORNBERG: And did you cause your AutoCAD operator to use the AutoCAD program to compute the square footages of both the little square and the two triangles that make up the difference between the two configurations?

GHALAMFARSA: I was standing right by, yes.

KORNBERG: And what was the result of that comparison?

SELF: Objection, objection. This is entirely wrong. These are Land Court properties. And if you look at the map as Plaintiff's Exhibit 5, and then Lot 1 shows 33, 979 square feet, Lot 2 shows 7, 794 square feet, and if you compare that to Appellant's Exhibit 6, it's the exact same lot; 1-A is 33,979 square feet, Lot 2-A is 7,794 square feet. These lots have not increased. It's the same square footage as the original.

KORNBERG: Mr. Chairman, that's an argument that she can put in evidence. We think that's wrong. And we haven't -.

SELF: That's my objection.

VITOUSEK: May I just -? These are Land Court properties, and you can't argue about Land Court boundaries; Land Court boundaries are determined by a court. The Land Court says that the two parcels are the same size now that they were before. And so you know, if there is a plotting error, it is somebody else's error. But as a matter of law those two properties are the same size as they were before because this was a Land Court subdivision. It is a Land Court subdivision. They are that size.

KORNBERG: I disagree. The boundaries are set by the Land Court; physical facts determine measuring the square footages. We agree that the boundaries are exactly like the Land Court approved. There is no, that's absolutely the law. But we are just submitting evidence that those numbers aren't correct. The actual square footages of the change increased the area. And that's Mr. Ghalamfarsa's testimony. Now, the Board is welcome to disregard that testimony and listen to the testimony from the other side, which could differ. But I believe it's legitimate testimony because he is a licensed architect, he has laid foundation that he used, you know, AutoCAD program to determine the square footages. He has testified that the boundaries he adopted were the exactly the boundaries by the Land Court map and the subdivision map, so there is no offer here that the boundaries have changed. We are just offering objective evidence that the square footages as measured with the AutoCAD program shows that there was a change in square footage as a result of this consolidation and resubdivision. And the other side perfectly, you know, has the right to put contrary evidence, and the Board would then decide who to believe. But I think we are entitled to put our evidence in, Mr. Chairman.

SELF: Objection to relevancy, because this should be based what the Planning Director made her decision on, and she made her decision based on these Land Court maps, not on something that was drawn by somebody that we have no idea what her qualifications are.

KORNBERG: I mean, we can see the Planning Director could have thought the square footages were the same. We are just offering testimony that they are in fact not.

HENDRICKS: Do you have anything further to proceed?

KORNBERG: Yeah, I was waiting for a ruling on the objection.

SCHOEN: Just so the record is clear, is the Planning Department alluding on the objections with respect to the Exhibits or just the testimony that's being presented right now?

SELF: Both.

SCHOEN: Well, he was referring to Exhibit 7, I believe.

KORNBERG: That's correct, and that's in evidence.

VITOUSEK: And just so I can clarify, the intervenor's objection is to this line of questioning based on relevance, because they are, what they are trying to do is dispute a Land Court map, and the way to do that is by going to the Land Court, and not you know -. And I

would also join the County's objections because basically there has been no evidence offered as to the qualifications of the person who is presenting this. Mr. Kornberg made some representations, but that's not evidence. And you know, so what we are having is a kind of unnecessary and complicated and irrelevant argument about whether or not the Land Court ruled correctly, in other words, made a correct determination, and on a basis of absolutely no evidence as to the ability or credibility of the person who did this. Mr. Ghalamfarsa has submitted that he didn't do it, so what his qualifications are are irrelevant.

KORNBERG: Well, I'll go ahead, if they are going to the qualifications of Dawn Tavares, I'll ask a couple of more questions, Mr. Chairman.

HENDRICKS: Go ahead.

KORNBERG: Mr. Ghalamfarsa, what qualifications does Dawn Tavares have to be a CAD operator?

GHALAMFARSA: She is certified. She teaches actually CAD. She is certified to teach AutoCAD. She is probably, I can comfortably say, the most qualified AutoCAD operator in the Big Island.

KORNBERG: Okay. And how long has she worked for you as a CAD operator?

GHALAMFARSA: Over eight years.

KORNBERG: Okay.

GHALAMFARSA: I must also say, Mr. Kornberg, that I do not do my draftings; all my draftings are done by CAD operators. I watch what they do. Under my supervision they work. I see what they do. I see what they write. That's why I put my stamp and signature on it. I do not physically draw every line.

KORNBERG: So Dawn Tavares is a certified, qualified CAD operator. And in your eight years of experience with her, has she proved to be accurate in her work?

GHALAMFARSA: I would comfortably say 99.9 percent.

KORNBERG: Okay. And she did this work under your supervision?

GHALAMFARSA: A hundred percent.

KORNBERG: And you were actually in her presence when she did this work?

GHALAMFARSA: Yes, I was.

KORNBERG: Okay. Your Honor, excuse me, Mr. Chairman, I would submit that there is an adequate foundation for purposes of this Board of Appeals hearing to allow the testimony of Mr. Ghalamfarsa.

SELF: Objection on a basis again of relevancy, because what should be the focus is what did the Planning Director used for the basis of her decision. And this is something that she has never even seen prior to today, so she couldn't have used this in her decision making process. So this goes way outside of the bounds of the Planning Director's decision which is the basis for this entire case.

VITOUSEK: And if I can just also add, we haven't had any testimony from Ms. Tavares, so the arguments about her credibility or lack of credibility really aren't relevant; I mean, if she hasn't testified to qualify this map. The other thing is what they are arguing is the location of boundaries, and that is a surveyor issue, not a computer operator issue. And they've made no showing that she has any basis to determine the location of a boundary, or whether the Land Court boundaries are correct or incorrect. So I just think it's without foundation.

HENDRICKS: Well, we respect the expertise of Mr. Ghalamfarsa and his staff, but we need to get back to the focus of this case, which is appeal of decision by the Planning Director dated February 23, 2009, relating to the determination of shoreline setback requirement as set forth in Planning Department Rule 11 (b), etc. So I think we've strayed from our focus here, and we need to get back to it. This is interesting information; I don't even know whether we need to entertain accepting it – that being the AutoCAD and the things that Mr. Kornberg described. I'd like comments from the Board, but I don't think it's, this particular line of reasoning is pertinent to where we are going where we need to make our decision. There may or may not be a difference in square footage caused by the Director's decision, but that's not the issue here. Do you want to proceed, Mr. Kornberg?

KORNBERG: Yes, Mr. Chairman. Mr. Ghalamfarsa, the Planning Director in her letters to you of February 2005 also referred to the fact that the boundary change was to one small corner of the lot, is that correct?

GHALAMFARSA: Yes.

KORNBERG: It only affected one small corner of the lot.

GHALAMFARSA: No, that's what he says; it's not correct, but the statement is correct, yes. And I was verifying what the Planning Director said, but I do not agree with it because it changed the entire property.

KORNBERG: Okay. In what way did the consolidation and resubdivision -? And let's turn to something in evidence that's uncontestable. Let's go to Exhibit 9 which is the Land Court approved Map 3.

GHALAMFARSA: Okay.

KORNBERG: And if we look – does everybody have Exhibit 9 – if we look at Exhibit 9, Mr. Ghalamfarsa, we see a dotted line that looks like a, makes a rectangular corner out of Lot 4. Isn't that the boundary line of the old Lot 2?

GHALAMFARSA: Yes, it is -.

KORNBERG: Okay.

GHALAMFARSA: The dotted line.

KORNBERG: And then the little rectangle and the two triangles that are depicted here show the changed boundary line, correct?

GHALAMFARSA: Yes.

KORNBERG: So that the boundary between your properties now instead of being a rectangle has that diagonal property line that's 31°24'30", 133.80 feet, that's the line that's now the boundary line between the two properties.

GHALAMFARSA: Yes, it is.

KORNBERG: Is that, is everyone clear on what I'm talking about? So how does that change in line affect the -? First of all, let me ask you this. Does that change in line in any way affect what can be built on Lot 3?

GHALAMFARSA: Yes, it does.

KORNBERG: In what way?

GHALAMFARSA: Setbacks – both shoreline and side setback.

KORNBERG: Now, as to the side setback, if we were looking at the lot in its old configuration that is the squared off dotted portion, how far in from that dotted line that runs from Ali'i Drive down toward the ocean would a building, a four-story building have to be located as a proper side yard setback?

VITOUSEK: Again, I object to the form of question. Four-story building, it's irrelevant; there is nothing before the Board and it's not relevant to the decision -.

KORNBERG: I'll rephrase the question.

VITOUSEK: This is not an SMA proceeding.

KORNBERG: I'll rephrase the question, Mr. Vitousek. Mr. Ghalamfarsa, does that change in line -? Let me ask you this. In what way does the side setback change affect the type of building that could be built on Lot 3?

GHALAMFARSA: Well, the side setback for a one-story building on the current zoning is eight feet, and you add two feet for every story up to 14 feet, I believe. So it's clear, it's very clear, you know, you would have to build minimum eight feet, if it's a one-story building, from the dotted line. And also I would like to note that the new lot created, which is 133.8 feet long, the long diagonal line, I'd like to show how that side, the new side line how much closer it is to the shoreline.

KORNBERG: Okay, would you tell us how that is?

GHALAMFARSA: Yeah, if you look at the long diagonal line, 133.8, I believe, see how, that is much closer to the shoreline than the dotted line that is perpendicular to the Ali'i Drive, which would have been considered as the side property line.

KORNBERG: Okay. And I'd like to call your attention now to Exhibit 11, and ask if you take a look at that, please.

VITOUSEK: Again, we've objected to Exhibit 11.

KORNBERG: Can I just get a foundation in, Mr. Vitousek, please? And what does Exhibit 11 show?

GHALAMFARSA: It shows both the old and new property line.

KORNBERG: And if we take the proposed building, but don't call it proposed building but any building -.

GHALAMFARSA: Any building.

KORNBERG: What does these two portion show about the size of any building that could be built on this lot? Let me ask you first, who prepared this?

GHALAMFARSA: Dawn Tavares from my office.

KORNBERG: And how were the shapes of the boundaries of the lots determined?

GHALAMFARSA: They're the exact electronic coordinates from Wes Thomas.

KORNBERG: And the 2007 shoreline again came from the certified shoreline that we looked at earlier?

GHALAMFARSA: Yes, from DLNR office.

KORNBERG: Okay. Now, if we just consider any building, could you explain how this Exhibit shows how the change of boundary line permits a larger building than would be permitted under the old configuration?

GHALAMFARSA: Yes, the one on the old configuration shows that the building would be much closer to the shoreline and actually being built into Lot 4.

KORNBERG: I'm sorry. So that if the boundary line of the old lot, which -.

VITOUSEK: Again, again, this is completely irrelevant. I mean, it's completely irrelevant to the issue. What he is talking about is, you know, is based on some hypothetical building; that's not the issue. It's not the issue he raised -.

KORNBERG: Excuse me -.

VITOUSEK: And again, we are driven to the exact same problems with respect to the document itself that we did do to the previous document that you didn't accept, and it has the same flaws as this document, which is it has a proposed building without foundation and -. So I just don't see why we are wasting time with this. The flaws with 11 and 10 are the same, and neither one should be admitted.

KORNBERG: Excuse me, I haven't tried to admit Exhibit 11 yet. And No. 2, the Planning Director in her letter uses the impact. I agree with Mr. Vitousek; I don't believe the impact of any development is relevant to the determination on whether this lot was created before or after 1997, and I would agree, and our main legal argument is that in fact nothing else is relevant but when the lot was created and when the lot wasn't created. But as the Planning Director who used in her letters the impact as she saw it of the change boundary line that led her to say that instead of being created, they were modified; so I believe that because the Planning Director inserted the impact of the boundary change in her decision, that we are entirely within our rights and relevant to deal with that as a side issue in case the Board goes along with the Planning Department and thinks that there are issues of impact that are relevant to 11-5. But again, our main argument is that none of this should have been used by the Planning Director to alter what create means; but because it was used to change the meaning, I think we are allowed to investigate the basis of the factual assumptions that the Planning Director used and put in her letters.

VITOUSEK: Okay, if I may. What the Planning Director said in her decision, February 23, 2009, that's the decision that's being appealed, is "This was a relatively minor lot line adjustment between this property and the same lot created in Sub. 1134. The adjustment involved a small corner of Lot 2 and did not change the number of shoreline lots." That's what she said. And so this, so basically what's happening here is Appellant's trying to turn this into an SMA proceeding. The appellant objects to a proposed building, and is trying to turn this into a proceeding where he preempts the Planning Commission and has you decide that this building can't be built; that's exactly what's happening here. And it's just not appropriate. So you know, if we are going to look at what the Director decided, let's look at what she decided. Let's base the appeal on the information the Director had and on the reasons that she may, that she stated in making her decision. And anything else is not relevant.

KORNBERG: I completely disagree with the characterization that we are trying to make this an SMA; we are just dealing with the assumptions and things that the Planning Director based her decision on. And again, I would say apart from Mr. Vitousek's trying to characterize those some SMA argument, we are just trying to establish that it wasn't a mere corner of the lot and it did allow a bigger building, whether it's this proposed building or any building. It's changed the boundaries in a way that allowed a bigger building. So therefore, to the extent to which those facts that the Planning Director set forth in her letter with a basis for opinion, and if the Board believes she is entitled to make that inclusion of facts, then I think we are entitled to show that they are not accurate. That's all. And I think it's just testimony, and it carries whatever weight the Board tends to give it. Thank you for your patience.

MAEDO: I guess it goes back to my question. When you bought the property, you were sure about what the boundaries were, and therefore you live with the choice that you made. I feel like I'm being asked to go back to before, you know, the landowner before, perhaps he should have felt aggrieved when he bought, I mean, when the lines were re-drawn. But to ask me to sit here for an hour and a half listening to something that I feel is not under the purview of this Board, I feel like I've already been pretty patient with listening to all of this. I can't understand why you feel aggrieved. I guess that's where I'm coming from.

KORNBERG: I will ask him later, but let me just say, there is no expressed dissatisfaction of Mr. Ali Ghalamfarsa to the existing boundaries. You are right; he bought it, that's his property. He has no problem with that. He is not trying to change the consolidation and resubdivision in any way. He is aggrieved, as we are getting into in a very few minutes here, by the decision that would allow his neighboring parcel to have a 20-foot setback instead of a 40-foot setback, and it's a legal argument that the word "create" in the rule means create by subdivision, so that this new lot was created by the new subdivision.

MAEDO: And I guess I'm not a planner, I'm just a teacher. I read through these documents, I shook my head the whole time; I wondered, wait a minute here, first 40-foot setback, now he gets 20, that seems like he is getting something. But what's good for him ought to be good for his neighbor. So I'm sorry if I can't, I can't get it.

KORNBERG: Excuse me, he was denied a 20-foot setback. And that's irrelevant. I think what's relevant is -.

MAEDO: Wasn't -.

KORNBERG: Excuse me.

MAEDO: Wasn't that part of the mistake? Was that what I heard?

KORNBERG: No, no, that was Mr. Vitousek's argument, and it's got nothing to do with our case here. The issue is simply whether Lot 3 was created before or after 1997. And the Planning Director ruled that Lot 3 wasn't created in 2002, but was actually created in 1957 and modified in 2002. And our position is that modification is what the 11-5 means by "create" because it was a modification by subdivision. And I'm, it's not an issue of, Mr. Ghalamfarsa is

not trying to change his use. He had put all new structures at 40 feet, and that isn't even the basis. It's the fact that -. Let me just ask this question right now and get to the basis of it. The impact that this change has on, Mr. Ghalamfarsa -. Does that answer your question? I'm sorry if I, I don't mean to be arguing with you, Ms. Maedo.

MAEDO: No, no, I don't feel like -.

KORNBERG: I just want to make certain that you understand the nature of our appeal, which is only that the Director's decision that Lot 3 was not created by the 2002 consolidation and resubdivision was incorrect in that this Lot 3 in its present configuration was in fact created in 2002. That is the whole argument and the whole appeal, and the rest of this was to deal with and counter things the Planning Director had said in her letter. And I hope that makes it any clearer what the nature of the appeal is.

MAEDO: I'm trying to think.

HENDRICKS: Mr. Vitousek.

VITOUSEK: This is just to clarify. Ms. Maedo said that she felt that the determination of the Director applied to Lot 4 as well. And I'm reading from the Director's letter to Ali dated February 25, 2009, where she states, "As a result of this determination, TMK: 7-7-4:96," which is that lot, "would now also qualify for the minimum 20-foot shoreline setback." So, I think I heard Mr. Kornberg said that was just my argument, but -.

MAEDO: That's what I read. I read that.

VITOUSEK: In fact, the Director has determined that both lots have a 20-foot setback.

KORNBERG: No, no, my argument was that you said Mr. Ghalamfarsa was permitted to build on the 20-foot setback and he wasn't; that was our argument. We agree that he has been allowed to change his. But he has already developed his whole property; he has already built the design around it. He isn't interested in changing it. He is interested in preserving his viewplanes, his breeze and otherwise enjoy the shoreline nature of his property.

HENDRICKS: So we can proceed, we are going to disallow Exhibit 11. I respect the work that's gone into it, but those pieces of evidence are contained in the shoreline certification, which is official, the Land Court document and the Wes Thomas Chrystal Yamasaki survey, which we've accepted.

KORNBERG: I'll proceed, Mr. Chairman.

HENDRICKS: Go ahead.

KORNBERG: Mr. Ghalamfarsa, what, how has the decision of the Planning Director aggrieved you?

GHALAMFARSA: Basically I live there, and they are allowing the 20 feet, which would allow a big building to block my view and the breeze that comes right through the lanai – that’s where I live actually, right out in the lanai.

KORNBERG: So let’s just take a look at -. When you say the breeze, could you explain a little more fully how the breeze comes into your property?

GHALAMFARSA: It comes right through the lanai.

MAEDO: Excuse me for interrupting. Am I hearing there is no building there? I think I would love to have you come back here when something is actually going to be built there where there isn’t argument that you would be aggrieved at that point. But I’m thinking there is nothing over there right now that I’ve heard about, so I feel like this may be premature, you know.

KORNBERG: Well, we only have 30 days from the decision of the Planning Director to file this appeal. And the decision that the Planning Director made permitting a 20-foot setback is going to apply to any development on this lot in the future, whatever its form, and any building that would be built in modern times, especially from the plans that have already been submitted – there is no evidence that these plans have been withdrawn, but I assume Mr. Vitousek is correct that they have been – but they are going to be resubmitted, and whatever it is, to be aggrieved by the change in shoreline setback, we are talking about what any structure would do and would interfere with his viewplane. The little house that’s there now is one-story. It’s actually not on the shoreline; it’s set back and it doesn’t loom over or come up. But this is the only opportunity that is allowed. And at the time the decision was made the proposed building was the proposed building, and any development is going to use the shoreline. So I think we are entitled to have Mr. Ghalamfarsa talk about the injury and how he is aggrieved by the change in the shoreline to that lot.

VITOUSEK: Mr. Chair, if I may. Again, referring to the decision that is being appealed, okay, that’s Ms. Leithead Todd’s decision that’s on appeal, that’s Exhibit 1, Appellant’s Exhibit, the last paragraph on Page 2 says, “Please understand that the 20-foot shoreline setback is the minimum setback under the Rules, and the Planning Department could require a larger setback in approving an SMA minor permit, and the Planning Commission could require a larger setback in approving an SMA major permit.” And so this just underscores the fact that the statement that no matter what is built there will have a 20-foot setback is a misrepresentation. And the appellant will have an opportunity under the Rules to challenge the effect on him of any building that’s built on a neighboring property. That’s why this is not even an appealable decision. And so I think it’s important to underscore this part of the basis for our argument that there is no standing, and that we are really just wasting our time arguing about something that he will have the right to argue, if someone proposes something other than what’s there now.

KORNBERG: I couldn’t disagree more. The SMA procedure has got nothing to do with this. There is no short circuit of an SMA procedure. There has been a decision by the Planning Director that’s going to be applied actually everywhere. And it’s simply wrong. A consolidation

and resubdivision creates new lots, if they change the boundaries. And the issue of the appeal has nothing to do with whether we have a right, Mr. Ghalamfarsa has a right, if there is an SMA Permit or anything; this is all camouflage I believe by the landowner. The issue is there has been a decision by the Planning Director and the appellant contends the decision is illegal, contrary to the law, and therefore he is aggrieved by it because changing the shoreline, as he testified, would interfere with his viewplane and block the flow of air across his property. And I was in the middle of even giving more questions about the impact. So I don't see what we are arguing about here. I just want to complete my evidence, if possible.

Okay. So Mr. Ghalamfarsa, could you please give more detail, in what way, how are you going to be impacted in living there to be aggrieved, if you could be more as detailed as you can?

GHALAMFARSA: I'm talking about an additional 20 feet that would be blocking, whether one-story, two-story, three-story or four-stories, would be blocking the living area, the outer living area that is facing exactly where this, any building could be built. And it's on the picture, I'm going to show you some pictures that show really clearly what -.

KORNBERG: Let me show you Exhibit 15, please. And if it gets objected to, at least we'll have record. Would you turn to Exhibit 15, please?

HENDRICKS: We note the objection to article 15.

KORNBERG: What is -? Could I lay a foundation, if I can, Mr. Chairman? May I proceed to lay a foundation? Thank you. Mr. Ghalamfarsa, who prepared Exhibit 15?

GHALAMFARSA: Dawn Tavares -.

KORNBERG: Okay.

GHALAMFARSA: From my office.

KORNBERG: What does Exhibit 15 show?

GHALAMFARSA: It shows the block of the small building that's the existing house, that's my house, and the big block is what could be built – on the left side what could be built with a 20-foot shoreline setback, and one on the right what could be built with a 40-foot shoreline setback.

KORNBERG: And again, where did you get the configuration for the proposed building that's shown on Exhibit 15?

GHALAMFARSA: I got it from the Planning Department.

KORNBERG: And what was, what did you ask for the Planning Department that resulted them giving you this information?

GHALAMFARSA: I asked them to give me the application that was submitted.

KORNBERG: So you took this proposed building off the application that was existing at the time that this Exhibit was prepared?

GHALAMFARSA: Yes.

KORNBERG: Okay. And looking at this Exhibit, which way does the wind blow?

GHALAMFARSA: From top left.

KORNBERG: So it enters your property through the, through where? Could you show the Board, please?

GHALAMFARSA: This is my house, and this is where the outer lanai is – actually I cook, live and eat there – right here. So this shows, if the building is 20 feet -.

KORNBERG: Which way does the wind blow?

GHALAMFARSA: This way, this way, right here.

KORNBERG: So it enters the narrow section of the rectangular -.

GHALAMFARSA: I would say the mauka-makai breeze of at least, at least 80 percent of it comes this way – this is the alignment. And about 20, 30 percent of it comes this way.

KORNBERG: So it's your testimony that any building that's more than one-story that's built on the 20-foot shoreline setback, instead of the 40-foot, would interfere with the flow of breeze through your house?

GHALAMFARSA: Even a one-story, because so much -. My house is at about eight-foot elevation -.

KORNBERG: Speak into the mike.

GHALAMFARSA: I'm sorry. Eight-foot elevation, so even, it doesn't matter it's one or two-story, it still, you know, blocks it -.

KORNBERG: Okay, and then -.

GHALAMFARSA: But on this one we didn't even show the roof; they are just a volume block of what could be built per setback – that's all.

KORNBERG: And also the viewplane, in what way does the 20-foot setback affect your viewplane?

GHALAMFARSA: Same way, same direction. I mean, I have view from that side as well, but it takes away about I would say 60 or 70 percent of, or even more, of north-west view.

KORNBERG: Okay. And the other side of this -.

VITOUSEK: Can I object? I'm sorry, I've got to object this line of questioning. He says, "it takes it away." What takes it away? There is nothing -.

GHALAMFARSA: The proposed, if it'll ever be built.

VITOUSEK: There is nothing there.

KORNBERG: Excuse me. Mr. Vitousek -.

VITOUSEK: I'm objecting to the line of questioning as irrelevant.

KORNBERG: Well, first you asked us to prove the impact and how he is aggrieved, and now when we try to enter evidence as to how he is aggrieved, because you don't like it, you are saying it's irrelevant. I'm sorry, I think it's very relevant. It's describing how this witness is aggrieved by this decision. I think, I don't see how we can be deprived that opportunity.

HENDRICKS: If you and Mr. Ghalamfarsa could be a little more specific noting the physical aspects and the direction and things like that, and not just using -.

KORNBERG: I'll do that. I'll take that - I think you are correct - as constructive criticism.

HENDRICKS: Yeah, and for the Board, we are talking about a place which is known as Lyman's; it's actually Hōlualoa Bay, and this property is at the northern end and it's a well-known spot. So we are somewhat familiar with the place.

VITOUSEK: Maybe for foundation you can look at the Exhibits that show what is there now, and what condition he bought it in, and where the existing buildings are relative to his home, so that his arguments about what might be blocking in the future can be viewed in that context.

HENDRICKS: So let's stick to specifics, please.

KORNBERG: Okay. Well, let's go to Exhibit - this is a better one - let's go to Exhibit 14. Exhibit 13? Yeah, Exhibit 13, please. And what is Exhibit 13, Mr. Ghalamfarsa?

GHALAMFARSA: That's an aerial picture. It was part of the document that was also sent to us as part of the application when they did this shoreline certificate.

KORNBERG: Okay. And that's same with Exhibit 14? Is that the same picture but a little smaller scale?

GHALAMFARSA: Yes, it is.

KORNBERG: And if we look at Exhibit 9 just to give the Board an idea where these structures are in relationship to the shoreline. I'm sorry, Exhibit 12. Exhibit 12, to remind everybody, is the shoreline certification survey of 2007. And the location of the long rectangular house shows that house is approximately how far in from, the present houses, how far in from the shoreline, certified shoreline?

GHALAMFARSA: About 20 feet.

KORNBERG: Okay. And the deck, is that a covered deck?

GHALAMFARSA: Yes.

KORNBERG: And the deck abuts the shoreline, correct?

GHALAMFARSA: Yes, it's on the existing rock wall determining the shoreline.

KORNBERG: So that if we go back to No. 13, the portion of the, if you look at the large house, it looks like an L-shaped. Do you see that?

GHALAMFARSA: Yes.

KORNBERG: What part of that house would be on the 20-foot setback? You want to show the -.

GHALAMFARSA: You see the covered area of the lanai, the shorter part of the leg? If that was, the very corner of that where it hits, that would be the 20-foot.

KORNBERG: So that this portion of the house is close to the 20-foot shoreline setback, correct?

GHALAMFARSA: Correct.

KORNBERG: And that's, what's that building off to the right there?

GHALAMFARSA: That's my house.

KORNBERG: Okay. So from looking at this picture, which way does the breeze enter into your house?

GHALAMFARSA: Pretty much there, going into the lanai.

KORNBERG: Okay. So that if a new building were to be constructed on the 20-foot setback, it's your testimony that that structure would interfere now with the breeze that would flow through your house.

GHALAMFARSA: And block the view.

KORNBERG: Okay. Thank you. That's all the questions I have. Do you want to -? Excuse me one second. Mr. Ghalamfarsa, have you told us all your contact with the Planning Department concerning this issue of the setback?

GHALAMFARSA: I'm sorry, what's the -?

KORNBERG: Have you told us all your contact -?

GHALAMFARSA: No.

KORNBERG: With the Planning Department about this issue?

GHALAMFARSA: No, not today, no.

KORNBERG: Okay, would you tell us then a more complete story? I notice like in Exhibit, County Exhibit 1, the January 16, 2009, letter, you have at the bottom something about your own due diligence. Why don't you tell us all the contact you had with the Planning Department since your first involvement and their position regarding the shoreline setback?

GHALAMFARSA: Okay. About over three years ago before I even purchased my house, I looked at the property, Lot 3. It was on the market. And I went to the Planning Department and asked questions regarding the -. The first thing I check always is planning, zoning, setbacks and then water, archaeological and so on and so forth. The first thing I checked was the shoreline setback and if this qualified for Rule 11-5, because I'm very familiar with that as I in other projects review it. And I was informed that this does not qualify because of the new subdivision. And I didn't even pursue it anymore. Even though I told the broker I was not interested because of this situation, I didn't tell him because of what I was not interested. But over a year ago in August when I knew this property was for sale – my house now – I went there, looked at it. As soon as I walked in there and looked at people surfing, I didn't look inside the house, and I said I want to live here.

And I was very sure of the fact all the property lines – I do my due diligence – I knew of the new property lines and I also very well knew of the limitations of the 40-foot shoreline setback. But I knew that what I had to do had to be under the roof grandfathered. And I knew the previous owner, when I did my due diligence when I wanted to buy my property, had requested for a building permit for a carport, and by some mistake he was granted the permit, and they not only built it like that, they also had another 4-foot extra overhang into the 20-foot. So in response to my application for remodeling my house – keeping everything under the roof, the tin roof is still there, in fact, I have basically recycled everything in the house, the old redwood, everything as much as I could have – one of the conditions was to cut off the overhang, and so at least it is

within the 20-foot, which I did, I complied. Not only I did that but also I took the roof of the carport off. Actually, there is no more carport there to help for the breeze because that was really blocking the breeze coming into the lanai. So right now I have like just four beams there for the surf boards. So actually, there is no more carport there; that's actually part of my outdoor lanai.

When I learned that there was an application for next door, just to be sure I went to the Planning Department. I talked to Ramsey. I said I wanted to look at the file. There was no file there. He contacted the Hilo office. They didn't have any file; there was no application. I was not comfortable, so I actually drove to Hilo. I met with Mr. Darrow and I asked him if there is an application pending for next door, I wanted to look at it to make sure that they comply with the 40 feet in their application. And Mr. Darrow said, well, the application was not complete and it's been sent back to the applicant, and a couple of times actually it has been sent back to the applicant. I said I just want to make sure that what they submit is going to be considering the 40-foot shoreline setback, and they are not going to file an exemption because clearly the previous owner received a letter saying that he does not qualify; when I applied for my remodeling, I was clearly told that it doesn't apply; I just want to make sure that it's consistent. And he said, yeah, it has to be brought to the Planning Director's attention. And I met, I went again in November, and I met with him again, and there was no file there again; I thought I could look at it. So then sometime in December I saw some activities at the house; someone, an archaeologist I know was there. So I felt that maybe they are going to apply again. So just to make sure I wrote this letter dated January 16, 2009, just to confirm that there won't be any mistake, there won't be any misunderstanding that this 40-foot applies to my neighbor as it applied to me and it was told to me and written to us twice. And then after that I received a letter, a copy of the letter to the applicant neighbor, that they do qualify for 20 feet. So I thought that was probably, definitely a mistake, you know, I mean there must be some mistake in the letter they wrote them.

And I respect it, actually, I mean, I'm familiar with the, a lot of Planning laws, rules and regulations at least to a good degree; I'm not a, I'm very familiar with it. And in fact, I understand the intent of Rule 11-5; the intention of it is to, it's very clear, so nobody can subdivide and create a new lot and be closer to the shoreline, that's very clear. Anyway, that's my story.

KORNBERG: Do you have anything to add, or are you done?

GHALAMFARSA: I'm very aggrieved.

KORNBERG: Thank you. That's all we have, Mr. Chairman.

HENDRICKS: Thank you very much. Ms. Self?

VITOUSEK: Can we have a short break?

DRURY: Maybe make it a lunch break?

HENDRICKS: Yeah, I was hoping that we could conclude this before, but we've got a little while to go. Maybe we should just take a lunch break. And we have one member of the

public, Ms. Heidi White, who wants to speak, and we'd like to allow her a couple of minutes to finish, so we can get that out of the way. Ms. White, could you just bring a chair up and you can take this mike?

VITOUSEK: Oh, I will -.

HENDRICKS: Okay, Mr. Vitousek is going to give you the chair.

WHITE: Hello, everyone. My name is Heidi White. I've been a resident of the Big Island for 35 years. And I just felt that maybe people were not quite aware of the precious situation of the location of the property. It is our shoreline, and to allow a 20-foot setback would be very obtrusive to the whole community on a whole. And I just want you to be aware of the fact that you know, the possibility of a four-story building with a 20-foot setback, how it would impact our community as ocean loving, fishing sports, sailing, canoeing, it's right there in the wonderful area. And I want everyone to just value their decisions today and realize it's not waste of time that we are spending here, you know, looking at all the documentation. It's going to affect our children, our grandchildren and thereon. So I think the decision of this 20 to 40-foot setback is a big decision, and you know, we need to really spend the time needed. Thank you.

HENDRICKS: Thank you, Ms. White.

KORNBERG: Mr. Chairman?

HENDRICKS: Mr. Kornberg.

KORNBERG: I just forgot one thing. Could I ask the Board to take official notice of the Subdivision Code?

DRURY: What about it?

KORNBERG: Just to take notice of it; I'm going to use sections of the definitions in my argument. And since there is a provision that official notice may be taken of any rules of the County, I just request it before I'm done with my case with the Board. Just take official notice of the Subdivision Code, in particular the definitions under 23-3. So I'm just asking that was part of my case, so it's in evidence.

HENDRICKS: So noted. And we are going to disallow -.

SELF: I'd like to object to that because the Subdivision Code does not apply to this consolidation and resubdivision.

KORNBERG: Excuse me, the rule says that official notice may be taken, must be taken of things that the courts have judicial notice of. And it's mandatory judicial notice; the rules and regulations of the county can be judicially noticed. So she can argue they are not relevant, but I'm asking the Board just to take official notice under the official notice statute.

SELF: I withdraw my objection.

HENDRICKS: We'll do that. And we are going to disallow Item 15 also for the same reasons as 10 and 11, although we appreciate the work that went into it. And we are going to take a lunch break and back at 1:30 and see if we can finish this up.

RECESSED The Chair called a recess at 12:05 p.m.

RECONVENED The meeting reconvened at 1:34 p.m.

HENDRICKS: We are back in session. Ms. Self, I think you are about to start.

SELF: Yes, okay, thank you. Good afternoon, Mr. Ghalam – sorry I'm screwing up your name – Ghalamfarsa. I'd like to ask you a few questions regarding your testimony. I'd like to refer you to the letter from the Planning Director, dated February 25, 2009; it's Page 13 in the Record on Appeal.

KORNBERG: What date is that?

SELF: It's Page 13 in the Record on Appeal.

GHALAMFARSA: Letter dated February 25th?

SELF: Yes, February 25, 2009.

GHALAMFARSA: Yes, I have it.

SELF: Okay. So in that letter, if you look at the second page, the first sentence, it says, "As a result of this determination, TMK: 7-7-4:96 would now also qualify for the minimum 20-foot shoreline setback." That's your property, Parcel 96, isn't that correct?

GHALAMFARSA: Yes.

SELF: And so if you were to decide to make any improvements to or construct anything on your lot now, you would also have the 20-foot setback just like the subject property of this case. Isn't that correct?

GHALAMFARSA: Yes.

SELF: Okay. And when you were talking about how you've been aggrieved by the Planning Director's decision to change from the 40-foot setback to the 20-foot setback for the property owner of Parcel, I believe it's 25, or let's say Lot 3 because you are Lot 4, so Lot 3, you were saying that it would affect, or if they built a building, that it would cut off your breeze. Isn't that correct?

GHALAMFARSA: And the view, yes.

SELF: And the view. Okay. But isn't it true that in your present situation there is already a house on Lot 3 and it's in the 20-foot setback, and doesn't that in fact also affect the breeze and your viewplane?

GHALAMFARSA: Partially, yes.

SELF: Okay, so you really don't have the viewplane that you were referring to because of the position of the dwelling that's on Lot 3, isn't that correct?

GHALAMFARSA: For the existing one, yes, that's correct.

SELF: Okay. And isn't a portion of your house presently in the 20-foot setback?

GHALAMFARSA: About twelve feet, yes.

SELF: Okay. Okay, so just to reiterate, your, the way the properties are, currently there is a dwelling on Lot 3 that's in the 20-foot, partially in the 20-foot setback; your house on Lot 4 is also partially in the setback. And so you, as it stands right now, you are still affected, the house on Lot 3 still affects the breeze and your viewplane, isn't that correct?

GHALAMFARSA: Yes.

SELF: Okay, thank you. That's all I have for now.

VITOUSEK: Yeah, I'm Randy Vitousek. I represent the owner of Lot 3. So I think you testified in your direct examination that you did a lot of due diligence when you purchased this property, isn't that correct?

GHALAMFARSA: Actually, I testified that I did some due diligence when I looked at Lot 3 -.

VITOUSEK: Okay, so -.

GHALAMFARSA: About three and a half years ago, yes.

VITOUSEK: Okay. So at one point you were actually interested in buying Lot 3, isn't that correct?

GHALAMFARSA: Correct.

VITOUSEK: But you didn't buy it, right?

GHALAMFARSA: Yes

VITOUSEK: You bought Lot 4 instead.

GHALAMFARSA: Not instead, but in two and a half years when I was comfortable and assured and certain that the 40 feet is going to apply to both lots, yes.

VITOUSEK: I don't recall asking that part; I just recall asking if -.

GHALAMFARSA: I'm sorry.

VITOUSEK: You then bought Lot 3.

GHALAMFARSA: Yes, I did.

VITOUSEK: If you could avoid, if you could just answer the question -.

GHALAMFARSA: Yes, I will. I'm sorry.

VITOUSEK: I'd appreciate it. And so you bought Lot 3 -.

GHALAMFARSA: Lot 4.

VITOUSEK: Lot 4, the house was, the existing house was on Lot 3, isn't that correct?

GHALAMFARSA: Yes.

VITOUSEK: And you said you are familiar with zoning requirements and with setback requirements and all of that, isn't that correct?

GHALAMFARSA: Pretty much, yes.

VITOUSEK: And so you are aware that the house on Lot 3 is legal in that position, isn't that correct?

GHALAMFARSA: Because it was existing, preexisting, yes.

VITOUSEK: Right, because it was built before June 22, 1970, isn't that right?

GHALAMFARSA: Correct. That's right.

VITOUSEK: So that house intrudes into the shoreline setback, into the 20-foot shoreline setback quite a distance, isn't that correct?

GHALAMFARSA: Yes, that's correct.

VITOUSEK: And the house that you bought also intrudes into the 20-foot shoreline setback quite a distance, right?

GHALAMFARSA: Yes.

VITOUSEK: And so -.

GHALAMFARSA: Not as much.

VITOUSEK: At the time you bought your home, the existing home on Lot 3 was in that position well makai of the 20-foot setback, isn't that correct?

GHALAMFARSA: Yes.

VITOUSEK: So those are the conditions under which you bought your -.

GHALAMFARSA: The open part of it, the lanai part, not the actual building.

VITOUSEK: Not the actual building?

GHALAMFARSA: That's correct.

VITOUSEK: Okay.

GHALAMFARSA: The enclosed building is at the 20-foot.

VITOUSEK: It's right at the 20-foot, okay.

GHALAMFARSA: About, yes.

VITOUSEK: Okay. So your testimony about something blocking your view more than it is now, that's based on something that might happen in the future, is that correct?

GHALAMFARSA: Yes, yes.

VITOUSEK: Okay. And so you are concerned that at some point in the future something may happen, which may impair your view, is that correct?

GHALAMFARSA: Yes.

VITOUSEK: Okay. If the 40-foot setback -. Well, now going back, you say you are familiar with zoning requirements. And if a structure that is a non-conforming use within the shoreline setback is destroyed by fire or by surf, can it be rebuilt in that same location?

GHALAMFARSA: By fire, I believe so.

VITOUSEK: You believe you can.

GHALAMFARSA: I believe so.

VITOUSEK: Uh huh. So your view is that even if the non-conforming structure is destroyed, it can be rebuilt in the same location?

GHALAMFARSA: I have to -.

KORNBERG: Excuse me. Your first question I object. It assumes a fact not in evidence. You limited your first question to a particular type of destruction -.

VITOUSEK: Two types.

KORNBERG: Fire and flood. And your follow-up question -.

SAUER: Please use the microphone.

SCHOEN: Use the microphone.

KORNBERG: I'm sorry. Your question assumed the fact, and you changed it from two specific episodes of a house being destroyed to no limitation on the house being destroyed.

VITOUSEK: Actually, that was a different question. So my pending question is, so is it your understanding that if a non-conforming structure in a shoreline setback is destroyed, that it can be rebuilt in the same location even though that is inconsistent with the current limitation?

GHALAMFARSA: I have to, I have to doubt my answer. I think you cannot, yeah. I'm not so sure, yeah.

VITOUSEK: Right. So if your existing house is destroyed by fire or by flood or any reason, it will have to be rebuilt 40 feet back from the shoreline, isn't that correct? If your -.

GHALAMFARSA: Yes, yes, yes, yes.

VITOUSEK: That's what you are arguing for here, right?

GHALAMFARSA: Yes. And again, it's to what extent, it's completely destroyed, sometimes, I have seen a situation when there is like two studs left, that could -.

VITOUSEK: I thought -.

GHALAMFARSA: Be subject to interpretation -.

VITOUSEK: (Inaudible) 50 percent of the value -.

GHALAMFARSA: Yeah, yeah.

VITOUSEK: Isn't that right?

GHALAMFARSA: Right. Okay.

VITOUSEK: So what's you are arguing for here is that if your home gets destroyed by fire or by surf, that you would have to rebuild it 40 feet back as opposed to 20 feet back. That's what you want to have happened, is that correct? I'm sorry, you are coaching your witness, Counsel.

KORNBERG: I'm asking him to listen to the question carefully and -.

VITOUSEK: Still I would prefer -.

KORNBERG: Not answer it before you finish asking it, so we have a procedure here. That's all I said -.

VITOUSEK: Fair enough. But I prefer you don't do that between a question and an answer; I prefer you don't whisper in your client's ear after I ask a question and before he answers it.

KORNBERG: You have a rule for that, Mr. Vitousek?

VITOUSEK: Yes -.

KORNBERG: Okay.

VITOUSEK: Coaching a witness.

KORNBERG: This is a Board of Appeals hearing.

VITOUSEK: Coaching a witness means the same anywhere, sir. Go ahead.

KORNBERG: Go ahead.

GHALAMFARSA: I'm sorry, could you please repeat the question?

VITOUSEK: I can. So what you are arguing for here is the proposition that if your home is destroyed by fire or by surf or by anything, that you would have to build it 40 feet back from the shoreline instead of 20 feet back. That's what you want here. Isn't that correct? That's the position you are advocating to this Board is that you should have a 40-foot setback on your property.

GHALAMFARSA: I'm advocating to this Board that whatever the law says, that should apply to me and anybody else.

VITOUSEK: Okay.

GHALAMFARSA: Yes. Even if I lose the whole house, yes. I will not ask for an exception different from that of my neighbor, yes.

VITOUSEK: Okay, but what is the current ruling of the Planning Director with respect to your property?

GHALAMFARSA: The latest ruling based on the letter that I received?

VITOUSEK: That's correct.

GHALAMFARSA: I need to look at it to repeat it correctly. I'm sorry, are you referring to the letter dated February 25th?

VITOUSEK: I'm referring to what you understand to be the Planning Director's current determination as to the shoreline setback on your property.

GHALAMFARSA: That it would apply, the 20 feet also apply.

VITOUSEK: Now, do you recall ever discussing this appeal with Mr. Corey Foulk who is the Meredith representative in this matter?

GHALAMFARSA: We ran into each other at the County building. He asked me, I understand you have some issues with the neighbor. I said, no, I have no issues with the neighbor. And -.

VITOUSEK: And you said you were just mad at the Planning Department -.

GHALAMFARSA: No -.

VITOUSEK: Isn't that correct?

GHALAMFARSA: I said I've seen a conflicting decision on the same issue.

VITOUSEK: Okay. Do you recall telling him that you had no issue with the neighbor, but that you are just angry at the Planning Department?

GHALAMFARSA: Yes, I did -.

VITOUSEK: Do you recall?

GHALAMFARSA: I'll probably just say that again.

VITOUSEK: Okay. So the appeal is not because you have an issue with the neighbor, because you are mad at the Planning Department.

GHALAMFARSA: That does not mean that I will approve what they are proposing. My only concentration, the only thing I'm thinking about is different ruling specific on something,

especially on something that I have, I've been very careful of for the last two, three years. And I brought it up to everybody's attention. That's all -.

VITOUSEK: Have you built -. Sorry, go ahead.

GHALAMFARSA: I'm sorry?

VITOUSEK: Have you built anything on the lot that's more than 40 feet back from the shoreline?

GHALAMFARSA: Anywhere, you mean?

VITOUSEK: On your lot, right. Have you gotten a building permit and built something more than 40 feet mauka of the certified shoreline?

GHALAMFARSA: More than 40 feet, no.

VITOUSEK: Okay. So everything -.

GHALAMFARSA: On my lot, you mean.

VITOUSEK: On your lot, right. So every bit of the improvements that you've done on your lot was based on there being a 20-foot -.

GHALAMFARSA: I'm sorry, do you mean within 40 feet or more than 40 feet?

VITOUSEK: I'm saying more than 40 feet. I'm saying, have you built anything, have you -?

GHALAMFARSA: No -.

VITOUSEK: Applied for a building permit and built anything -?

GHALAMFARSA: No.

VITOUSEK: That, where you observed a 40-foot setback?

GHALAMFARSA: I have built a rock wall, yes.

VITOUSEK: Uh huh. And where is that located?

GHALAMFARSA: It's 40 feet away from the shoreline. It's a six-foot tall barbecue rock wall.

VITOUSEK: Okay, so you built a barbecue wall 40 feet back.

GHALAMFARSA: Yes.

VITOUSEK: But all the improvements that you did to the house, those were all done even makai of the 20-foot.

GHALAMFARSA: Within the building envelope that was built in 1952, yes.

VITOUSEK: Right, so you -.

GHALAMFARSA: I even preserved the tin roof.

VITOUSEK: Okay, so you actually did construction that is on the ocean side of the 20-foot setback, isn't that correct?

GHALAMFARSA: Correct. And also I deleted, or took away the things that were non-conforming by prior owner, yes.

VITOUSEK: And that's three feet of the, that was removing three feet of the roof of the carport?

GHALAMFARSA: That was four feet of the roof of the carport, and also actually removed the roof of the carport.

VITOUSEK: Okay, but the carport is inside the 40-foot setback, isn't that correct?

GHALAMFARSA: The previous carport was; I don't have any carport right now. That's -.

VITOUSEK: Right, I understand. So the four feet that was removed was the four feet that was makai of the 20-foot setback, isn't that right?

GHALAMFARSA: Built by previous owner, yes.

VITOUSEK: Right, okay. So did you review the correspondence between the previous owner and the Planning Department about the carport and about their obtaining building permits for the carport?

GHALAMFARSA: Yes, because it was actually sent to me when I applied for the SMA exemption, yes.

VITOUSEK: And did you note in the correspondence that where the Planning Director said that the 2005 letter made a mistake when it said that they could get a building permit for the carport within the 20-foot setback, I'm sorry, within the 40-foot setback?

GHALAMFARSA: Yes.

VITOUSEK: Okay. And so the previous owner applied for a building permit within the 40-foot setback -.

GHALAMFARSA: Yes.

VITOUSEK: Makai of the 40-foot setback and without getting a variance, isn't that correct?

KORNBERG: If you know. (Inaudible) foundation while the witness finds the answer?

VITOUSEK: Well, I asked him if he read the letter, and I asked him if he was familiar with that. So, but he's trying to answer, so you can let him.

GHALAMFARSA: I don't know how he applied, but I was, I was -. I just had their response to his application; I did not review their application. I saw the response to their application, yes.

VITOUSEK: Okay. And you saw that in the response the Planning Director said that it appears that the building permit was issued for the carport within the 40-foot setback and it's makai of the 40-foot setback.

GHALAMFARSA: I don't recall that exact phrase, but I can look at it.

VITOUSEK: Okay. So look at the 2005 letter that your counsel had you read earlier – that's the letter to Gregg Kashiwa.

GHALAMFARSA: You mean -. Yeah, okay, yes.

VITOUSEK: Isn't this the letter that was referred to as saying that the applicable setback would be 40 feet and not 20 feet?

GHALAMFARSA: May I ask which page and -?

VITOUSEK: Sure.

GHALAMFARSA: Because I think that'll save some time here.

VITOUSEK: Okay, so I'm referring you to Page 3, September 14, 2005, letter which says, "Therefore, any additional structures or activities or enlargement of the existing structures or activities within the 40-foot setback area shall require a Shoreline Setback Variance"

GHALAMFARSA: Okay.

VITOUSEK: Then I'll refer you to Page 4, the paragraph starting with "However" where they say, "approval by the Planning Commission for a Shoreline Setback Variance for the approximately 17-foot shoreline setback in lieu of the 20-foot minimum shoreline setback." So

that's inconsistent, isn't it? I mean, one part of the letter they are saying that a 40-foot setback applies and the other part they are saying a 20-foot setback applies. Isn't that correct?

KORNBERG: I object as being argumentative and vague and ambiguous.

GHALAMFARSA: Could you please again point me to the first paragraph, so I can clearly answer your question?

VITOUSEK: Sure. Okay, so I'm referring you to Paragraph 3 of the September 14, 2005, letter; it's the second paragraph within Sub Paragraph 3. That's your Exhibit 4 -.

GHALAMFARSA: On Page 3?

VITOUSEK: Page 3.

GHALAMFARSA: Okay. Item No. 3, is that the one, "The existing?"

VITOUSEK: That's correct, yeah.

GHALAMFARSA: Okay. So could you please repeat your question regarding -? This is regarding this paragraph?

VITOUSEK: That's right. And that says that, that's the paragraph that you were pointing to before, where it says the lot does not qualify for a 20-foot shoreline setback. Isn't that correct?

GHALAMFARSA: No. I read the second paragraph; it says, what I read was "Because the subject lot was created after January 19, 1997" That's what I read.

VITOUSEK: Right. That's correct.

GHALAMFARSA: And I ended at "enlargement of the existing structures or activities."

VITOUSEK: Right.

GHALAMFARSA: Okay.

VITOUSEK: Okay. And so, isn't this letter also saying that the carport was not permitted, was not a permitted structure?

GHALAMFARSA: Where does it say?

VITOUSEK: Paragraph 4, "After careful review of our records and your submittals we find no evidence to support the assumption that the carport was legally constructed."

GHALAMFARSA: Okay.

VITOUSEK: Right?

GHALAMFARSA: Okay, yes.

VITOUSEK: And then later on in the paragraph they say that they need a variance to demonstrate that the carport to, for approval of the carport -. And also the carport is 17 feet from the shoreline setback, right? Doesn't it say that?

GHALAMFARSA: Yes.

VITOUSEK: And so the paragraph says that "approval by the Planning Commission for a Shoreline Setback Variance for the approximately 17-foot shoreline setback in lieu of the 20-foot minimum shoreline setback." So what I'm saying is, isn't that internally inconsistent? Isn't the one letter part saying that the setback is 40 feet and the other part is saying it's 20 feet?

GIMPEL: I believe that the September 30, 2008, letter to Mr. Ghalamfarsa -.

VITOUSEK: That's what I'm getting.

GIMPEL: Well, we are taking an awful lot of time to get to the point where the Planning Director has admitted and acknowledged in writing that the use of the 20-foot was an inadvertent typographical error and should have been 40-foot both times.

VITOUSEK: I completely understand that, Mr. Gimpel. My point is that the owner went ahead and built based on the 20-foot setback even though it was clear from the earlier letter that a 40-foot setback was applying. So all I'm saying is that the current owner benefited from the previous owner's decision to interpret the error in their favor and built to a 20-foot setback.

KORNBERG: And I would object as being comp -.

GIMPEL: That's -.

KORNBERG: I'm sorry.

GIMPEL: I'm not sure that the benefit to either owner is the issue in this hearing; the issue in this hearing is the grounds on which the Planning Director made the determination in the latest case that a minor lot adjustment was not a creation of a new lot, period. So therefore, I fail to see the reason why we are going into whether it benefits one owner or doesn't benefit an owner.

VITOUSEK: Okay. I completely understand that. It's -. One of the issues that were raised in the very beginning of the hearing was the standing of the appellant to raise this issue, because whether he suffered any harm and an injury in fact. And so he testified that he suffered injury in fact because he had to build improvements behind the 40-foot setback line. And so the cross-examination is directed towards his previous testimony that he had to observe the 40-foot

setback and he was damaged by having to observe the 40-foot setback. He has now testified that everything has been built using a 20-foot setback -.

GHALAMFARSA: No.

VITOUSEK: Including improvements that came to him from the previous -.

GHALAMFARSA: No, no.

KORNBERG: I object. There has been no testimony that anything new has been built on this lot, and I think you should establish that fact before you argue it.

VITOUSEK: I think that his submissions show what he intends to build; that's his submission in 2008 that was accepted, and he did testify that he rebuilt, that he reconstructed the home which is makai of the 20-foot setback. Now he said that the only thing that, new construction he's done has been a wall. That's his testimony.

GHALAMFARSA: Sir, but my improvement was independent of any setback.

VITOUSEK: I understand that. It was -.

GHALAMFARSA: It had nothing to do with the setback at all. In fact, one of my original sketches that I have from the very beginning everything was so carefully done that we don't increase an inch in height or width at all. I mean, you are welcome to go see my house. Like I said, I was so careful that I even kept the tin roof. So I did no improvement within 20 or 40-foot setback. In fact, I improved the wrong previous improvement, the carport area.

VITOUSEK: So have you applied for any building permit, which has been denied?

GHALAMFARSA: I never recall -.

VITOUSEK: On this property, have you applied for any building permit that has been denied?

GHALAMFARSA: No. Not denied, no. It was for the rock wall, for the rock wall; it has not been denied. It was denied because I did not have the, I did not apply for the exemption of SMA, which I did.

VITOUSEK: So you applied for an exemption, you got the exemption -.

GHALAMFARSA: Correct.

VITOUSEK: You got the building permit -.

GHALAMFARSA: Correct.

VITOUSEK: You built what you wanted to build.

GHALAMFARSA: Correct. Because, if I may say that previously -.

VITOUSEK: Yeah, if your counsel wants to ask you additional questions, he can do that.

KORNBERG: No, he is entitled to complete his answer, Mr. Vitousek.

VITOUSEK: He said he wanted to say additional -.

KORNBERG: No, he wants to complete his answer -.

GHALAMFARSA: Just to complete my answer, previously the exemption, the SMA exemption for single family was just over the counter, but recently you have to apply for the whole, go through the whole process to get the exemption, and that's why I did.

VITOUSEK: And when you were told by the, or when you became aware that a 40-foot setback was supposed to apply to your property, did you appeal that determination?

GHALAMFARSA: No, I was already aware of it.

VITOUSEK: Did you ever appeal the Planning Director's determination that a 40-foot setback apply to your property?

KORNBERG: It assumes a fact not in evidence. That was impossible to appeal by the time he bought his property.

VITOUSEK: Then I guess the answer is no. But the question is, did you ever appeal?

GHALAMFARSA: Did I appeal? No, I did not appeal.

VITOUSEK: Okay. Okay, that's all questions.

HENDRICKS: Anything further? Ms. Self? Mr. Kornberg?

KORNBERG: I just have one redirect question for Mr. Ghalamfarsa. Mr. Ghalamfarsa, in answer to Ms. Self's question about whether the present structure on Lot 3 interferes with your viewplane and breeze, and you said partially, is that your testimony that granting this, making it a 20-foot setback increases the impact on your property over the present existing single-story house?

GHALAMFARSA: By future development, yes.

KORNBERG: Thank you. And one more question. And your conclusion that there will be future development comes from the fact the owner has submitted development plans to the

County and keeps resubmitting them until being returned for being inadequate. Is that your belief?

GHALAMFARSA: Yes.

KORNBERG: Okay.

HENDRICKS: Any questions from the Board? Ms. Self.

SELF: I'd like to call the Planning Director, Bobby Jean Leithead Todd, as a witness.

HENDRICKS: Do you swear to tell the whole truth and nothing but the truth?

LEITHEAD TODD: I do.

HENDRICKS: Thank you.

SELF: Okay. I think in order to clear up everything I'd like to ask you, Ms. Leithead Todd, to go through and explain to the Board, because I'm sure there is some confusion because this happened over a period of two Planning Directors not just one. So some of this occurred, well, the first decision which affected Mr. Ghalamfarsa, that decision was initially made by the former Planning Director, Chris Yuen. Isn't that correct?

LEITHEAD TODD: Yes, it was.

SELF: But you are familiar with everything that's occurred in this particular case, so that you can give an explanation, correct?

LEITHEAD TODD: Yes, I can. I'm familiar with what occurred prior to my becoming Director as well as since me going into the Department on February 1st, February 3rd.

SELF: Okay. Let's start with, I'm referring to, I'm going right to the Record on Appeal, and starting with Page 2, a letter dated September 30, 2008, to Mr. Ali Ghalamfarsa. And this particular letter was signed by the previous Director, Mr. Christopher Yuen. So could you please explain to the Board what happened in this first, where he is telling that the setback for Mr. Ghalamfarsa is going to be 40 feet? Can you go into that a little bit?

LEITHEAD TODD: I think you need to understand how things occur in the Department to really understand how letters go out. Because of the volume of requests, appeals, variances, rezonings that come through the Department, typically what occurs is when someone sends in a letter requesting a determination by the Department, it is assigned to the division in charge of that particular action, and it then goes to an employee who pulls the files, reviews it, and they actually draft a letter for the Director to sign. The first time the Director typically sees the file is when it lands on your desk with a letter that's already been drafted, delineating what the determination of the Department is. At that point the Director can look at the letter, look at the

file, and decide whether the recommendations as put forward by the staff are correct. To a great extent you rely on staff's review of the files just because of the sheer volume. Typically, at the end of a day after I've had a full day of meetings, I have about 16 to 32 inches of material that I have to review on a daily basis just to sign off on these letters.

I became aware of this letter, which had been written by the Department, when the files landed on my desk, because Mr. Ghalamfarsa had asked whether the property next door to him would have to observe the same rules that applied to his property. So at that point I saw this earlier letter which had gone out to Mr. Ghalamfarsa, which had some internal inconsistencies in it; because at some points it referred to a 40-foot shoreline setback and at some points it referred to a 20-foot shoreline setback. If I'm remembering the correct letter, or, no, I think this one corrected the 2005 letter, I'm sorry. So anyway, the September 30, 2008, letter that went to Mr. Ghalamfarsa referred to a 40-foot shoreline setback, and it had been signed by Mr. Yuen. Staff had drafted a letter referring to this earlier letter for my signature. So it hit my desk in early February, and I was reviewing it, and the original letter that would have gone to Mr. Ghalamfarsa said that the property next door would have a 40-foot shoreline setback. I looked at it, and several questions arised in my mind. First was whether the consolidation and resubdivision of property became a subdivision as envisioned by the rules under shoreline. Because typically, when we do a consolidation and resubdivision, it's exempted from application of the requirements of the Subdivision Code as long as it creates the same number or fewer lots than currently existed. So I questioned why we were imposing a 40-foot setback both on Mr. Ghalamfarsa's property as well as his neighboring property since my review of the files indicated that the lots that existed prior to the consolidation and resubdivision were essentially the same size pursuant to the Land Court documents. One lot was just under 8,000 square feet and the other one was a little bit over 3,300 square feet before the consolidation, and after the consolidation and resubdivision the square footage that was lined out in those maps was exactly the same as it was before. So I questioned whether it was an appropriate application. Two, I also had a problem with the letter that was going to be sent to Mr. Ghalamfarsa because there was no notice to the neighboring property owner that we were making a determination of a 40-foot setback, and I said how can you write to the neighbor and say, yes, your neighbor has a 40-foot setback but we've never notified to the neighbor; so I had a problem with that. Then I went back and looked at the consolidation and resubdivision, and I saw no notice when the consolidation and resubdivision came to the office that we had ever told the then-property owners that we were going to change the determination of a 20-foot setback to a 40-foot setback. I'm a lawyer by training. I was concerned about due process and notice that someone was going to lose a substantial property right; because along the shoreline if you are going to go from 20 feet to 40 feet, that is a substantial loss of property rights. So I had several issues with the letter. I bounced it back to staff, saying please look at this, and is this consistent with what we are doing, is this a correct application.

Subsequent to that, it turned out that a different employee in the office – the first letter was drafted by Esther Imamura who was looking purely at Mr. Ghalamfarsa's request – it turned out that a separate employee in the office, Mr. Jeff Darrow, who works in the division that actually processes SMA applications through the Planning Commission, had met with Mr. Yuen, and upon their review, according to Jeff, Mr. Yuen had met with Mr. Foulk, and Mr. Yuen had determined that they had made a mistake and it really should be a 20-foot setback versus a 40-

foot setback because the consolidation and resubdivision had essentially created two lots that were the same size that they were prior to the consolidation and resubdivision. So he viewed it as kind of a de minimus change, and that it wasn't what we had intended under our rules in terms of subdivision. Subdivision is typically creating new lots out of a larger lot so that you have more lots created. So what happened when I bounced it to Esther, the file next came back to me with a letter that had been prepared by Jeff Darrow to Mr. Foulk, indicating that we had reviewed the file and determined that, because the lots were essentially the same size as they had been before the consolidation and resubdivision, that we would view them as having been created in 1957, and impose a 20-foot shoreline setback.

SELF: Excuse me. For the Board's sake, you are referring to the letter -.

LEITHEAD TODD: Of February 23, 2009, that -.

SELF: Page 8 of the Record on Appeal.

LEITHEAD TODD: Is in Page 8 of the Record on Appeal, that is signed by me. And if you look down below, you know, you'll see initials, and the "JWD" refers to Jeff Darrow and the "smn" refers to the staff person who has physically typed the letter. But that's how it works. Somebody else reviews it, they type it up, it comes to me, and if I agree I sign off; if I disagree, I bounce the file. So the file then went back to Esther to respond to Mr. Ghalamfarsa's request on whether a 40-foot shoreline setback would apply to his neighbor.

SELF: And that would be Page 13 of -.

LEITHEAD TODD: Page 13.

SELF: The Record on Appeal.

LEITHEAD TODD: So the new letter, the one that I actually signed, is done after Mr. Darrow has prepared the letter saying that it's 20 feet, not 40, to Mr. Foulk. Based on that letter Esther takes another look at what we have previously said to Mr. Ghalamfarsa, which was that he had a 40-foot shoreline setback, and we said, hey, we've reviewed the neighbor's property, it's 20 feet, we made a mistake, yours is 20 feet also.

But I need to explain that 20 feet is a minimum, okay? If someone comes in with an application, depending on what the application is, the Director or the Planning Commission can determine that you need more than 20 feet, depending on what the actual application is. In this case, because we are talking about what exists on the land, and that's what I'm looking at; there is an existing building, it's existing in the setback. I'm looking at, if somebody came in and said, hey, I want to do some reconstruction of my existing home, we would allow it to be in the same footprint even though that footprint might extend into the 20-foot shoreline setback. If he was going to reconstruct a home and change the perimeters, we might say, well, you have to do a 20-foot because it's a single family home and that's the minimum that we require. If an application for a larger building came in, such as a 16-unit condo, that would trigger an SMA Major, which would mean that the applicant would have to do at minimum an environmental assessment,

potentially an environmental impact statement, depending on the perceived impacts, and that application would have to go to the Planning Commission. Adjoining neighbors, surrounding neighbors as well as the public would have to be informed. And on the environmental assessment there would be an opportunity for the general public to comment on things like viewplane, impact on the shoreline, impact on the activities, whether you have subsidence in the area. And all of that would ultimately go to the Planning Commission, which could then determine whether they wanted to impose the minimum 20-foot or whether because of the specific conditions of the property they wanted to impose more of a setback. The fact that we've determined there is a minimum 20-foot does not mean that if you come in for a 16-unit building that you automatically get a 20-foot setback; that's up to the Planning Commission because of the size of the unit.

SELF: Okay. Ms. Leithead Todd, what, you say that the Planning Department has the authority to apply a greater setback, a minimum is 20 feet, but you have the ability to apply a greater setback, if you determine that's what the setback should be. So now what is your, what is the Department's authority for doing that?

LEITHEAD TODD: It's under Chapter 205A, and it's also under our Rules. And if you notice the letters that go out, we talk about a minimum of 20 feet; we in no way tie our hands to say that we couldn't impose more. And the reason is, is that there are different properties around the island and there are different things that occur during a period of time; you could have changes, you have an earthquake that changes the property next door, so it changes the way that waves come in, you could have subsidence, you could have accretion, you could have all kinds of things that occur. And you have to look at that and take it into consideration when somebody comes in with an application.

The other thing is when you are kind of making a rule or making a determination, you are making it sometimes in the absence of information as to what someone is actually going to try and build on a property. So when we say minimum, we don't want to tie our hands that if what is actually put forward has more of an impact than let's say a single family dwelling, we don't want to tie our hands to that 20 feet; we want to reserve that ability to impose more. Our decisions are generally fact-driven, and we do it property by property, and every property is not the same. And so in some areas, you know, they are driven by, there may be cultural resources, this may be a favorite fishing area, it may be necessary to preserve, you know, public access in the front because of the way the wave action comes in or because of the nature of the rocky shore. And so you have to base your decisions when somebody actually comes in for an SMA application. And because this was in the context of what did the consolidation and resubdivision do, now we are just talking about what we would apply as a minimum, and whether the consolidation and resubdivision somehow magically changed what was occurring here on the ground. And we viewed it as one lot was essentially -. If you look at the Land Court maps that are in your Exhibits that were submitted by Mr. Kornberg – for purposes of the Planning Director's decision we rely on those maps that are submitted to us – and the maps indicate that although the lot line changed, the size of the two lots remained the same. So essentially it did not create a new lot that was different from what had previously existed.

SELF: So let me refer you to Section 23-7 of the Subdivision Code, which determines whether or not the Subdivision Code actually applies to consolidation and resubdivision action. So it states that the requirements and standards of the Subdivision Code shall not apply to consolidation and resubdivision action resulting in the creation of the same or fewer number of lots than that which existed prior to the consolidation/resubdivision action. So this is why the Subdivision Code does not apply to this particular situation, isn't that correct?

LEITHEAD TODD: Because, yes, because you had two lots before, both of which had shoreline, and after you did this you still had two lots with shoreline. So you look at, basically, although the lot line changed a little bit, you had the same square footage on both lots, and you had, both lots both had shoreline before the consolidation and resubdivision, they both had shoreline after the consolidation and resubdivision. And the reason some of the language looks like -. It might be different, like, let's imagine that instead of two lots, you had here three lots: two that were shoreline and one that had no shoreline. And I came in and consolidated it and resubdivided it so I had three lots with shoreline. That would not be the same lot; that would be substantially different, and that might generate a very different call in terms of whether subdivision would apply or whether we would consider that a subdivision for purposes of the Subdivision Code.

SELF: Okay. One last question. I want to take you back again to Hawai'i Revised Statutes Chapter 205A, Part III, Shoreline Setbacks, 205A-43.6 deals with the enforcement of shoreline setbacks. So the State Legislature has stated that "The department or an agency designated by department rules shall enforce this part and rules adopted pursuant to this part." So it is the planning department of each of the counties that is responsible for enforcing the shoreline setbacks, isn't that correct?

LEITHEAD TODD: Yes, it is, so long as no variance has been granted by the Planning Commission from the shoreline setback. And the reason I'm mentioning variances, like, if you look at Mr. Ghalanfarsa's property, which is very small, now let's assume that my department had remained by the standard that we are going to say it's a 40-foot shoreline setback, but if you look at the size of his parcel, a 40-foot shoreline setback basically wipes out the existing home. If the home were ever destroyed, he could not rebuild it in its existing footprint; he could only rebuild it, if it had been less than a 50-percent destruction. So in order to, if the home were destroyed by fire and he wanted to rebuild it on its existing footprint, he would need a shoreline variance from the Planning Commission. And what that means is that the Commission could look at the buildable area on his lot, and despite having a 40-foot shoreline setback, could determine and give him a 20-foot or lesser, determine that he could rebuild on the existing footprint; they have the authority to do so. So even Mr. Ghalanfarsa is not limited to a 40-foot, if that was a rule. Neither would the neighboring property owner, if we were to determine a 40-foot setback; the Planning Commission could still give them a variance from that 40-foot and allow them to go with a 20-foot.

SELF: Just one more follow-up question on that because this is very important. Are you aware of any provision under 205A that allows a member of the public to file a lawsuit to require the County to enforce shoreline setback?

LEITHEAD TODD: No, there is not. And I was one of the attorneys that was involved in the Federman case, which went to the U.S. District Court which determined that there was no private right of action to enforce a shoreline setback. But you know, I think the rights of the public and the rights of Mr. Ghalamfarsa are protected because if you come in for an SMA Permit for that, you know, 16-unit condo that he is talking about, he gets notified, he has an opportunity to participate, the public has an opportunity to participate and go before the Planning Commission to object to the plans. We've seen it happened before when the Waiaha property, which was subsequently acquired by the public, when there was a man planning to build a legally permitted condo unit there, but the public objected, and the end result was that the county ended up buying the property to protect it. There is opportunity to object, there is opportunity to provide testimony, because anything like that, anything that is substantially different than what exists on the property, which is currently a single family dwelling, would have to go for a Shoreline Management Area permit, and it would be considered probably a Major permit, and there will be opportunity to protect both his rights as well as any rights of the public. And on those, on an SMA Permit they do have a right to intervene.

SELF: Thank you. That's all the questions. Thanks.

HENDRICKS: Mr. Vitousek, since you are a party, do you have anything to add, which hasn't been covered?

VITOUSEK: Well, I guess I thought that usually it would be the claimant who cross-examines the Director, and then I would question her, and then I would present anything that I -

HENDRICKS: Excuse me. Let's back up a bit. Mr. Kornberg?

KORNBERG: Is it Mrs. or Miss? Ms.?

LEITHEAD TODD: Ms.

KORNBERG: Ms. Leithead Todd. I'm Steve Kornberg, as you know, and represent Mr. Ghalamfarsa. You just talked about this federal case that said that you can't bring a lawsuit to enforce a shoreline setback. This procedure is in appeal, is it not? Isn't it – just answer the question – it's in appeal under 8-2 of the Planning Department Rules (sic)?

LEITHEAD TODD: Yes, it is.

KORNBERG: And doesn't 8-2 of the Planning Department Rules (sic) permit any aggrieved person to appeal a decision of the Planning Director?

LEITHEAD TODD: Yes, it does.

KORNBERG: Okay.

LEITHEAD TODD: It doesn't mean that it's necessarily a right that can be adjudicated by the Board of Appeals; it just allows you to file an appeal.

KORNBERG: Well, and the Board of Appeals has the power, does it not, to reverse a decision of the Planning Director, if in its belief it is either illegal, goes beyond the discretion of the Planning Director or it's clearly erroneous? Isn't that correct?

LEITHEAD TODD: I'm not sure that, in the area of enforcement of shoreline setbacks, that they have the authority to determine what the setback is. And this has to do with what the authority is. And although we have very expansive language in the County Code, I sometimes question whether that expansive language really authorizes the Board to get into matters, which is solely in the discretion of the Department or the Planning Commission under State law.

KORNBERG: This appeal is over whether an exception to the 40-foot setback established by the County was properly applied in the given case, is it not?

LEITHEAD TODD: I think this appeal is not so much about that as to whether a consolidation and resubdivision qualifies as a subdivision under the rules or whether a consolidation and resubdivision that results in two lots, which was essentially the same as the lots that pre-existed before, does not qualify as a subdivision of land for the purposes of this rule.

KORNBERG: And where in Rule 11-5 (b) does it provide that the Planning Director has discretion to do more than just determine when a lot was created?

LEITHEAD TODD: What happened here is we determined whether the lot was created through this consolidation and resubdivision or whether the lot was created back in 1957, and the determination was that it was created back in 1957 and that the consolidation and resubdivision was essentially a minor lot line change; it did not result in the creation of any new lots, which typically what a subdivision is, is the creation of new lots.

KORNBERG: Prior to the 2002 consolidation and resubdivision, Lot 3 with its present border did not exist, correct?

LEITHEAD TODD: Prior to the consolidation and resubdivision, you had two lots: one that was roughly -.

KORNBERG: No, that's not my question. Would you please answer my question? My question was -.

LEITHEAD TODD: The lot existed, which was approximately 33,000 square feet -.

KORNBERG: No, that's, excuse me -.

LEITHEAD TODD: And it's 33,000 square feet after the consolidation and resubdivision -.

KORNBERG: Excuse me, that wasn't my question -.

LEITHEAD TODD: It's been given a different name; it is essentially the same lot.

KORNBERG: I'm not talking essentially. The question was, prior to 2002 consolidation and resubdivision, Lot 3 with its present border did not exist, correct?

LEITHEAD TODD: Lot 3 existed as Lot 1-A. I'm sorry, it's 1-A now. For purposes of the Land Court it was previously considered Lot 1 and it had 33,979 square feet. After the consolidation and resubdivision it was called Lot 1-A and it had 33,979 square feet -.

KORNBERG: But that wasn't -.

LEITHEAD TODD: The exact line separating the two lots changed, but the size of the lot remained the same, and other than that minor lot boundary line change, that is essentially the same lot that was there before -.

KORNBERG: But -.

LEITHEAD TODD: It is exactly the same amount of square feet pursuant to the Land Court documents.

KORNBERG: The question was, Ms. Leithead Todd, whether Lot 3 in its present configuration with this little rectangle cut out of it and with the border coming down here, whether that lot, not an essentially similar lot, but whether that lot existed prior to the consolidation and resubdivision.

LEITHEAD TODD: Yes, it did.

KORNBERG: And how did it exist?

LEITHEAD TODD: It existed with slightly different boundaries, but it is the same lot for purposes of my decision in this case.

KORNBERG: So you will admit that the boundary of Lot 3 is different than the boundary of Lot 1 under the 1957 subdivision.

LEITHEAD TODD: There is a slight change in the boundary, yes.

KORNBERG: Okay. And Lot 1 does it have the exact same footprint as Lot 3? No, it doesn't, does it?

LEITHEAD TODD: It does not have the same footprint, but it is the same size; it's 33, 979 square feet.

KORNBERG: Now, if you measured the required setback, which varies from eight feet to some number that increases two feet per story, and you measure it from the old property line that was existent for Lot 1, and compare it to the setback of the new line, it's true, is it not, that a larger building is possible to be built under the configuration of the consolidation and

resubdivision of 2002 than could have been built under its old configuration under the 1957 subdivision?

LEITHEAD TODD: I don't know whether that is true or not because that was not part of my decision. It was not a consid-. The side yard setbacks were not part of the consideration that was made by the Department, the previous Director; that was not part of the decision that I made. It was purely based on whether the two lots were essentially the same size and represented the same lots that existed prior to the consolidation and resubdivision. Whether you could build a bigger building on it was not part of the record, it was not part of my decision. And for me it's entirely speculative since I'm not a surveyor. I don't have the equipment in front of me or the necessary staff to make that determination; I have to rely on the representation of your client. But I cannot independently determine whether you can in fact build a bigger building.

KORNBERG: Does, where in Rule 11-5 does it provide that whether the lot created after 1997 equals the number of lots before that? Where does Rule 11 give the Planning Department discretion to decide that created involves a consideration of how similar the two lots are or what the impact on the shoreline is?

LEITHEAD TODD: The issue was whether the lots were created in 1957 or whether they were created by the consolidation and resubdivision -.

KORNBERG: But as you've already admitted -.

LEITHEAD TODD: And we determined that the lots were created in 1957.

KORNBERG: But that's not pursuant to 11.5 of the rule.

SELF: Objection.

KORNBERG: Is that correct?

SELF: Objection, he's becoming argumentative with my, my witness, and I'd like to place that on the record.

KORNBERG: I believe the witness is being somewhat evasive, too. So I'd like to get a direct answer that Lot 3 with its present boundary, not similar, with the exact present boundary was not in existence before the consolidation and resubdivision of 2002.

SELF: Objection. It's been asked and answered two times already.

KORNBERG: I don't believe I've gotten a straight answer, Mr. Chairman.

SELF: She can't change her answer (inaudible).

HENDRICKS: I think we've heard enough.

KORNBERG: Okay. You referred in your testimony, Ms. Leithead Todd, to Section 23-7 of the Subdivision Code, and your counsel read how the standards and requirements of the chapter don't apply to consolidation and resubdivision action resulting in the creation of the same or fewer lots, is that correct?

LEITHEAD TODD: Yes.

KORNBERG: And by using the word "creation" in that Section as it refers to what happens on a consolidation and resubdivision, it is true, is it not, that the resubdivision and consolidation action results in the creation of the lots that come out of that subdivision process?

LEITHEAD TODD: For purposes of interpreting Rule 11-5 we determined that the lots were created in 1957. That's the way I interpreted the rules when I combined looking at the County Code, as well as the rules, as well as, I have to be honest, past practice of the Department in how we've looked at consolidations and resubdivisions. I was the attorney for the Department for about four years, so I'm very familiar with past decisions of the Director and the Department in how we treat consolidations and resubdivisions.

KORNBERG: And referring to the definition in 23-8 (sic) (31) that "Subdivided land" means improved or unimproved land or lands divided into two or more lots or parcels, whether immediate or future, and includes re-subdivision, is that correct?

LEITHEAD TODD: You cannot use this definition to kind of wag the tail of Section 23-7 which refers to consolidation and resubdivision actions.

KORNBERG: So what does, when you consolidate and resubdivide, when the lots were first consolidated, what is the status of the piece of land at that moment before the subdivision occurs?

LEITHEAD TODD: In all honesty, because the actions are done simultaneously, the consolidation is just kind of a figment that occurs on paper because the consolidation and resubdivision is one action that is done. There's never really a moment in time, except kind of like an imaginary point, where the parcels are really consolidated, because the application that comes in is a consolidation and resub and we sign off basically on the resubdivision. But the consolidation of the lots does not actually exist in real time; it's just kind of a point. And I sign off on a consolidation and resubdivision, but there's never like a six-month period where the lot is consolidated. The consolidation and resubdivision occurs simultaneously.

KORNBERG: But in order to resubdivide the lot and to come out with a new boundary, in fact there has to be a fiction of consolidation, does there not?

LEITHEAD TODD: There is a fiction of consolidation. It never physically occurs in any of our documents.

KORNBERG: And what's the definition of consolidation under the Subdivision Code? Isn't it creating one lot out of two or more lots?

LEITHEAD TODD: You can't look at it separately because we never create -. We have separate actions where people actually come in and consolidate for tax purposes. Somebody has two TMKs and they either want to consolidate it into one because it lowers their tax burden or it may be that they want to build a bigger house - so by consolidating two lots they get rid of that middle line so that they can then have a bigger house because the setbacks don't imply, occur. Those have occurred and we've consolidated, and those exist. But in a consolidation and resubdivision, an actual consolidation of the lot does not really occur except as kind of a fiction, because what I sign off is on the resubdivision of the property. So the consolidated lot never really exists for purposes of these consolidation and resubdivisions.

KORNBERG: And it's your testimony that the Land Court on its Order of Subdivision, which is set forth in our Appellant's Exhibit 18, does not first consolidate the lots prior to them subdividing the lots?

LEITHEAD TODD: I'm not aware of a separate document. The ones that I've dealt with have been the maps. But I am not that familiar with Land Court applications. And my only consideration and my decisions are based on what the Planning Department does, not what the Land Court does, except for purposes of applying those maps in terms of the size of the lots.

KORNBERG: So it is possible, is it not, for the Planning Department to amend Rule 11-5, if they want to change the definition of "create" from the normal ordinary use of the word "create," is that correct? There is an amendment procedure?

LEITHEAD TODD: There is always an amendment procedure, but I do want to mention something -.

KORNBERG: That's a question. Let me just finish then.

LEITHEAD TODD: On -.

KORNBERG: So was that procedure followed prior to your decision as to the definition of when those lots were created?

LEITHEAD TODD: It wasn't necessary because we determined the lots were created in 1957.

KORNBERG: Right. So the answer to my question is no, you did not go through an amendment process prior to your decision?

LEITHEAD TODD: It wasn't necessary.

KORNBERG: That's not my question. My question is, did you go through the process -?

SELF: Objection, objection.

KORNBERG: I'm entitled to an answer.

SELF: Asked and -.

KORNBERG: Excuse me.

SELF: Answered already. I'm so -.

KORNBERG: When I asked yes or no, she said she didn't have to. That's not an answer, I would respectfully submit to the Chairman. She can say no, and then give her answer. But I think I'm entitled on the record to whether she followed the procedures for amending the rules prior to making her decision. A just yes or no answer, Mr. Chairman.

HENDRICKS: That's fair. But I hope you're coming to some conclusion -.

KORNBERG: I am.

HENDRICKS: Here pretty soon.

KORNBERG: I am.

LEITHEAD TODD: There was no amendment of the rules because it was not necessary, so we did not go through any rule making amendments.

KORNBERG: Okay. And the rule making procedure involves the participation of the general public, is that correct?

LEITHEAD TODD: Yes, it would.

KORNBERG: Okay. And also the owner of this property, if he feels the impact of Rule 11-5 is too onerous, has the right to request a variance, is that correct?

LEITHEAD TODD: You're referring to Mr. Ghalamfarsa's neighbor?

KORNBERG: Correct.

LEITHEAD TODD: Yes.

KORNBERG: Okay. And that variance process involves the Planning Commission participation as part of that process, correct?

LEITHEAD TODD: Yes. Just as he would have to do, if he wanted to build a condo, he would have to go to the Planning Commission.

KORNBERG: And in this case prior to your decision in February of 2005, no variance had been applied for or granted by the County of Hawai'i, is that correct?

LEITHEAD TODD: On the subject property?

KORNBERG: On the subject property.

LEITHEAD TODD: There has been, there is no current application for anything on the subject property, not for building permits, not for SMA applications. There is nothing in front of the Department.

KORNBERG: But there have been submissions in the past, have there not, by this very owner?

LEITHEAD TODD: But they have been withdrawn, yes.

KORNBERG: And they've been withdrawn or were they sent back because they were incomplete?

LEITHEAD TODD: That I'm not 100 percent sure of.

KORNBERG: Okay. And are you aware of what the nature of the structure was that was shown on the applications that have already been submitted by this very owner?

LEITHEAD TODD: On the applications that were submitted previously and withdrawn, there were designs for a condominium. I can't recall the exact number of units. I believe it might have been 16, but I'm, without having the file in front of me I can't say for sure. I think it was 16, but I'm not a 100 percent sure.

KORNBERG: In your letter to Dr. Foulk of February 23, 2009, you state that the adjustment involved a small corner of Lot 2. Do you recall saying that in your letter?

LEITHEAD TODD: Yes, I do.

KORNBERG: In fact, when we take a look at the subdivision map, more was changed than just one small corner, correct?

LEITHEAD TODD: Well, I don't think that we're talking about -. I think here we're arguing about what my definition of small is; and I consider this a small corner of the lot.

KORNBERG: But in fact, but in fact the boundary, the whole boundary, not just the corner but the whole boundary between these two lots was changed by this consolidation and resubdivision, that's correct?

LEITHEAD TODD: Actually my verbatim from the letter, this was a relatively minor lot line adjustment between this property and the same lot created in Subdivision 1134. The adjustment involved a small corner of Lot 2 and did not change the number of shoreline lots.

KORNBERG: Correct. And where in 11.5 does the number of lots become relevant?

LEITHEAD TODD: It becomes relevant because no new lots were created by the subdivision. There were two lots before, there were two shoreline lots afterwards.

KORNBERG: How much change in the configuration of the lot is necessary in order to have the consolidation and resubdivision create new lots rather than modify the lots?

LEITHEAD TODD: If we have, instead of these two lots, if the two lots had not been both with shoreline, if one lot had had shoreline and the other lot had not had any shoreline property, and the consolidation and resubdivision then created two lots with shoreline, we would probably have had a different determination. What was important here is that both lots prior to the consolidation and resubdivision were essentially the same size, the same square footage, and they were both shoreline properties. So you had two lots with shoreline, two lots afterwards. If you'd had two lots, one with shoreline and one without and then had created two with shoreline, that would be different and they might have applied a different rule.

Similarly, if you had three lots with two with shoreline and one with no shoreline and then you consolidated and resubdivided to create three lots with shoreline, then those would be different than what occurred before.

KORNBERG: And where in the Planning Department Rules or any statutes do we find these criteria that we can look to in advance to see whether or not a consolidation and resubdivision creates new lots or just modifies old lots?

LEITHEAD TODD: These are, these I think are call of discretion of the Director and the Department in making that determination on whether these are essentially the same lots or whether you've created different lots. Case by case, just like whether you go in and get an SMA Permit, every SMA Permit doesn't look the same, they're case by case and they're fact driven. We try to interpret the rules in a manner in which we look at whether there's notice to people, whether property rights were affected and whether a fair reading of the law and the rules as we intended them apply. When you have this kind of a situation where the lots are essentially the same size, where you're not creating -

KORNBERG: You're not responding to my question.

LEITHEAD TODD: I am responding to your question.

KORNBERG: I'll let you finish then. Go ahead.

LEITHEAD TODD: When you're looking at a consolidation and resubdivision where the two lots existed before with shoreline access, where the two lots are the same square footage as they were before the consolidation and resubdivision, you end up with a determination I made that these were essentially the same lots that existed in 1957 – one slightly less than 8,000 square feet with shoreline, one with about 33,000 square feet with shoreline access.

KORNBERG: And where do you feel your authority to make this discretionary determination as to the application of Rule 11-5 come from?

SELF: Objection, she has already answered that question.

KORNBERG: No, I'm looking for a rule. She did not. I'm asking what rule or statute -.

SELF: It's the -.

KORNBERG: Excuse me. What rule or statute is the Director relying on that she could exercise her discretion in interpreting what creating a lot means?

LEITHEAD TODD: It's a combination of 205A, the Hawai'i County Charter which gives authority to the Planning Director to apply the rules, regulations and the law, and it's also in the County Code. And I can't cite all the various provisions but there are numerous provisions. Obviously you would not have the ability to appeal a discretionary decision of the Director unless the Director had discretion. But basically if you look at the Hawai'i County Charter, I am given the authority to interpret and apply the rules and regulations of both State and County laws that apply to land and subdivision, zoning, and under 205A of the shoreline management areas.

KORNBERG: And doesn't the Planning Department Rules and regulations allow an appeal for the wrongful exercise of discretion, not only the wrongful use of discretion but an unwarranted use of discretion? Isn't that one of the grounds for appeal also?

SELF: That question has also been asked and answered, so I'm going to object again. This was a question way in the beginning of this question and answering session; and so I am objecting to that.

HENDRICKS: Thank you. Let's move on. That's been asked and answered, I believe.

KORNBERG: I don't believe so, but -. Are you prohibiting me from an answer to that question, Mr. Chairman?

HENDRICKS: I think it's been explained, County statutes and State law where the authority lies -.

KORNBERG: No, but -.

HENDRICKS: And where the discretion lies.

KORNBERG: This witness just testified that I'm appealing from the exercise of her discretion, so therefore she had to have discretion. And I asked her, in opposition to that, that doesn't the appellant have the right to appeal from the unwarranted use of discretion, not the wrongful application of it? And it's an, it's an important point because the rule provides we can appeal when the Planning Director uses discretion when there is no discretion. And that's

different from the question of wrongfully applying discretion that she's legally given. So I would ask the Chairman to reconsider it.

HENDRICKS: Okay, in that form, the question is, still stands.

LEITHEAD TODD: Yeah, I think I said earlier that you have the right to appeal final decisions of the Director, regardless of what those decisions are under the County Code.

HENDRICKS: Thank you.

KORNBERG: I have no further questions.

HENDRICKS: Any questions from the Board?

GIMPEL: Yeah -.

TAVARES: I just have -.

HENDRICKS: Mr. Gimpel.

GIMPEL: Yeah, I'll start. How do you, Ms. Leithead Todd, how do you differentiate your determination from that of Mr. Yuen's determination in 2005 that there was a creation of a new lot?

LEITHEAD TODD: I believe that Mr. Yuen's decision was erroneous; and Mr. Yuen came to the same determination in November of 2008 when he reviewed it. And it's easy to understand how you do this in the office. You have so many documents come across your desk, you rely on the staff to review the files and make recommendations, and so sometimes you can make mistakes. And Mr. Yuen had actually decided that he had been wrong and had talked to Mr. Darrow, and told Mr. Darrow to let Mr. Foulk know that it was 20 feet and not 40, and that the consolidation and resubdivision did not constitute a subdivision under Rule 11-5. So Mr. Darrow was prepping that letter. It came to my desk in February. I concurred with the conclusions.

And I'll tell you one of the reasons that really swayed me was the fact that there was no prior notice to the property owners when they came in for a consolidation and resubdivision, that this was going to deprive them of what I considered a substantial property right, which is the application of the 20-foot or 40-foot setback. And I thought that that was an important thing, and I instructed staff that in the future when we're going to do an action and if we have information that it's going to impact property rights, that we should disclose that before the action is undertaken.

Because this is not the first time where people have done things and then after -. We've had people who consolidated property and then come back couple years later asking us to undo the consolidation. And, as a matter of fact, we had a case like that that came to the Board of Appeals, and despite our saying that it was too late to undo the consolidation, the Board ruled

that the woman could undo the consolidation of her lot several years later so that she could then have two lots, so that she could have two lots to build on. So, you know, I just look at the fact that people make mistakes, employees make mistakes, and directors make mistakes. So what you do when you look at these decisions is you try, based on the best available information you have at a particular moment in time, to make a good decision that's fair and equitable and is consistent with your understanding of the law.

GIMPEL: Thank you. And that's one of the reasons we're here today, is because somebody has challenged you and said that you made a mistake.

LEITHEAD TODD: Yes.

GIMPEL: So I'd like to know, I have a few other questions. You've indicated that there are two factors that entered into your decision here that this was not the creation of a new lot. One was that the lot sizes -.

LEITHEAD TODD: Uh huh.

GIMPEL: Appeared to be the same. And, two, that the, there were very relatively minor "changes" to the lot lines. What do you consider a minor change to the lot lines?

LEITHEAD TODD: I don't know whether in other cases I would consider them minor changes, but in this case I did. And a lot of that had to do with the fact that you ended up with two lots that were essentially the same size as before. You changed the pattern of the lot line but you had one lot that was 8,000 square feet before and you had another lot that was about 33,000 square feet before and after. So that -.

GIMPEL: Well, I will ask then the question I think perhaps was asked, but I'm not sure I understood the answer. Is, what if the lots of, what amount of lot size change would constitute a major change?

LEITHEAD TODD: I would think that if the lot sizes changed by 25 percent or more that I would consider that a major change.

GIMPEL: And then my question then is, where is that in the rules?

LEITHEAD TODD: It isn't in the rules. It would be the issue of whether this was essentially the same lot that was there before or it was the same or different lot. But even that might not apply, depending on the particular lot, particular location, what the impact was. In this case what we were looking at is the amount of shoreline that you had and whether both lots had shoreline before; and they both had shoreline before, they both had shoreline afterwards.

GIMPEL: Yeah. I'm troubled, I think you can discern because there are no criteria at all for your determination in this case, for your exercise of discretion. And that bothers me in a way because the next person that comes down the pike who wants to exercise a similar right won't have anything to go by. And your determination might be different in that case; and we

don't know on what that is based. So that, that is a concern I have – what really constitutes a minor versus a major change.

And the other line of questioning I have is the rule, the Subdivision Code appears to say, I mean, I'll get, see if I can quote it exactly, that the requirements and standards of the Code don't apply to consolidation and resubdivision action "resulting in the creation of the same or fewer number of lots." Agree that this was a subdivision that resulted in the creation of the same number of lots, but that determine -. That is a definition of the word "creation"; subdivision results in a creation of lots. And then we have the rule, 11-5 of the Planning Department which says, 11-6, I'm sorry, cause the subject lot was created, that's your rule, but pursuant to the rule, the subject lot was created after January 1997. We already have a definition of creation. That's what happens when you subdivide. And then we have a creation, a subdivision after January 1997 that resulted in two lots that should now be subject to the new shoreline rule. That's where I'm, I'd like you to explain how that is different.

LEITHEAD TODD: Well, it's because of the way the Department has treated consolidations and resubdivisions. We haven't viewed them the same as subdivisions that create other lots. And in this case because, you know, it was two lots, it's both with shoreline, they're the same size as the lots were before, we didn't consider these to be new lots, that these were basically the same lots that existed in 1957 but they just changed the boundary between the two properties.

And I have to admit that to some extent my concern when I interpret the laws and try to apply them is that, you know, prior to development of zoning and subdivision laws people could do whatever – and the creation of 205A – people could do pretty much what they wanted on their property, which is why you have existing buildings that are nonconforming buildings and intrude into even the 20-foot shoreline setback. So when you create the laws and rules and codes, you're stripping people away from what were previously their property rights. So I tend to err on the side of protecting property rights when I am applying these, and particularly when in the case of this consolidation and resubdivision there was no notice that we were going to change the shoreline setback from 20 to 40 feet. That was very important to me that we did not give notice that that was going to apply.

When somebody normally comes in for a subdivision of land that previously hasn't been subdivided and they come in with these maps, we look at it and we say, hey, these are new lots, you've got a 40-foot, etc., etc. This did not occur with this consolidation and resubdivision. If you, nowhere in the discussion on consolidation and resubdivision was there a discussion in the Department on whether there'd be a 20-foot or a 40-foot setback, and that typically occurs when somebody comes in with a new subdivision. And so I was very concerned about the lack of notice, because to apply the 40 feet was really stripping the property owners of what I considered a substantial property right. And I was very concerned about the lack of notice.

GIMPEL: Yeah, but not to be argumentative, which means I'm going to be argumentative, you may well have recognized the property right of the owner – I don't know the current name – but in so doing you may have jeopardized the property rights of Ghulam -, Mr. Ghulamfarsa.

LEITHEAD TODD: Well, actually, we increased his property rights because we wrote him a letter and said that he no longer has a 40-foot shoreline setback, he now has a 20-foot shoreline setback, and -.

GIMPEL: Beg to, beg to differ. You've altered his property right, but not necessarily increased it, because perhaps he enjoyed, wanted to enjoy the 40-foot setback that his neighbor -.

LEITHEAD TODD: His neighbor currently is built within the existing 20-foot shoreline setback, so he currently does -. Actually, if the neighbor were to pull down the house and rebuild a building, he would have a better viewplane than he has right now. Because right now that house is, part of it is in the 20-foot setback. And -.

GIMPEL: Part of it, yeah, okay.

LEITHEAD TODD: You know, he'd actually have a better viewplane and probably more wind coming through.

GIMPEL: Well, Mr. Ghalamfarsa obviously feels that his property rights have been detracted; otherwise, he wouldn't be here. So, anyway, that's argumentative and I -.

LEITHEAD TODD: He's concerned about a future building which isn't in front of us.

GIMPEL: All right, that's correct. All right, I'll pass on.

HART: I have some concerns, too.

HENDRICKS: Yes, ma'am.

HART: I've listened to so much today. I've got so many notes here. But I understand what Bobby Jean is saying, that it's basically a historical County interpretation of when the subdivision was, was formed. And one thing that really bothers me is Exhibit 18 that Mr. Ghalamfarsa submitted to us. And there are two court documents that he presented to us. And the first one, it looks like it's, you know, a form where you just fill in the blanks. And I remember that Amy said that there was no provision in that system for resubdivision, and so I accept that. But on the second court document, it's the "RETURN OF THE STATE LAND SURVEYOR." This doesn't look like a fill-in-the-blanks thing. And they specifically say here that, they give a date of October 28, 2002, and he's talking about approval of a subdivision. So in my mind in a court of law they've determined that this is a subdivision. So I'm kind of torn between the County's historical interpretation of a subdivision versus resubdividing, because I've got this court document that refers to it as a subdivision. Let's see. So I also agree with Bobby Jean that the, the whole matter is about when this subdivision was created. And I guess my question is does this court document take precedence over the County's historical interpretation of creation of a subdivision? That's just my comments.

HENDRICKS: Ms. Tavares?

TAVARES: Okay, I just wanted to ask counsel to please repeat something that I heard you say once before that might answer some of these questions. There was something, I don't remember if it was in Code, I mean if it was in 205A or in the Code, but it said, something about an exception for consolidating and resubdividing, that this is not going to apply to that because there is this exception. But I didn't write down what the exception is. Can you repeat that?

SELF: Oh, that's part of the Department Rules which is, oh, I'm sorry. Oh, you're talking about the Subdivision Code. Section 23-7, and this is, this is the section -. Okay, you have your definition section and then it goes into the applicability of this section of the Code, which is the Subdivision Code.

TAVARES: Okay.

SELF: And so it says "The requirements and standards of this chapter," meaning the whole Chapter 23 which is the Subdivision Code, "shall not apply to consolidation and resubdivision action," that's one action, "resulting in the creation of the same or fewer number of lots than that which existed prior to the consolidation/resubdivision action..." So, in other words, this is not, this does not apply to this action because it's the exact lots that were there prior to 1997; back in 1957, I think it was when they were first created. And the only thing that changed was one lot line, one boundary line. It didn't change the square footage of the two lots that were there originally. So essentially this Subdivision Code does not apply. So the -.

TAVARES: Except for that one paragraph that -.

SELF: Yeah, what the paragraph is saying that the Subdivision Code does not -. You know, if there'd been, if this consolidation and resubdivision had amounted to more lots, let's say they consolidated two lots and made three lots, well, then the Subdivision Code would apply. But in this situation no change was made except on one boundary line. It didn't even change the square footage of each of the lots; that remained the same. That was a subdivision of the Land Court in 1957, or whatever year it was originally when they did this, it's the same one in Exhibit 18 in the Land Court. It didn't change the lots. It just, the size of the lots remained the same. So it's still, the subdivision is the subdivision from the beginning prior to 1997. It's still a subdivision. It hasn't changed. It's still two lots, same amount of acreage.

TAVARES: Okay, thank you. Yup, that was what I was looking for. Because, you know, it's, it is confusing. I mean I can see both points. But at first, you know, I'm thinking, okay, well, subdivision and recon -, consolidate and resubdivide, you're subdividing, that's pretty clear to me. But now this 23, Chapter 23 says except in the case of when you're consolidating and resubdividing that the Subdivision Code applies. Is that -?

SELF: I can let you read, it's in the highlight, it's highlighted in pink. So you can get a better look at it.

TAVARES: Okay, so "Section 23-7. Applicability to consolidation or resubdivision action. The requirements and standards of this chapter shall not apply to consolidation and

resubdivision action resulting in the creation of the same or fewer number of lots,” blah, blah, blah. I think that kind of says it.

HENDRICKS: Welcome back, Mr. Vitousek.

VITOUSEK: Yeah, thank you.

HENDRICKS: Have you got anything further that hasn't been covered that -.

VITOUSEK: Can I just ask the Director a couple of questions?

HENDRICKS: Sure.

VITOUSEK: Ms. Leithead Todd, oh, can I have -?

LEITHEAD TODD: Yeah, sorry.

VITOUSEK: Ms. Leithead Todd, in the Planning Department Rules, is there any definition of creation of a lot that you're aware of?

LEITHEAD TODD: Offhand I can't recall. There may be. It's just -.

VITOUSEK: Well, I, yeah, they refer you to the definition section. It's not a trick question. I don't, there's a definition of lot.

DRURY: There's a definition of lot.

VITOUSEK: There's a definition of creation and -.

DRURY: Established by subdivision.

LEITHEAD TODD: In our rules?

VITOUSEK: In your, in the Planning Department Rules.

LEITHEAD TODD: I'm not sure that we have a definition of lot -.

DRURY: Yes, we do.

VITOUSEK: Well, if you look at Rule 11, 11-3.

DRURY: Yeah, 11-3.

LEITHEAD TODD: In the first section. Okay.

VITOUSEK: So it just says, established by subdivision, the definition of lot means a parcel, tract, or area established by subdivision or as otherwise lawfully established, right?

LEITHEAD TODD: Yes.

VITOUSEK: Or otherwise lawfully established before the Subdivision Code, is that correct?

LEITHEAD TODD: Yes.

VITOUSEK: Okay. And so in determining when the lot was created for purposes of applying Section 11-5 of your rules, did you essentially utilize your discretion to determine whether this lot qualified for the 20-foot shoreline setback?

LEITHEAD TODD: Yes. We determined that it was created in 1957 -.

VITOUSEK: And that was -.

LEITHEAD TODD: And not under our Subdivision Code.

VITOUSEK: That's correct. And you are exercising that discretion as the Director of the Planning Department of the County of Hawai'i, isn't that correct?

LEITHEAD TODD: Yes.

VITOUSEK: And this, I think you testified, but this same issue had been presented to the previous Planning Director relative to the Parcel 3, isn't that correct?

LEITHEAD TODD: Yes, it had.

VITOUSEK: And he reached the same conclusion that you have reached?

LEITHEAD TODD: Yes, he had determined that the decision back in 2005 was erroneous and had changed his position.

VITOUSEK: And so he had, he had reviewed it in his last couple months in office, is that correct?

LEITHEAD TODD: Yes.

VITOUSEK: And he had determined that he made an error in his previous determination, is that correct?

LEITHEAD TODD: Yes.

VITOUSEK: And then you got to review that anew when you became Planning Director, isn't that correct?

LEITHEAD TODD: Yes.

VITOUSEK: And you exercised your discretion as Planning Director to find that Lot 3 did qualify for a 20-foot shoreline setback, isn't that correct?

LEITHEAD TODD: Yes, because we determined that it had been created previously through the 1957 subdivision.

VITOUSEK: Okay. That's all the questions I have.

KORNBERG: Could -.

HENDRICKS: Mr. Kornberg.

KORNBERG: Could I just, one recross?

HENDRICKS: Yes, sir.

KORNBERG: Just one question. Ms. Leithead Todd, turning to Exhibit 17, please. This is a letter from the Planning Department, is it not, to Chrystal Yamasaki of Wes Thomas Associates, is that correct?

LEITHEAD TODD: Yes.

KORNBERG: And it's entitled "FINAL SUBDIVISION APPROVAL NO. 7582," is that correct?

LEITHEAD TODD: Yes.

KORNBERG: And what does the first, doesn't the first paragraph say, "Please be informed that final subdivision approval for recordation is hereby granted to the final plat map and supplemental...map....," etc.? Is that what it says?

LEITHEAD TODD: Yes.

KORNBERG: Okay, thank you.

HENDRICKS: Ms. Hart.

HART: I have a question for Mr. Ghalamfarsa. I'm looking at the exhibit, what exhibit is this?

TAVARES: Six.

HART: Exhibit No. 6. And this is a Land Court map.

KORNBERG: Excuse me, that's 9, I believe. You might have it upside down. The Land Court map I believe is 9.

HART: Oh, okay, sorry, it is 9, okay. Is it 9? No, it is 6.

GIMPEL: This is the Planning Department's -.

HART: Six.

KORNBERG: I apologize.

HART: Okay.

TAVARES: It says 6.

SELF: It's Appellant's 6.

HART: Did you, how much shoreline did you gain when the lots were resubdivided?

HENDRICKS: The Land Court map?

LEITHEAD TODD: Yeah, this is the Land Court map.

HART: How many, how many more feet of shoreline did you gain when, when -. I'm looking at the map and I'm trying to figure out the dotted line -.

GHALAMFARSA: Yes, from the dotted -.

HART: For the original lot and then the new one. To me it's, this big curvy section here, it looks like you gained a bit of shoreline by their reconsolidation.

GIMPEL: It's the setback.

GHALARMFARSA: Right. Yes, I'm sorry.

GIMPEL: It's the setback from the shoreline. The shoreline stays the same.

HART: Yeah, but I'm saying that originally his property came to this point here and then this became part of his property. And it looks like you gained quite a bit of shoreline, or did you not? Am I reading this wrong?

GHALAMFARSA: Well, the property line, you see the dashed line? That is the property. The shoreline is, of course, public. But the dashed line that says 50.93 feet?

HART: Uh huh.

GHALAMFARSA: Yes. The shoreline stays the same basically.

HART: Right. But I'm saying that your lot originally where the dots are where it says Lot 2 -?

GHALAMFARSA: Yes.

HART: From Ali'i Drive coming across -?

GHALAMFARSA: Yes.

HART: Okay, that was the original lot?

GHALAMFARSA: Yes.

HART: And then I'm assuming that the dark line, that little piece of land on Ali'i Drive and then coming straight across to the shoreline, I'm looking at that curvy thing -.

GHALAMFARSA: Yes, yes.

HART: That comes out.

GHALAMFARSA: Yes. That's outside of the property.

HART: That's outside of your property line?

GHALAMFARSA: Yes.

HART: How much -? Okay -.

HENDRICKS: That's the end of the -.

GHALAMFARSA: That's outside of the property line.

HART: Okay, that answered my question. I was thinking that you had gained a lot of shoreline, but in fact that's not your property.

GHALAMFARSA: No, ma'am.

HART: Okay, thank you.

HENDRICKS: His new property line is -.

HART: Right. That's why I kept thinking he got all of this.

HENDRICKS: That's correct.

HART: Right, which in my mind became a really different piece of property. You know, even though the square footage might be approximately the same in my mind it became a different piece of property. Thank you.

HENDRICKS: Anything further from the Board?

GHALAMFARSA: Ms. Hart? Ms. Hart?

KORNBERG: Ms. Hart, excuse me, if Mr. Ghalamfarsa wants to say more -.

HART: Yes.

GHALAMFARSA: There, part of the property lines, actually all of the shoreline of Lot 1, it's actually is the property line. These other lines, a straight dashed line that you see, they're traversed line. The surveyors do this to determine their non-geometrical shape of the lot normally. So they have applied the same thing to that portion that you're referring to as well.

HART: So in other words when I look at the dotted line that says 49°57' to 50.93 everything outside of that line is not your property, is that what you're saying?

GHALAMFARSA: I'm not sure. I'm not sure.

HART: Oh, you're not sure if that's your property -.

GHALAMFARSA: No. I believe that may be the traversed line, determining the, that area.

HART: Okay, thank you.

GHALAMFARSA: Sure.

HENDRICKS: Mr. Vitousek, do you have anything left?

VITOUSEK: No.

HENDRICKS: While we're collecting our thoughts, I would like to quote from Rules of Practice and Procedure, Board of Appeals, County of Hawai'i, "General Standards for Appeals," this is Non-Zoning in this case, "A decision appealed from may be reversed or modified or remanded only if the Board finds that the decision is: (1) In violation of the Code or other applicable law; or (2) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (3) Arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." Do any of the parties have any closing remarks they'd like to make?

GHALAMFARSA: I do.

HENDRICKS: Mr. Ghalamfarsa.

GHALAMFARSA: In regard to minor effect of this lot line adjustment and in regards to the intention, I believe, of the Chapter 11-5, even, you can get two lots and manipulate the joining, the common property line, and by doing that you can take advantage of Rule 11-5 – very, very, geometrically you can do that. Even if we do not change the size of the lot, I can create a jagged line which would reduce my allowable building area, and reduce it by less than 50 percent, which then would qualify me to apply for a 20-foot setback. So, to me, this is a major, major lot line alteration that changes the setback. See, that, that exemption is so if your lot, when you apply that 40-foot lot, setback, it imposes on you because you end up with less than 50 percent. Right? So if I, if I manipulate the side lot, side lines, that would therefore affect the setbacks, which therefore reduces my buildable area to less than 50 percent, then I would enjoy that exception. And that's, and that's, I think it doesn't matter when it's a new lot created or not. If the property line on the Ali'i Drive, and this is the property, common property line that goes all the way to the shoreline. So that is, I think, the intention of that law, that you do not manipulate the property line to build a bigger building near the shore, bigger building or closer, regardless of what the future proposal is. But it will affect that. Thank you.

HENDRICKS: Thank you.

KORNBERG: And just very quickly, cause I know we've been over this, but just to repeat it's the position of Appellant that Rule 11-5 does not permit the Planning Director to exercise her discretion to judge the impact of creating a lot, that the consolidation and resubdivision in 2002 by all definitions in the subdivision law, by common sense definition of the word "create," which is to put something in existence that didn't exist before, clearly means that under that rule this Lot 25, Lot 3 was created by that consolidation and resubdivision. There's a subdivision order by the Land Court, there is a granting of final subdivision approval by the Planning Department. The footprint and configuration of the lots are different. We happen to disagree they're the same square footage, but it's not important. What's important is Rule 11-5 does not give discretion to bring in all these other factors. The exemption doesn't relate to the definitions. The exemption under 23-7 means that if you consolidate and resubdivide and create no greater number of lots, you don't have to go through all the rigmarole of the requirements of the subdivision. You don't have to comply with roads and water and all that stuff. It by its terms, that same section recognizes that a consolidation and resubdivision creates new lots. It uses the language "creates."

I believe whether this lot was impacted, the danger here is if the Planning Director without any written guidelines has the power to determine what create means, then in fact we don't have a rule of law, we have a rule of a person. And I don't believe that's our system.

The law should give the, if there's discretion being used, it should be pursuant to factors that are set forth for everybody to look at; and there's some predictability especially with development. If this could flap back and forth, supposing the next Planning Director develops new criteria and says, oh, this was significant enough that I really think we're going to call it create, or another time another Planning Director may say, you know, I don't think those factors really create a new lot, they just modified the old lot. Really, that's linguistic tomfoolery, if you don't mind me saying it. Create means create, and the rule needs to be amended, if the Planning Department wants to exclude consolidation and resubdivision from the meaning of create; they have the power to do that. The Planning Department can pass a law that says these are the factors we're going to look at to see whether this subdivision creates a lot. That all can be done. And if that were the law, we'd follow it. But I believe it's very dangerous in our country and our society not

to have specific criteria that allow bureaucracies like our Planning Department to make decisions that are so critical to all our life.

And I think you've heard the rest of our position; and that is, the bottom line, that this consolidation and resubdivision of '02 simply created two new lots that didn't exist before, they have different boundaries. And to say that's not a creation but a modification, really, I think we can all say, is just really pushing the use of our language to the limit. Thank you for your patience.

HENDRICKS: Thanks, Mr. Kornberg. Ms. Self.

SELF: The Director did not make up anything. If you look at Section 23-7 of the Subdivision Code it clearly states that the requirements of the Subdivision Code do not apply to this particular application. This is a consolidation and resubdivision. It did not increase the number of lots, it kept it the same. It's the same subdivision with a minor change in a boundary line that did not affect the shoreline. And I would disagree with counselor when he stated that the Planning Director has no authority or has no discretion in this area. She clearly does according to State law; Hawai'i Revised Statutes 205A, Part III, Shoreline Setbacks, it is up to the, it is clearly the, the Planning Department is designated as the department to enforce shoreline setbacks. That has been stated by the U. S. District Court for the district of Hawai'i. This has also been stated by our Hawai'i Supreme Court, although it dealt the case that -. Not the Hawai'i Supreme Court, the Hawai'i Intermediate Court of Appeals has also made that determination, even though it applied to Chapter 205, that there is no private right of action – which means essentially what they want to do is to tell the Planning Department to enforce the shoreline setback or the 40-foot shoreline setback against the subject property owner; they can't do that. And if it goes up to Circuit Court, you'll find out that you don't even have jurisdiction over that. The planning departments of each of the counties are the ones who have to enforce the shoreline setback law. There is no private right of action. Okay? That's No. 1.

No. 2, as I mentioned in my opening statement, Board Rule, Board of Appeals Rule 8-2, the appellant in this case has the burden of proof. And we would contend that he does not even have standing because he has not proven that he's an aggrieved party. His whole reason that he gives for being an aggrieved party is that if, I mean there isn't even an application in front of the Planning Department right now for what's going to be built on that lot. But he's saying if something is going to be built, it will affect the breeze to his house, it will affect his viewplane. But you just heard him testify that that's already affected. This house has been there already. When he purchased his property, the house on Lot 3 was there already, and it's within the 20-foot setback as is his house. So his view from that one direction, he doesn't have right now. There's already a house obstructing his view that he's complaining about may happen in the future. It's already happening. So how is he being aggrieved? The Department has admitted a mistake was made. You can't expect a planning director to never make mistakes. But the thing is, is that both Planning Directors, the former Planning Director and the present Planning Director, both agreed there was a mistake and that it was important that they correct this, not only correct it for the property owner of Lot 3 but also go back and fix what had been done before to Mr. Ghalam -, I'm sorry, Ghalamfarsa. I'm sorry about your name, mistaking it. Anyway, the point is a mistake was made, it was corrected. There is, he has not been aggrieved. There are no damages, nothing has changed. He still doesn't have a viewplane, he still doesn't have the breeze he wants. Both properties, both dwellings are in the 20-foot setback already. That hasn't changed. It was like that before he bought the property, it's like that now.

Okay, and then the last thing I want to bring up is that the appellant also testified that he did not appeal the Director's decision even when the Director sent a letter to him stating that if he built anything in the future that he would have to be within the, he would have to be held to the 40-foot setback. He never appealed that decision. So he waits until the property owner of Lot 3

gets his decision, then he appeals that. So -. He never appealed the decision that the Planning Director gave him.

KORNBERG: (Inaudible)

SELF: Well, he could have. The point is he could have, if he was concerned about his viewplane. But, anyway, I think the most important point I'd like to leave with the Board is that the Planning Director does have the authority and is the only, the Planning Department is the only department in this county that is authorized under State law to enforce the setback law, the shoreline setback law. And she does have discretion in interpreting the, not only State law but also interpreting the Hawai'i County Code, the Subdivision Code included. That's what our State, that's what our County Charter says. She administers the Subdivision Code and the Zoning Code. And the General Plan, she interprets the General Plan. You cannot have -. I know that she was asked to speculate on different things. Everything that comes into the Planning Department is done on a case-by-case basis. The facts are different every time. And I don't think that the Planning Director should be asked in a hearing to speculate about, well, what would she say if it was this situation or that situation. We should be focused on a situation that's in front this Board right now. And I think that it went a little beyond that during the hearing. But I just wanted to leave the Board with that. And we hope that you will rule in our favor. Thank you.

HENDRICKS: Mr. Vitousek -.

VITOUSEK: Thank you.

HENDRICKS: One last one.

VITOUSEK: I'll be brief. The, you know, this is a property that is in the State Land Use Urban District and it's zoned for a Resort use under the County of Hawai'i. When the Director made her decision, which is being considered here on appeal, she specifically found that, you know, the issue was whether the parcel, that is the Meredith parcel, qualified for a 20-, that's Lot 3, qualified for a 20-foot setback under Planning Department Rule 11-5(b)(1). And it's important to note, and I think this addresses Board Member Hart's part of her issue, was that both parcels qualified for a 20-foot setback before; in other words under the, you know, both parcels as they existed before the consolidation and resubdivision qualified for a 20-foot setback under Rule 11-5. And then after the consolidation and resubdivision they still both qualified for the 20-foot setback under the same application of the rule. So what the appellant was arguing about how you could gerrymander a line or zigzag a line to affect what the shoreline setback was, that didn't happen in this case. The, basically what the Planning Director did was, was look at the fact that the lots were created in 1957, the houses were built in 1957. This is the old, the house on Lot 3 is the Lyman family's house. That's what the name Lymans came from. And it was, you know, it was built back in the time before a lot of land use regulations. So there is a seawall that runs along the front of both properties and the houses are built right smack up against the seawall, and well within even the 20-foot setback. So the situation there is, you know, there are these two parcels that qualify as nonconforming uses, they're older parcels, they're thin parcels. Ali'i Drive came along and, you know, makes some, makes it so the distance between the roadway and the ocean is very tight. And that's why if you applied all the setbacks from the road and the sides and the shoreline setback, and 40-foot shoreline setback, the buildable area of both lots would be reduced to, to 50 percent. That would have been the case before, it was the case after.

And so I think that, you know, pretty clearly what we have is the planning directors, Mr. Yuen and Ms. Leithead Todd, looking at the facts and circumstances and exercising the discretion that the Legislature gave them in Chapter 205A to interpret the shoreline setback. And they made a

determination that the lots were created by the subdivision in 1957, there was a lot line adjustment by a consolidation and resubdivision in 2003-2004, and that they didn't make any material change in how the Director would apply the rules in determining the shoreline setback. And so that's a decision that was made.

I think it's a situation where the Legislature and the County rules give the Director the authority and the discretion to make this type of decision; and she has articulated the criteria that she utilized in making that decision. And it's hard to say that it's an abuse of discretion or an unauthorized unwarranted exercise of discretion. She is exercising the discretion of the Planning Department as -. There's nothing that is going to, that's taking away the appellant's right to argue about future development on the property. They've been very clear in stating this is a minimum shoreline setback; and if there's any application for a larger building or anything other than a single family residence, that it will have to go through the SMA process. And there will be ample opportunity both for the Department and for the appellant and for members of the public to be involved in that process, and they will be if it goes through, proposing a 20-foot shoreline setback. So there is going to be plenty of opportunity for input. And it's just we request that you affirm the decision of the Director. We join the arguments of the County on standing and, you know, would hope that the Department and the Board, they will follow their requirements for appropriate procedure in making a decision. Thank you.

HENDRICKS: Anything further from the Board? The Board will now, or rather the Chair will now entertain a motion in this respect. I think probably it would have to include consolidation and resubdivision as well as the setback process in this case.

GIMPEL: Before that motion is made, if I may, I'd like to, one, apologize for being in the wrong place at the wrong time and not getting here until about one hour after the hearing started. But I would note that Hawai'i Revised Statute, Section 92-11 has as its principal point the idea that all voting board members pay attention to all the record evidence, especially the parts that the parties point out as relevant. And, therefore, that Statute requires that those who were not at the entire hearing must before making a decision serve a proposal for a decision to the parties with all the issues in it, allow parties to file exceptions to the proposal for a decision, and allow parties to present argument on the proposal for a decision. However, the parties may also waive any or all of these requirements. So I ask in order for me to participate today and take part in the vote that you waive those requirements in this respect.

HENDRICKS: Can we have the pleasure of the parties on this.

KORNBERG: Yes. So by waiving we're permitting -.

GIMPEL: We're permitting me -.

KORNBERG: Mr. Gimpel to -.

GIMPEL: To vote, and if the case is adverse to a party other than the agency we could still vote.

KORNBERG: That's, I'll, that's fine with me.

HENDRICKS: Thank you. Ms. Self? While they're conferring, Mr. Vitousek.

VITOUSEK: Yeah, we're not going to waive the requirements of the Statute, and I only say that because we've gone up to the Circuit Court on that issue before from the Planning Commission. And so we just think that, that it's appropriate for all, all people who are going to

make a decision on it to hear all of the evidence. And then they can do that by reviewing the transcript and then the proposal for a decision being it.

HENDRICKS: Thank you. Ms. Self?

SELF: For that same reason the County is not going to waive.

HENDRICKS: Okay.

GIMPEL: Okay. Then if I vote then we would still have to, oh, I couldn't vote today then. I cannot vote today.

HENDRICKS: You could not vote today.

KORNBERG: But we can follow the procedures so that you can vote, isn't that correct?

GIMPEL: Yes. In other words we could serve all, if enough people don't go one way or the other today then we could serve all of the, a proposal for a decision to all the parties; and I could vote on that after I see the transcript.

HENDRICKS: Even though you can't vote you could still -.

DRURY: Make a motion.

HENDRICKS: Entertain a motion, or make a motion. Do we have someone to make a motion? Mr. Gimpel.

GIMPEL: For purpose of -.

SELF: I'll object.

GIMPEL: Yeah, I don't think I should make a motion.

DRURY: All right, fair enough, fair enough.

SELF: He's the one that should not make a motion.

HENDRICKS: Okay. Sorry, I agree.

DRURY: I always make motions. Someone else can if -.

HENDRICKS: Mr. Drury, are you willing to make a motion.

DRURY: All right, for purposes of discussion, I would move that we uphold the Director's decision. On my own part I see an exercise of discretion but I don't see an abuse of discretion. And from the standpoint of property rights, this is a very conservative decision. So I would vote to uphold.

MAEDO: Second. I second.

HENDRICKS: Discussion? Just a personal comment, I would like to see a more specific process. As an aid to the Director of the Department in matters such as these, it would be really nice to have this encoded either by Council or by the Department to give a little better guidelines in the future for this.

DRURY: Would you call for discussion?

MAEDO: He did.

HENDRICKS: I did.

MAEDO: He did call for discussion.

HENDRICKS: Yeah, I did call for discussion. Anyone else?

GIMPEL: I'm not, am I precluded from offering some comments?

SELF: I don't, I would object. I mean if this goes up on appeal you'd want to have a -.

GIMPEL: Okay, I won't.

KORNBERG: Is there anything in those rules that say you can't make your comments? I didn't hear that when you read the rule.

GIMPEL: As long as I don't participate in the vote, I suppose. I don't know.

HENDRICKS: You know, I'm going to ask counsel here. Let's hang on a moment.

SCHOEN: There's nothing that I see in 91-11 which discusses examination of evidence by the agency. So I would say that it would not be improper for Mr. Gimpel to participate in the discussion; but with respect to whether or not he can vote, I would say that he would not be able to vote at this time.

GIMPEL: I promise not to vote.

HENDRICKS: Then go ahead.

GIMPEL: My legal background is pointing me to Section 23-7 of the Subdivision Code, which has been the topic of a lot of discussion today. And that says that "The requirements and standards of this chapter shall not apply to consolidation and resubdivision action resulting in the creation of the same or fewer number of lots than that which existed," etc., etc. The words "the creation of" can be omitted and so it could have read, "resulting in the same or fewer number of lots." Therefore my legal training tells me that "in the creation of" were specifically inserted to make sure that it is understood that consolidation and resubdivision results in a creation of a lot. Therefore, since there's, this resubdivision was performed in 2002, I believe that did result in a creation. Now that's just my particular legal reading of that particular Statute. So I remain concerned about the Director's position that the resubdivision didn't result in the creation of a lot because it was the same number of lots before and after and approximately the same square footage in both. That's really puzzling to me. And I'm going to have to do a lot of thinking about it when I read the entire transcript. Thank you.

HENDRICKS: Further discussion? Call for the question.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Ms. Maedo?
MAEDO: Yes.
KAWAHA: Ms. Hart?
HART: No.
KAWAHA: Ms. Tavares?
TAVARES: Aye.
KAWAHA: Chair Hendricks?
HENDRICKS: Aye.
KAWAHA: Aye. There are four ayes and one no. Motion is carried.
VITOUSEK: Thank you very much.
HENDRICKS: Thank you.
KORNBERG: Thank you for your patience.
KORNBERG: Mr. Chair, preparing of the -.
LEITHEAD TODD: Now, now that, can I say something now that the decision is done?
SCHOEN: Wait, no.
MAEDO: Wait, wait, wait, the meeting is not over, Ms. -.
SCHOEN: Wait, hold on.
HENDRICKS: Prevailing party, the Planning Department, prepares the order. Thank you.
SELF: I'll do the Findings of Facts, Conclusions of Law.
HENDRICKS: Thank you.

The discussion ended at 3:43 p.m.

Respectfully submitted,

Noriko Sauer
West Hawai'i Secretary